J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 195 of 1974

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

R. v. GLENROY WATSON

B. Macaulay, Q.C. and D.V. Daly for the appellant.

Chester Orr, Q.C., Deputy Director of Public Prosecutions and F.A. Smith for the Crown.

October 9, 10, 13, 14;
November 24, 1975

Luckhoo, P. (Ag):

On October 15, 1974 the appellant Glenroy Watson was convicted in the Home Circuit Court before Henry, J. and a jury of the murder of Aston Chung on December 23, 1972, and was sentenced to death. The appellant had been indicted along with Ainsworth Thompson and Dennis Gibbon for the murder of the deceased. We were informed during the course of the hearing of this appeal that Dennis Gibbon fled the Island before the commencement of the trial. Ainsworth Thompson was acquitted on the direction of the learned trial judge at the close of the case for the prosecution.

The deceased resided with his mother Choy You Lin in the upper storey of premises situate at 173¾ Windward Road, Kingston. Choy You Lin with the assistance of the deceased carried on a bar and grocery business on the ground floor. Both Choy You Lin and the deceased retired to bed before midnight on December 22, 1972. During the early hours of December 23, 1972, Choy You Lin heard someone come

into her room. She called out "Who's that?", got up, and then sat down. A man, whom she later identifed as Dennis Gibbon held her hand and demanded money. He had a flashlight in the other hand. She spoke in Chinese to the deceased who was in the other bedroom. The deceased got up. Gibbon, let go her hand and turned towards the deceased. She heard the sound of two or three gunshots. She saw the deceased on the floor lying near his bed. The deceased was bleeding by one of his ears. Gibbon then left her room taking with him a case containing money which she had brought upstairs from her grocery the previous evening. The deceased was fatally injured by what appeared to be a .38 bullet which entered about one inch in front of the right ear and fractured the vertebral artery found in the muscles of the neck. A bullet was found upon a post mortem examination carried out by Dr. Ramu, embedded in the muscles of the neck behind and one inch below the right mastoid process. In the doctor's opinion death was due to shock and haemorrhage the result of injury to the blood vessels in the neck caused by the bullet.

At about 7.30 a.m. on December 23, 1972, Det. Insp. of Police Cranmer King, who was then a Sergeant of Police stationed at Rockfort Police Station, went to the deceased's premises in consequence of a report he received. He observed that the living quarters upstairs was an apartment consisting of two bedrooms one to the east and the other to the west divided by a passage running from north to south. At the southern end of the passage he saw a mesh wire with a portion cut out large enough to admit the body of an adult. About five feet from the mesh wire he saw a carton box with what appeared to be bullet holes - entry and exit holes. Tracing the direction of these entry and exit holes he discovered to the west what appeared to be a .38 calibre bullet embedded in a piece of wood. Outside the building he saw a ladder standing on the ground with its upper end resting against the northern wall of the building. Immediately above the top of the ladder there was a section of the zinc portion of the wall - the lower portion of

the wall was of concrete - cut out, leaving a space of about 4' x 8' giving entry to the upper storey of the building. On the ground by the foot of the ladder there were two cash pans containing $3.31 in coins as well as a screw driver and a pair of "zinc" scissors.

The case against Ainsworth Thompson rested on a cautioned statement which he is alleged to have made to Sgt. King on January 6, 1973 a few hours after he had been detained by that officer in connection with the matter. The statement purporting to bear the signature of Thompson is as follows -

> "Well, sah, about the robbery I never go in a the yard. Me was in the hills and Glen and Hot Stuff and Bigger from Spangler Gang ride them Honda and come up dey to me the evening. This is a Friday evening before Aston dead the Saturday morning. I stay outside the road and dem decide to go inside Aston place fe rob it. We arrange it I believe a early morning dem ride them bike and park it on the hill and all four a we go down a Aston place at Windward Road. Hot Stuff and David go over a yard tek a ladder carry it go lean up against the building and Hot Stuff and Glen broke out piece ah roof and go inside and I stay a de gate and David stay over the next door yard. I don't member if I hear any gunshot sound but about half hour after I see Hot Stuff and Glen come from out a de shop and Hot Stuff have a bag.
> All four of us run go pon de hill wey de bike dem park and Hot Stuff gi me $30 and dem go wey pon dem bike and I go a my yard. After I go a my yard I never hear anything. On Saturday 6/1/73 at about 11 p.m. (sic) I was standing in front of my gate and some police come dey and hold me with some other boy and carry me a station and me yard go search it but don't find nothing. Det. Sgt. King asked me about Aston place and dem kill Aston and I tell him what I know. Him bring a man who I know from Polka Flat and ask me if I want to give statement and I tell him yes and I gi him statement."

