~~1st Proof~~

Privy Council Appeal No. 16 of 1977

Dorothy Roulstone – – – – – – – *Appellant*

v.

O. L. Panton (Administrator of the Estate of Olive Hinds) – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA (ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27th July 1979

Present at the Hearing:

THE LORD CHANCELLOR
VISCOUNT DILHORNE
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
SIR CLIFFORD RICHMOND

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal is from a judgment dated 20 September 1976 of the Court of Appeal of Jamaica (Watkins J.A.(Ag.) and Swaby J.A., Robinson P. dissenting), which allowed an appeal from a judgment in November 1973 of the Grand Court of the Cayman Islands. The question of substance is whether the beneficial interests in certain parcels of land conveyed to the appellant and the late Olive Hinds jointly on purchases were those of joint tenants, so that on the death of Hinds in September 1972 intestate the appellant became by survivorship the sole legal and beneficial owner of the lands, or whether their beneficial interests were those of tenants in common. It is to be observed that if the answer is that on the purchases they became beneficial joint tenants there is no suggestion that there was ever a severance of that beneficial joint tenancy.

The appropriate Tribunal under the Land Adjudication Law, 1971, of the Cayman Islands decided in favour of the present appellant that they were beneficial joint tenants. The Grand Court upheld that Decision. The Court of Appeal by a majority (Robinson P. dissenting) reversed it, holding that they were beneficial tenants in common in equal shares.

Before embarking further on the matter their Lordships deal with a preliminary point going to jurisdiction taken by the respondent, the administrator of Hinds. Put briefly the contention was that the Court of Appeal having given conditional leave to appeal to Her Majesty in Council, a condition being

> "that the Defendant Appellant do procure the preparation of the record and despatch them (sic) to England within 120 days of the date of this order" (20 September 1976).

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and the record not having been despatched within that period, there was no jurisdiction in the Court of Appeal on 4 February 1977 under the Cayman Islands (Appeal to Privy Council) Order 1965 to grant final leave to appeal or to extend the period of 120 days either expressly or implicitly. The only proper course for the Court of Appeal, it was said, was to have refused final leave, in which case the present appellant could have applied to this Board for special leave to appeal. Inasmuch as, if this contention were correct, it is clear that special leave would have been given, the default being not attributable to the appellant but to the Office of the local Registrar, their Lordships are well content to hold that the contention is not correct. Section 5 of the 1965 Order deals with conditional leave to appeal: it provides that leave shall in the first instance be granted only

(*a*) "upon condition of the appellant, within a period to be fixed by the Court *but not exceeding ninety days*" from the granting of conditional leave giving security for due prosecution of the appeal and for costs: and

(*b*) "upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose".

In their Lordships' opinion there is a crucial distinction between the two types of condition: in the one case there is a maximum period of 90 days laid down by the Order in Council, and clearly the Court has no jurisdiction to alter the Order in Council by extending that period: and it was so held by the Court of Appeal of Jamaica under parallel provisions of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962: see *I. H. Smith* v. *S. McField* (1968 unreported). But it is left at large for the Court to determine what period is to regulate the condition under paragraph (*b*) of section 5 of the 1965 Order in Council, and their Lordships see no justification for holding that there is no jurisdiction to re-fix the period either expressly or implicitly on or before granting final leave. Their Lordships accordingly reject the preliminary point taken for the respondent. Before leaving it, however, their Lordships would question the form of the condition in the Order of 20 September 1976 already quoted. It appears to assume that it must be the duty of the proposed appellant directly to despatch the record to England. However section 10 of the 1965 Order in Council envisages that the duty of the appellant is limited to supplying the local Registrar with a copy (or copies as the case may be) and that it is the duty of the Registrar to despatch to England. In particular in the instant case section 10(3) was applicable, the duplication being effected in England: in such case the Registrar's duty was to transmit to the Registrar of the Privy Council one certified copy of the record at the expense of the appellant. Such a copy was supplied to the Registrar in good time for such transmission together with a payment to cover its expense, but the Office of the Registrar failed so to transmit within the 120 days. Section 10(3) in terms provides that no other certified copies of the record shall be transmitted to the agents in England by or on behalf of the parties to the appeal. Insofar as the conditional Order apparently imposed upon the appellant a duty directly to despatch the record to England it would appear to be *ultra vires* the Court to impose such a condition: insofar as it should be construed as merely requiring the appellant to put the Registrar in a position to despatch to England in due time under section 10, the condition was complied with.

