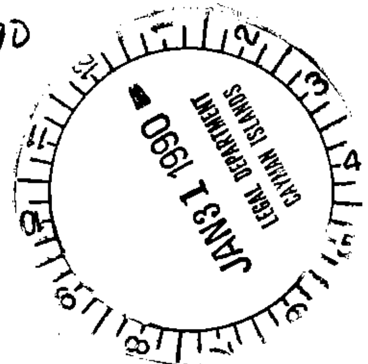

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON the 15th, 16th, 17th, 18th and 19th January, 1990

Ind. # 40/88

REGINA V RODNEY MICHUM ANGLIN

AND DWAYNE WILLIAM EBANKS

Mr. Anthony Smellie for the Prosecution

Mr. Jeremy Jenkins and Mr. John Furniss for the Defence

MALONE C.J. **JUDGMENT**

On the morning of Monday the 13th December, 1982 at about 7:30 a.m. Jesse Yates, the brother and immediate neighbour of Una Yates ("the deceased") found her dead body in the bathroom of her home. She had been shot twice. One shot to the right forehead and another to the left area of the neck where it joins the head. It is beyond dispute that the shot to the forehead was the first of the two shots and was fired from outside the bathroom window. The second shot was fired within the bathroom with the fatal weapon held sufficiently close to the victim for there to be gun powder flakes on the edge of the wound. Each shot would be potentially fatal but its effect, independently of the other, would not be the same. Death would follow immediately after the second shot. Unconsciousness and inability to control the extremities would follow immediately after the first shot but the victim might survive for several minutes extending even, perhaps, to an hour or longer. Those opinions of Dr. Davis I accept and from them conclude that the physical evidence cannot establish the time that elapsed between the two shots. However, the evidence of the ballistic expert, Mr. Whittaker, leaves me without a doubt that the two shots were fired from the same gun. That gun has not been recovered.

The two accused were charged with the manslaughter of the deceased on the basis of their participation in the joint enterprise of violent burglary. It is not in question that the deceased was murdered and her premises burglarised. Nor is it in question that the man who murdered the deceased is the individual with whom the two accused are alleged to have participated in the joint enterprise. At the close of the prosecution's case I held on a no case submission that there was no case for the first accused to answer but that there was a case for the second accused to answer. The ruling in favour of the first accused was made because in my view the Crown had not adduced in relation to that accused any evidence in proof of an essential element of the case against him. Namely, any evidence which showed or from which it could reasonably be inferred that the first accused knew that the man who killed the deceased went to the scene of the incident armed with a gun. In arriving at that finding, I have taken account of the evidence of Bart McCarthy that on meeting the two accused in the evening of the day that the deceased's body was found, he asked them why they would go with the man who killed her to rob and kill her. Clearly the question by McCarthy, assuming it was asked, implies an accusation that both accused knew that their companion was armed. That accusation is not their admission and neither admitted in the conversation that followed the knowledge imputed to them by McCarthy. Consequently, that evidence from McCarthy is not evidence of knowledge on the part of the accused that they knew their companion went to the scene armed with a gun.

The remainder of this judgment is concerned only with the second accused ("the accused") in whose case, as will appear, there was other evidence than that of McCarthy on which the Crown might rely. There was, therefore, a case for him to answer.

The deceased was about 70 years of age at the time of her death. She lived at West Bay. Attached to her house was a shop she owned and managed with the assistance of her brother, Jesse Yates. Both shop and house were found by Jesse Yates on the morning of the 13th December 1982 to have been ransacked and various articles were missing including C.I. $600.00 which Jesse Yates knew that she kept hidden between her mattresses and U.S. $1,000.00 which he believed she

kept in her hand bag. No money was recovered but some of the missing articles were recovered though not from the person or premises of the accused.

Apart from the background evidence in proof of the burglary and the murder of the deceased, the evidence on which the Crown relies to prove the accused's participation is:

(a) a portion of the conversation which Charles Hydes said took place between him and the accused in December 1982 shortly after the death of the deceased;

(b) the conversation which Bart McCarthy said took place at about 6 to 7 p.m. on the evening of the 13th December 1982 between him and the accused;

(c) the record of an interview of the accused by New Scotland Yard detectives on the 18th September 1983;

(d) the caution statement by the accused recorded on the 18th September, 1983;

(e) the finding of a knife embedded in a banana sucker in the grounds of the deceased's premises;

(f) a portion of the evidence of Andrea Ebanks.