That statement bears the signature of "Bishop L.G. Bartholomew" as a witness thereto.

The case against the appellant Glenroy Watson depended on (1) the details of a conversation which the appellant is alleged to have had with one Angelita Gauntlett (2) a cautioned statement alleged to have been made to Det. Insp. of Police Wilbert Walker on January 16, 1973 at Rockfort Police Station in the presence of Bishop L.G. Batholomew and purporting to have been signed by the appellant in their presence. According to Angelita Gauntlett (who is also know as Juliet) early in January, 1973, she had gone to 30 Rusden Road,

Rockfort to visit a friend Vilma Brown when she saw the appellant, with whom she had been on social terms for the past six years, sitting on a garden bench in those premises. He called to her and she went and sat with him on the bench. He told her that his "friend" had been held and that he heard that "they" beat him up. He spoke of Aston Chung's death and said that Aston Chung should have been "bumped off" long ago. She asked him who had killed Chung. He replied "It is I man shot Aston because" and then he cursed, "He is an informer". He asked her to meet him at the Rialto Theatre the following Thursday night and said that he would give her some money to buy some things to take for his friends at G.P. (the General Penitentiary). She attended a show at the Rialto Theatre on the following Sunday night and although she saw the appellant she not speak with him. She said that after her conversation with the appellant on Vilma Brown's premises she left him with Vilma Brown who had come up and listened to what the appellant was telling her.

The cautioned statement bearing the appellant's signature which was put in evidence was as follows -

> "One Friday evening near Christmas gone ah was up me yard at Moonlight City in Rockfort when ah see Ainsworth Thompson, who we all call Billy, and two boys come to me. Billy tell me sey dem going to broke Roslyn shop a Rockfort and ah mus' come wid them. Ah sey to him, 'Imagine you gwine broke Roslyn shop and the people dem down there know you." Him sey to me, 'Dat alright man, no worry.' De four a we sit down up the hill and wait till late in de night. Billy tell me sey is good time fe do de job now and so all a we agree and lef fe de shop. Billy did have a .38 revolver wid him. We walk fe reach the shop. When we reach down to a house behind the shop, Billy go in dere and tek out a long ladder and lean it up on de back a de shop. Him and de two boy go up and leave me pon de ground in de yard which part dem lean up de ladder pon de shop back. Billy tell me fe watch if anybody was coming. While a was watching a hear a gun fire inside the upstairs a de shop which part dem did gone. Just after the shot fire, one a de two boy jump down off de back a de building and Billy and de other boy come down quick pon de ladder. One a de short brown one did come out de shop with a bag and de four a we go back up de hill a Moonlight City. When we were going up we see two woman an' a man on D'Aquilar Road same place where we walk. Billy did have the gun in a him han' but when 'im see the people him hole down him han' and hide it. When we reach up the hill de brown boy wid de bag tek out a whole heap a money out de bag and share up between de four a we. I get eleven dollars and de

three a dem get the res'. I go to my home after the sharing and dem lef sey dem gone home. When day light out a hear say dat Aston who live upstairs a Roslyn get shot and dead.

Some days after this happen a hear sey dem hole Billy and charge him fe murder Aston. A couple days after dem hole Billy a girl who a know as Red Juliet come to see me and tell me sey police out a Rockfort a look fe me fe de murder a Aston. When me hear say de police looking fe me, a consider wha' fe do and a go to me lawyer, Mr. Winston Spaulding, and tell him sey de police looking fe me fe murder Aston. Him telephone the Rockfort police an' ask fe Detective King, but him didn't get Mr. King. A go home and go back to Mr. Spaulding dis morning an' him tell me sey a mus' go to Rockfort and hand over myself to de police. Since him tell me so, a come out and a tell Mr. King Jus' wat a tell you now, and dat is all I know 'bout de killing.