Their Lordships turn now to the substance of the appeal. They make two preliminary but important observations. It is not disputed that

the form of each of the conveyances on purchase to the appellant and Hinds constituted them joint tenants: there are no words of severance such as "in shares", or "between them". Indeed in some the word "jointly" appears, though the lack of them does not suggest the contrary in other cases. Secondly, in a case in which the conveyance of the legal estate is to two as joint tenants, it is necessary to establish circumstances which show that the beneficial interests were interests as tenants in common if beneficial survivorship is to be excluded—unless of course a subsequent severance of the beneficial interest be shown, which is not here suggested.

By the Land Adjudication Law, 1971, of the Cayman Islands Land Adjudication Tribunals are established with exclusive jurisdiction to determine disputes as to ownership of lands and as to boundaries. The parcels of land now in question, having been registered initially on their conveyances in the joint names of the appellant and Hinds, were proposed on Hinds' death to be registered in the name of the appellant as being solely interested therein by survivorship. The respondent petitioned the Tribunal, asserting in each case that the Estate of Hinds claimed a one half interest in the land, on the economically stated grounds (*a*) that it was purchased by the appellant and Hinds and (*b*) that the appellant had no right of ownership over the entire parcel, and no claim other than to her one half interest therein. The hearing before the Tribunal, consisting of an Adjudicator and two assessors, was on 11 September 1973. There was no written evidence save the conveyances on purchase in question, and one conveyance on sale by the appellant and Hinds. Sworn oral evidence was given by four witnesses. A brief summary of these conveyances in chronological order suffices, it having been already observed that it was not contended that in point of form they reflected in any way a tenancy in common: 'R' is the appellant: 'H' is Hinds.

(1) *20 March 1958.* Sale by 'R' and 'H' "jointly" to Potter for U.S. $2,200 of land at West Bay Cayman. (There was no evidence how this land came to belong to 'R' and 'H': nor what happened to the $2,200: but assuming it was divided equally that would have been quite consistent with a beneficial joint tenancy in the land followed by a severance of the interest in the proceeds of sale.)

(2) *18 November 1958.* Purchase by 'R' and 'H' from Bush and Manderson of land at West Bay Cayman for £250. (There was no evidence that this was traceable to the $2,200: nor whose money was used save that Bush in evidence said that 'H' paid him his half of £125.)

(3) *7 January 1959.* Purchase by 'R' and 'H' from G. Jefferson of land at West Bay for £85.

(4) *19 November 1959.* Purchase by 'R' and 'H' from H. Glidden of land at West Bay for £75. This conveyance contained the phrase "To hold . . . unto and to the use of 'R' and 'H' jointly their heirs and assigns in fee simple".

(5) *30 November 1959.* Purchase by 'R' and 'H' "jointly" from D. E. Glidden of land at West Bay for £200.

(6) *30 January 1960.* Purchase by 'R' and 'H' from D. Glidden and H. Glidden of land at West Bay for £400.

(7) *29 June 1963.* Purchase by 'R' and 'H' from L. Powell of land at North West Point in West Bay for £100.

There was no evidence of any joint participation in purchase of any other land (or other property) by the appellant and Hinds, either before 1958 or after 1963 until the death of Hinds in 1972. There was no evidence that the parcels of land in conveyances Nos. 2 to 7 were ever turned to any account in Hinds' lifetime. There was some evidence of the appellant having purchased land in her own name alone: and of Hinds having made an investment in shares in her name alone.

Before referring to the oral evidence before the Tribunal their Lordships observe firstly that it is reproduced in the form only of notes made by the Adjudicator: and secondly that the right of appeal from the Decision of the Tribunal is upon an alleged error in point of law only (or a failure to comply with the due procedure, which is not here in question). To this their Lordships will return. This limitation of the right of appeal to a point of law applies both to appeal to the Grand Court and to a further appeal to the Court of Appeal: see section 23 of the Land Adjudication Law, 1971. Further, it is clear law that if the legal interest in the property is on the conveyancing documents a joint tenancy it is for those who assert a beneficial tenancy in common to establish it as resulting either from evidence of intention to that effect, or from evidence of circumstances surrounding the acquisition in joint names which in equity is regarded as sufficient justification for departing from the situation at law.