There was conflict between three of the Crown's witnesses as to the location of the banana sucker. I have no doubt, however, that Chief Superintendent Cacho and Sergeant Roger Ebanks are correct in locating it 8' 6" from the bathroom window of the deceased's house.

The conversation reported by:

(a) Hydes is that the accused is said to have told him that both he and another man had guns or a gun and with a third man went to rob the deceased. They were surprised and ran away. The man who subsequently shot the deceased said she was not going to get away with

that and he was going to go back and get her. He left the accused and the third man and those two went to the ironshore where the accused threw his gun into the sea. The first sentence is the portion relied on by the Crown.

(b) McCarthy is that the accused is said to have told him that the one thing he was worried about was a knife he had left in a tree in case it had his fingerprints. He is said to have told McCarthy he was at the window of the house of the deceased taking out the jalousie panes with the individual who shot her when the deceased came into the bathroom with a gun and said:

'You all come in here tonight. I have something for you."

His companion rested the muszle of a gun on the window and shot the deceased in the forehead. They left the bathroom window and went into the bushes where another man was waiting for them. They returned to the deceased's house about an hour after. They went through a window at the side of the house and searched.

The contents of the interview with the New Scotland Yard detectives and of the caution statement relevant to the issue of participation in a joint enterprise are the same. They recount that on the night of the 12th December 1982 the accused was on his way to get some food with his companions of whom one was the man who subsequently shot the deceased. They came to the deceased's house and that man walked off leaving him with the other man in front of the house. He heard two shots and went with his companion to the place from where the sound of the shots had come. There he met the man who had left him in front of the house. That man then said what he had done, namely, that he had shot the lady. The accused and his companion left. When questioned by the New Scotland Yard detective, the accused denied telling anyone two days after the shooting that he had tried to rob the deceased or that he had a gun which he threw into the sea.

The portion of Andrea Ebanks' evidence relied on by the Crown is her statement that her customers know that her restaurant is not open on a Sunday. The 12th December, 1982 was a Sunday.

Whilst it is not in question that the caution statement and the record of the interview correctly report what was said by the accused, the conversations recited by Hydes and McCarthy, are put in question by the defence. That is because the defence challenges the veracity of Hydes and McCarthy. If, however, both Hydes and McCarthy spoke the truth when each said that the conversation he reported had taken place and that it had been accurately reported, there remains considerable conflict. For example, if the truth is that the accused was at the front of the deceased's house when he heard the two shots, he cannot have been at the bathroom window when the deceased was shot. If he ran off with his companion because they were surprised by the deceased armed with a gun, he would not have seen the deceased shot. The finding of the knife and the acceptance of McCarthy's statement that the accused was worried because he had left a knife embedded in a banana tree does not resolve those conflicts. Nor does the portion of Andrea Ebanks' evidence relied on by the Crown. The knife might have been embedded in the tree when the accused went to the back of the deceased's house after he had heard the two shots when at the front of the deceased's house. It might have been embedded when he was at the back of the building before he was surprised by the deceased, or before he saw her shot. As regards the evidence of Andrea Ebanks it cannot resolve the conflicts as there is no evidence in the case against the accused that he had Ebanks' restaurant in mind as the place at which he and his companions would get some food. Consequently the acceptance of Ebanks' evidence does not put in question the accused's statement that he was on his way to get food when passing by the home of the deceased.