The above statement was read over to me and I have been told that I can correct, alter, or add anything I wish. This statement is true. I have made it of my own free will."

The appellant's defence at the trial was an alibi.

It was without doubt that the prosecution's case against Thompson and the appellant was that they were part of a joint enterprise to break and enter the deceased's premises with intent to commit a larceny and that the enterprise extended to the use of personal violence involving serious bodily harm or death either in the course of committing that offence or for the purpose of making good their escape after the offence was committed. The case against Thompson broke down because the only evidence connecting him with the crime - his cautioned statement - while disclosing a joint enterprise on his part with others to break and enter the deceased's premises with intent to commit larceny did not disclose that the enterprise extended to the use of personal violence for any purpose whatsoever. The cautioned statement attributed to the appellant however, if properly admitted in evidence (and this is challenged) and if accepted by the jury as giving a true account of what had transpired was capable, upon a proper direction in law by the trial judge, of grounding a verdict adverse to the appellant on the indictment as laid. Mr. Macaulay for the appellant has conceded, and we think rightly, that the directions in law given by the learned trial judge were impeccable, though he submitted that there was nothing contained in the cautioned statement from which it might reasonably be concluded that the enterprise to break and enter with

intent to steal extended to the use of personal violence involving serious bodily harm or death. Further, acceptance of evidence given by Angelita Gauntlett and of the truth of what she testified was stated to her by the appellant could by itself result in the jury coming to the conclusion that the appellant's part in the enterprise was not in fact that of the watcher on the ground - a principal in the second degree - but rather that of one of the persons who ascended the ladder and either alone or with others shot at the deceased. It is not of little significance that Sgt. King found what appeared to be entry and exit holes in the carton box seen a short distance away from the opening in the mesh wire in the southern wall and recovered a bullet from the western wall. Further, at no time did Choy You Lin speak of seeing any firearm in the hand of the person she identified as Gibbon. It is true that Angelita Gauntlett said that the appellant in asserting that he shot the deceased gave as his motive that the deceased was an informer. It was open to the jury to reject that assertion, if they believed it was made, for it is without doubt within the competence of a jury to accept such admissions in a statement made by an accused person as they think worthy of credit and to reject the remainder.

The learned trial judge seemed not to agree with counsel for the Crown in the latter's approach to Angelita Gauntlett's evidence as being consistent with the common design indicated in the cautioned statement attributed to the appellant. Rather the learned trial judge (at p. 395 of the record) considered that the contents of Angelita Gauntlett's testimony if accepted as the truth of the facts stated would necessarily lead to the conclusion that the appellant was acting on his own. In this respect we think that the learned trial judge was wrong for the reason that it was undoubtedly part of the case for the Crown that Gibbon was one of the persons, one of whom was the appellant, who together went to the deceased's house on December 23, 1972. So that it was possible for the jury to act upon the testimony of Angelita Gauntlett together with the other testimony in the case but excluding the cautioned statement attributed

to the appellant and arrive at a verdict adverse to the appellant. Another possible position is that the jury might have acted upon the cautioned statement and the other evidence in the case exclusive of Angelita Gauntlett's testimony. A third possibility is that the jury might have acted upon a combination of the testimony given by Angelita Gauntlett and the other evidence in the case including the cautioned statement.

A number of grounds have been urged before us. We have given careful consideration to them all but the only one of any substance in our view is that which relates to the refusal of the learned trial judge to hold a trial within a trial upon objection being taken to the admission in evidence of the cautioned statement attributed to the appellant. In the course of Inspector King's testimony the cautioned statement attributed to Thompson was tendered whereupon Mr. E. Blake, Attorney-at-Law for Thompson objected to its admission in evidence on the ground that the signature thereon purporting to be Thompson's was a forgery whereupon the learned trial judge observed that Inspector King had testified that Thompson had signed the document. Mr. Blake then said that it was a matter which the defence could take later but that on the instructions he had on the point he was obliged to make the objection. To that the learned trial judge said that he could establish it in due course and the jury would give whatever weight they thought fit to it. Thereafter Thompson's statement was admitted in evidence and read to the jury. Inspector King then related that at about 8 a.m. on January 16, 1973, he received certain information from Mr. Winston Spaulding, Attorney-at-Law and that about 11 a.m. on that day the appellant attended at his office at Rockfort Police Station along with a man who he said was his step-father. He informed the appellant in his step-father's presence that he was making inquiries into the death of the deceased Aston Chung which had occurred on December 23, 1972, and that he had received information that he knew and took part in the murder but that he (King) was unable to see him at that moment in view of certain appointments he had made. The appellant was detained at the