The first witness Thomas Farrington (described as aged 73 "business" man), called for the petitioner (the present respondent), said nothing relevant in chief: he had been concerned with drawing up conveyance No. 7 (*supra*), and could not remember whether he had been thus concerned with any other of the conveyances. In the course of cross examination he said that the appellant and Hinds were "very close friends inseparable". It would appear that in fact in chief he had said, though it was not noted by the Adjudicator, that in connection with conveyance No. 7 the ladies had told him they were purchasing "jointly" but that his understanding of the word jointly as used by him was "between them" and he said that he "assumed" they were "purchasing half and half": he believed "they were paying half and half": he "regarded" the two ladies as intimate friends "and business associates". He gave no ground for regarding them as "business associates" beyond his "assumption" and "belief" in connection with conveyance No. 7. In their Lordships' opinion the evidence of this witness has no tendency whatever to establish an equitable tenancy in common.

The next witness called for the present respondent was Henry Bush, one of the two vendors in conveyance No. 2, aged 70, farmer of West Bay. He said that the two ladies told him they wanted to buy my property "between the two of them": that Hinds paid him his half of the purchase price £125: that he knew the two ladies well: that they bought a lot of land in West Bay "between them": that they told him they were "business women". In cross examination he said that they told him that "they were in partnership".

The third witness called for the present respondent was Granville Rutty of George Town. His wife was a niece of Hinds. He confirmed that the appellant and Hinds were very close friends. He spoke of an exercise book with notes of land purchases, dates and prices in Hinds' writing with both the appellant's and Hinds' names there: this book was not forthcoming. The note of his evidence contained this passage:

> "Understood that Hinds and Roulstone"—the appellant—"were doing a business transaction when purchased the land. Paid half each. With her own money. She was taking her money and

investing it in land. She bought shares also in Caribbean Utility Company. Hinds and Roulstone as being partners in business ventures".

There is no note to show that this witness gave any reason for that which he said he "understood": nor, if the final sentence quoted is to be taken as prefaced by the word "regarded", that he gave any reason for thus regarding. It was not suggested that the investment in the Caribbean Utility Company was in joint names.

For the appellant her son Frank Roulstone gave evidence. He said that from 1955 to her death for about 80% of the time Hinds lived free in a hotel belonging to his parents or in another of the appellant's houses. He said the two ladies were very close to each other: they were "always together. Closer than sisters. Never in business together". He said that the land they bought together was never advertised for sale: "personal not business relationship". He said that two nights before Hinds died she told him to tell his mother "that when she died she was to have everything". "Many times before in my presence she stated that everything she had was to go to my mother who had treated her as one of her own". He said that he felt sure that when Hinds was dying her reference was to land. He said that he had heard the two say that everything the other had was to go to the survivor.

The final point to note is that the appellant did not give evidence, a matter which the majority in the Court of Appeal considered of significance in favour of the respondent. Their Lordships do not consider that to have been justified. The appellant lived partly in the United States and was accustomed to return to the Cayman Islands for the winter on 1 November. On being notified that the hearing of the respondent's Petitions was fixed for 10 September she wrote to the Office of the Adjudicator asking as a matter of convenience to her that the hearing be postponed to November or at least the middle of October. She was told in reply that postponement was not possible, with the suggestion that if she could not attend she should appoint a local representative to put her case for her. She understood that the question for determination was purely on the wording of the conveyances, as to which she could not help: see her letter 20 August 1973 to Brandon, the Attorney who in fact represented her. This is all the more understandable in that there was no hint in the Petitions that it would be contended that an equitable tenancy in common might be established by showing a business partnership in the land dealings of the two ladies. The absence of evidence by the appellant does not support the respondent's case for a tenancy in common in equity.

The Decision of the Tribunal was in writing. It correctly stated the *prima facie* situation that without words of severance in the conveyances these were joint tenancies. It correctly rejected an argument—no longer pursued—that references to heirs and assigns of the purchasers were an indication of tenancy in common. It noted a contention for the respondent that the two were business partners and that Hinds contributed her share of the purchase prices so that in equity she was entitled to be considered a proprietor in common as to a half share so that there was no survivorship in equity to the whole. Some criticism can properly be directed to the passage which follows:

> "Unfortunately for Hinds none of the witnesses called could establish that Hinds had paid half the purchase price in the six purchase transactions or had received half of the proceeds from the two (sic) sales. From the evidence led it could be argued equally well and with greater probability that Hinds did not contribute half the purchase price or even nothing at all. That Mrs. Roulstone—a

businesswoman and an alien was merely using Hinds' name and standing to effect purchases for land for herself. This would be consistent with Hinds living virtually free on Mrs. Roulstone throughout the period when they enjoyed close friendship and were as inseparable as sisters."