The Crown's case against the accused is that the accused knew before he got to the house of the deceased that he was going there to participate with another in a robbery and that his companion, the man who shot the deceased, was armed with a gun. The Crown further alleges that the accused and that man on getting to the house began to remove the jalousie panes from the bathroom window when they were surprised by the deceased who had a gun. Thereupon the deceased was shot by the accused's companion. Having regard to the conflicts in the evidence presented by the Crown the question must be asked how does the Crown resolve those conflicts? It does so by adopting for

the purposes of its case against the accused the inculpatory matter in the conversations reported by Hydes and McCarthy and rejecting the exculpatory matter in the conversation reported by Hydes, in the record of the interview with the accused and in the caution statement of the accused. The Crown then invited the Court to consider that evidence against the background of the murder of the deceased and the burglarising of her home and to weigh it having regard to the fact that the accused has given no evidence on oath and has contradicted himself many times in recounting his movements on the night in question. Such an approach to the facts in evidence is sanctioned by the law as appears from the following passage in the judgment of Lord Lane C.J. in Reg. v Duncan (1981) 73 Cr. App. R which was approved by their Lordships of the House of Lords in Reg. v Sharp (Colin) (1988) 1 W.L.R. 7. At p 365 Lord Lane C.J. said:

> "Where a 'mixed' statement is under consideration by a jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating facts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?) whereas the excuses do not have the same weight. Nor is there any reason why, again when appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

I shall keep that direction in mind now that I turn to the Crown's case.

Clearly the consideration of the Crown's case against the accused, must begin with an assessment of the two witnesses, McCarthy and Hydes. Apart from the fact that MaCarthy has some 18 convictions and has been punished for a contempt, he is a witness who has come forward to tell his story about 5 years after the event having earlier denied knowledge of the event when interviewed by the Police. Further he chose to come forward as a witness at a time when he was in lawful custody and because of his behaviour in prison had lost 78 days remission time. Admittedly he derives no benefit from coming forward but it is out of keeping with his known character and the conduct he has exhibited in this matter, that he should come

forward at this late stage because as he expressed it:

> "I felt like doing society some good."

McCarthy is not a witness in whom I can place my faith. Relevant to that conclusion is, I think, the fact that in his interview by the police the accused made no reference to the knife that had been found embedded in the banana sucker. At that time the police had not heard from McCarthy that he had been told by the accused that a knife had been embedded by him in a banana sucker and he was worried that his fingerprints were on it. Accordingly it is not surprising that the accused was not questioned by the police about the knife. But if McCarthy is believed that the accused told him of his concern about the knife, it is unlikely that having of his own volition elected to be interviewed by the police, he would not have made some attempt to explain the presence of the knife. The fact that he did not is, I think, some indication that McCarthy has not spoken the truth. Consequently I am not sure that McCarthy was told what he says he was told by the accused.

Hydes was a more impressive witness. He appears to have no criminal record and he first made a statement to New Scotland Yard detectives in 1983. His evidence is, however, contradicted by the accused's brother, Dewey Ebanks, who Hydes acknowledges was present when he, Hydes, spoke with the accused. Dewey's evidence is that the accused did not admit to being present at the deceased's house when the incident took place. He expressed himself as follows:

> 'I am sure Dwayne was in the vicinity of Che Che's (i.e. the deceased's) premises but not in her presence. I understood he was walking on the road by Miss Che Che and was in the company of a couple of guys but I am not sure who they were. I understand they were simply walking by. I did not understand that one or other of the persons he was walking by with was involved. I learned of that a couple of months after the death of Che Che. I spoke to Dwayne about the incident. Dwayne acknowledged that Phillip was involved but did not mention a third person.'

That version of the conversation is close to the account of his movements given by the accused in his caution statement and when interviewed by the New Scotland Yard detectives. Accordingly it is in conflict with the evidence of Hydes. If the accused then spoke the truth, his earlier denial that he was involved is not an inconsistency as indeed he would not have been involved. Further

as the accused voluntarily submitted himself to an interview by detectives of New Scotland Yard, voluntarily made a caution statement and presented a witness in support of his story, his election not to give evidence on oath is understandable and is not, I think, cause to question his credibility. Where I have a reasonable doubt I am obliged by law to give to the accused the benefit of the doubt in resolving a factual issue. As I have a reasonable doubt that the accused did tell Hydes what Hydes claims he was told, I resolve that doubt in the accused's favour and consequently find that Hydes was not told by the accused what he claims he was told.

Those findings with respect to the testimony of McCarthy and Hydes dispose of this case. My verdict is that the accused is not guilty.

Dated 31st January, 1990.

Sir Denis Malone.