Station. At about 5.15 p.m. that day he (King) returned to Rockfort Police Station where he again told the appellant that he had information that he knew about the murder of Aston King. According to Inspector King the appellant said "Mek I tell you how it go, sir." He stopped the appellant from speaking further and contacted Det. Insp. Walker and Bishop Bartholomew who attended the station. In the appellant's presence he told Det. Insp. Walker and Bishop Bartholomew that the appellant had something to say in respect of the murder of Aston Chung and that he would like Insp. Walker to interview him. Thereupon Insp. Walker asked the appellant if he wished to give a statement and the appellant said "Yes". Insp. Walker wrote down the caution, read it to the appellant and then he (King) left. At about 7.30 p.m. that evening Insp. Walker handed him a statement. He then arrested and charged the appellant with the offence of murder and cautioned him and the appellant made no statement. Insp. King was then cross-examined by Mr. Blake for Thompson who suggested to the witness that he used various means of violence upon the person of Thompson in an endeavour to extract a confession of the crime from him. That suggestion was denied by the witness. Then it was suggested by Mr. Blake to the witness that Thompson did not sign the statement attributed to him. Mr. Blake further cross-examined the witness in an endeavour to show that the signature on the statement purporting to be Thompson's was in fact a forgery.

Mr. Witter for the appellant then cross-examined Insp. King. He suggested to Insp. King that Insp. Walker never cautioned the appellant in his presence (or at all) and that the appellant never dictated nor signed the statement attributed to him. He also suggested to Insp. King that in fact he (King) had asked the appellant if he knew about Aston Chung's murder and that the appellant had said that he did not but he knew that Aston Chung had been killed. These suggestions were denied by Insp. King. Thereafter Mr. Witter suggested to Insp. King that he told certain policemen to take the appellant into a nearby room in the Station, that into that room the appellant was taken with a view to extracting a confession from him and was subjected by those policemen to violence

of such a degree that he became unconscious. All these suggestions were denied by Insp. King.

Thereafter Insp. Walker gave evidence as to the circumstances under which he went to Rockfort Police Station on January 16, 1973 at the request of Insp. King. He said that when he got to the Station Insp. King told him in the appellant's presence that the appellant was one of the men who were being sought in connection with the murder of Aston Chung who was shot and killed and that the appellant wanted to give a written statement as to what he knew. Thereupon, the appellant nodded his head in agreement and said "That is right, sir, I want to get my side straight with the law." He cautioned the appellant and asked if he understood what was meant by a written statement and he said "Is my lawyer Winston Spaulding I leave and come from right here." The appellant was asked if he wished to write the statement himself or if he wanted someone to write it and he said that he wanted someone to write it and further that Mr."B" (pointing to Mr. Bartholomew) whom he knew from his youth would not make anything go wrong with him. Thereafter he wrote the caution on foolscap paper, read it back to the appellant asked him if he understood it and he said "Yes". At his request the appellant signed it (the caution) and Bartholomew signed as witnessing it. Thereafter the appellant related his story which he (Walker) wrote down in the appellant's own words. Upon completion of his story he (Walker) read over to the appellant what he had written down and asked him if he wished to add or alter or correct anything in the statement. The appellant said that what was there "is just so it go." He invited the appellant to sign it which he did and Bartholomew certified it by signing it as a witness. Upon that testimony being given it was proposed to tender the statement attributed to the appellant. At this stage Mr. Witter objected to its admission in evidence in terms which did not impress us as identifying with any great degree of clarity just what were the grounds for his objection. Mr. Witter in the course of his