The receipt and retention by each of half of the proceeds of any sale would in fact be quite consistent with a joint tenancy in equity of the land and a severance as to the proceeds of sale. If the two ladies had contributed unequally to any purchase price that would have been a ground for holding against a beneficial joint tenancy. Assuming that the sentence beginning "That Mrs. Roulstone . . ." should be regarded as prefaced by the words "It may be", this, so far as the notes of evidence go, appears to be speculation: but it was not expressed as a conclusion upon which a denial of any beneficial interest in Hinds was based. The fact remains that the contention of fact that in these purchases the ladies were acting as business partners with the lands as assets of the partnership business was clearly rejected: and only that could have established that their interests in equity were other than their interests in law.

One other passage in the Decision may be questionable in logic.

> "If Hinds had believed she had a half share in the property she must surely at some time in the 14 years she was associated with Roulstone have taken the simple step to sever the Joint Proprietorship".

But of course in equity if she thought she had a half share she would not have needed to sever. Their Lordships however suppose that the Decision refers to a failure by Hinds to procure a division on the register of the various plots into two halves. Finally the Decision placed reliance on Frank Roulstone's evidence that Hinds when dying said that he was to tell his mother "that all her property at her death would become the property of his mother". The note of his evidence was "everything she had was to go to my mother". The majority judgment of the Court of Appeal considered this to be an important departure from the evidence as noted. Their Lordships do not agree. The Tribunal was well entitled to take the evidence as a pointer in favour of (in the mind of Hinds) a beneficial right of survivorship in the appellant rather than as an attempt to make a will orally. Hinds had herself in the past been a beneficiary of land (Grand Old House) under the will of Helen Lambert.

When the present respondent appealed to the Grand Court the judge (Moody J.) appreciated that there could be no rejection of the Tribunal's Decision in this case except for error in law. He could find none. He indicated that the starting point must be the absence of words of severance from the conveyances. He finished with a short phrase which taken by itself might be thought to show that in any case that must also be the finishing point. However in the course of his judgment he said

> "In the rest of the decision the Adjudicator appeared to have accepted the case put forward on behalf of Dorothy Roulstone and rejected the case put forward on behalf of the Estate of Olive Hinds".

In this he was clearly referring to a contention that the Tribunal should have on the evidence found for the Estate of Hinds on the "partnership" point, and was rejecting that contention as not involving a point of law.

In this their Lordships are in agreement. There may, as already indicated, be some criticisms advanced of points made in the Decision

of the Tribunal: but this was not an ordinary appeal in which an appellate Court is at liberty to disagree with findings and inferences of fact, albeit with due caution when the Tribunal of first instance has heard oral evidence and the appellate Court has but a note of the evidence. But here there is in their Lordships' opinion no discernible error of law, such as a finding on the "partnership" point which no reasonable tribunal properly instructed in the law could have made having regard to the evidence and all the circumstances of the case.

The majority judgment of the Court of Appeal correctly stated that in this case there was no appeal ~~to~~ save on a question of law. It also correctly stated that on the language of the conveyances there were joint tenancies at law. It then stated that the question was whether the beneficial interests were those of joint tenants or tenants in common, which was a question "to be determined on the facts as found and on the proper inferences to be drawn therefrom". It criticised the language of the Tribunal's Decision in the respects to which their Lordships have already drawn attention, but which do not in their Lordships' opinion disclose an error in point of law in arriving at the Tribunal's Decision.

The judgment of the majority concluded in the following manner:

> "It still remained therefore for the Adjudicator to have determined whether the facts disclosed the existence of joint-tenancies in equity as well as in law or tenancies in common in equity. Those undisputed facts were that the deceased and the respondent took conveyances in their joint names, not of merely one property, but of eight, two of which they subsequently sold, and that these transactions covered a period of five years. Both parties were persons of some means, of varying but unascertainable degree. What was the extent of the contribution, if any, of any particular party to any particular transaction is utterly unknown. From these undisputed facts the inference of the existence of a *joint-undertaking* on the part of these ladies seems irresistible, and *a fortiori*, of the existence in equity of tenancies in common in the lands. Where it is impossible to determine the extent of respective contributions, the rule is that equality is equity".