submissions in this regard said (p. 132) that it was the case for the appellant that he never dictated anything or any part of the statement whereupon the trial judge said that all he was going to decide was whether there was or was not duress, the question whether or not the appellant gave the statement being one of fact for the jury. Mr. Witter said he thought that course to be illogical. Mr. Hall (for the Crown) on the other hand submitted that the two alternatives were irreconcilable, the defence seeking to assert that no statement was given but that if a statement was given it was not voluntarily given. He submitted that it was a pure question of fact for the jury. The learned trial judge was obviously impressed by Mr. Hall's reasoning for he said that he agreed with his submission. Thereupon Mr. Witter said that he wished to make it abundantly clear that the appellant gave no part of the statement (p. 133). Then Mr. Witter made certain submissions (pp. 134-136) relating to the question of whether a statement is given "voluntarily" or "involuntarily" in terms which we are at a loss to understand what bearing it has on this matter. It was perhaps not surprising that at that stage Mr. Witter sought the assistance of Mr. Blake. Mr. Blake submitted that although the defence (in that regard) appears to be inconsistent "at the proper time the judge's duty is to deal with both angles of the matter. I submit that you cannot be satisfied about the allegations of pressure unless there is also an inquiry about it."

The learned trial judge then indicated that he would consider the matter overnight. On the resumption next morning the learned trial judge indicated that he had consulted judgments delivered by West Indian Courts on the question and that the prevailing view is that the question as to whether a statement was given or not is a question of fact for the jury to decide and that what the judge has to decide is whether the statement was given voluntarily. He then continued (p. 139) -

> "In those circumstances, it seems to me, as I indicated yesterday, it wouldn't be open to you to object to this statement being admitted on the sole ground that it was never given at all. Equally, if there is, prima facie evidence to indicate that it wasn't (sic) given voluntarily, in the sense that I have indicated already, at that stage my only duty would be to admit it and then to leave to the jury subsequently the question as to whether or not the statement was in fact given."

The word "wasn't" in the above passage seems to be an error in recording. We think that the word "was" was intended. Thereafter the question of the admissibility of the statement on the ground of relevance to the charge laid in the indictment was argued and upon the judge ruling in favour of the Crown on that issue the statement was admitted in evidence and read to the jury.

Although the language in which the submissions were made might have occasioned the learned trial judge some difficulty in appreciating just what course he was being urged to follow at that stage it does appear that the defence was contending (i) that the appellant did not give or sign the statement attributed to him; (ii) that he was subjected to a violent attack upon his person by policemen at Rockfort Police Station in an endeavour to get a confession from him and he was prepared to adduce evidence to support his allegations in that respect.

Mr. Macaulay has submitted that where objection is taken that a statement sought to be tendered was not made by the accused, the pith of such objection is that the statement is irrelevant to the proof of the charge, or if relevant is a breach of the hearsay rule. He contends that in such a case the trial judge should hear evidence to enable him to decide as a preliminary question whether the statement was made by the accused and if he decides the preliminary question in the affirmative he must go on to decide whether the prosecution has satisfied him beyond reasonable doubt that the statement was made voluntarily. Once the trial judge is so satisfied it is for the jury to say whether or not the accused made the statement and if they decide that he did, to say what weight should be attached to the statement. In support of his

submission Mr. Macaulay referred us to the cases of -

(i) N.V. Lakhani v. R. (1962) E.A. 644;

(ii) Asare alia Fanti v. The State (1964) G.L.R.70;

(iii) Nyarko v. The Republic (1974) 1 G.L.R. 206.

In Lakhani's case a confession attributed to the accused as having been made to a person in authority was admitted in evidence by the trial magistrate. The accused took no objection to its admission at the time it was adduced and did not cross-examine the witness upon it but in his sworn statement in his defence he denied ever having made the confession. The accused was convicted on the charge laid against him. On his appeal to the Supreme Court of Kenya that Court observed that the trial magistrate ought to have asked the accused (who was unrepresented by counsel) at the time when the confession was about to be adduced whether he wished to repudiate or retract it or whether he agreed to its admission in evidence. The Court held that on finding that the confession was repudiated a trial within a trial should have been held. A similar procedure is to be adopted where an accused retracts as the Court of Appeal for East Africa held in Nwangi v Nyeroge (1954) 21 E.A.C.A. 377. However, as the trial magistrate directed his mind to the issue as to whether in fact the confession was made by the accused and found that it was, no injustice or prejudice resulted to the accused by reason of the fact that no trial within a trial was held upon the issue as to whether or not he had made the alleged confession. The appeal was accordingly dismissed. In the course of its judgment the Court stated that on the question of voluntariness there was nothing in the record to suggest that if the confession was in fact made by the accused it was not made voluntarily so that what might be called the issue as to voluntariness was never a disputed issue in the trial. The Court went on to observe that while it is for the prosecution to prove to the satisfaction of the judge or magistrate that any confession or statement by the accused was made voluntarily before it is admitted in evidence against him the cases did not go as far as to suggest