It may properly be said that the question would have been more accurately posed as being for the Adjudicator to determine whether, on the facts disclosed, a beneficial tenancy in common was established. But, be that as it may, the basic question for decision was one of fact and inference of fact for the Tribunal, namely whether on the occasions of these purchases the ladies intended their beneficial interests in the lands purchased to depart from their legal interests therein. That was for the present respondent to establish as a fact to the satisfaction of the Tribunal and he failed to do so. There was no solid evidence to show a partnership between the ladies in a business of buying and selling land, which was the one ground advanced (and plainly rejected by the Tribunal) for the contention that equity would not follow the law. Quite apart from the fact that their Lordships cannot identify a point of law to ground any appeal, they are of opinion that the facts and evidence in the case were insufficient to justify that contention. In substance these were the grounds upon which Robinson P. dissented, and their Lordships agree with his judgment.

Their Lordships are accordingly of opinion that this appeal should be allowed (with costs here and in the Grand Court and the Court of Appeal) and that the Decision of the Land Adjudication Tribunal is to be upheld, and they will humbly advise Her Majesty accordingly.

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In the Privy Council

DOROTHY ROULSTONE

v.

O. L. PANTON
(ADMINISTRATOR OF THE ESTATE
OF OLIVE HINDS)

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LORD RUSSELL OF KILLOWEN

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evidence was admissible but that it was desirable that the jury should have been warned as to how they should deal with it.

At the trial no application was made for the discharge of the jury. No warning was given by the learned trial judge at the time of the reception of the evidence or during his summin-up to the jury.

We are of the view that this evidence when considered with the evidence given by Clementina Edwards that she heard the applicant's mother say "What is this on the poor boy again" was of a highly prejudicial nature and ought not have been admitted in evidence. Although no application for the discharge of the jury was made on behalf of the applicant, the learned trial judge should have considered whether, in the exercise of his discretion, he ought to have discharged the jury.

We are unable to say what effect the reception of this evidence did in fact have on the minds of the jury in arriving at their verdict. For these reasons the conviction for murder must be quashed.

Thirdly, it was submitted on behalf of the applicant that the learned trial judge did not deal adequately with the issue of provocation. It was argued that the issue of provocation arose as a result of the evidence of Egbert Roberts to the effect that in answer to a question by the Hospital 'Sister' the applicant replied, "No, she only held on to him, pulled on his shirt and he chucked her off and said, "go away"".

There was no evidence to indicate when this incident occurred. It was not being suggested that as a result of this incident, the deceased received any injury. If the issue of provocation arose solely on the Crown's case then it ought to have been left with the jury for their consideration. On a careful review of the evidence we cannot say that the issue of provocation arose in this trial on the evidence referred to above. In our view, the simple answer to this complaint is that it was unnecessary for the judge to have dealt with provocation as an issue for the consideration of the jury in this case.

Fourthly, it was submitted on behalf of the applicant that the issue of manslaughter on the ground of lack of intent was a live issue at the trial and the judge in failing to leave such a possible verdict with the jury, the conviction ought to be quashed.

The evidence of Dr. Martin was to the effect that the deceased died as a result of a broken neck. Although the Doctor stated that a broken neck could be caused by (a) strangulation, (b) choking, (c) a direct blow and (4) a fall, the Crown failed to lead any evidence as to which one of the methods described above caused the deceased's neck to be broken. There was clearly a gap in the medical evidence. The jury having convicted the applicant of murder, must have ruled out accident, and must have concluded that the broken neck was caused by an act of the applicant. In view of the state of the medical evidence could the jury have been sure of the method adopted by the applicant in breaking the neck of the deceased? Can we now say what conclusions the jury reached as to how the neck was broken? It was open to the jury to say that the neck was broken 'by a direct blow' and in those circumstances it would have been open to them to say whether in delivering the blow (if indeed it was a blow which caused the broken neck) there was in the applicant an intention to kill or to cause grievous bodily harm.

In the circumstances, the Court is of the view that the issue of manslaughter (on the ground of lack of intent) was a live issue and the jury should have been told that a verdict of manslaughter was open to them as there appeared to be no sufficient evidence on which they could reasonably say they were sure that the applicant intended to kill the deceased. The failure of the learned trial judge so to direct the jury is fatal, and on this ground of appeal the conviction must also be quashed.

Having regard to the conclusions at which we have arrived, the application for leave to appeal is treated as the appeal; the appeal is allowed. The conviction for murder is quashed and the sentence of death set aside.

We conclude, however, that in the interests of justice there should be a new trial at the next session of the St. Mary Circuit Court and we so order.