that there is a presumption that such a confession or statement was not made voluntarily until the contrary is proved but rather the tendency of the cases was the other way. The Court further observed that it was necessary, however, that the circumstances should be considered in order that the judge or magistrate may decide whether or not it required further evidence to satisfy itself that the confession or statement was voluntarily given but that where there was nothing to suggest that it was not voluntarily given and the accused himself does not say it was not voluntarily made it would not be open for an appellate tribunal to decide an appeal upon an issue which was never contested at the trial and which is not supported by the evidence.

In Asare's case the Supreme Court of Ghana held that "where objection is raised to the admission of a statement made by a defendant in a criminal case on the grounds that the defendant did not make the alleged statement, or that the said statement was not a voluntary statement, or that it was made under duress, or procured by threats or promise, the said issues should be tried, and a court should not admit the statement until it is satisfied that it is a voluntary statement made by the defendant: See R. v. Onabanjo (1936) 3 W.A.C.A. 43 and R. v. Kassi (1939) 5 W.A.C.A. 154. But this rule only applies where, as earlier pointed out, the allegation is either no statement at all was made by the defendant or that the statement was made
/ by him in consequence of duress, threat, or promise, and not that the statement is not an accurate record of what the defendant has said. The admissibility of the statement is one thing, the weight to be attached to its contents is quite a different thing. The admissibility is a question of law for the judge; the weight to be attached to it or the questions whether the contents are true or accurate are questions of fact for the jury. Therefore the statement must first be admitted before its contents can be evaluated."

In Nyarko's case the accused at his trial in a circuit court in Ghana denied the authorship of a statement allegedly made and signed by him which the prosecution sought to tender in evidence. The trial judge admitted the statement without evidence or investigation. On appeal to the High Court (Andoh, J.) by the appellant one of the grounds of appeal was that the trial judge erred in ruling upon the statement without evidence. It was held on this point, allowing the appeal, that where the accused denies the authorship of the whole statement it is incumbent on the trial judge to hold a "mini trial" for the determination of the issue whether the statement was made by the accused and if so whether it was voluntary. The mere fact that an accused person signed a statement did not mean that it must be admitted in evidence without investigation; neither did it mean that the statement was made by the accused nor that it was voluntary. The admissibility of such a statement is a question of law for the judge but the weight to be attached to it is a question of fact for the jury - and the prosecution must satisfy the court on all these issues. Among the cases relied on by the Court for these conclusions were those of Asare, Onbanjo and Kassi.

Mr. Macaulay recognised that the reported West Indian cases on the subject took a different view from that expressed in the West African and East African cases. However, he contended that that difference in view proceeded upon a mis-interpretation by the Federal Supreme Court of the West Indies in R. v. Farley (1961) 4 W.I.R. 63 of what the English case of R. v. Baldwin (1931) 23 C.A.R. 62 had decided and that this error has been perpetuated in the succeeding judgments of the Court of Appeal of Trinidad and Tobago and of the Court of Appeal of Guyana where a similar question was in issue.

Shortly before R. v. Farley was decided the Federal Supreme Court had determined R. v. Charles (1961) 3 W.I.R. 534. In the latter the prosecution tendered a statement which they alleged the appellant had made to the police and which contained certain admissions. The appellant objected to its admissibility

on the ground that he had not made the statement. The trial judge treated the objection as though it were made on the ground that the statement was not free and voluntary, heard evidence in the absence of the jury, and then ruled that the accused had made the statement and that it might be used for the purpose of refreshing the memory of the witness who took it. The statement was thereafter read to the jury and dealt with as an exhibit. In his summing up the trial judge treated the statement as if it had never been challenged and read passages from it which might be used as admissions by the accused. It was held by the Federal Supreme Court, allowing the appeal, that the procedure adopted by the trial judge and his treatment of the statement in his summing up, amounted to the withdrawal from the jury of an important issue which was a proper one for them to try and that this was a serious irregularity affecting the validity of the trial. The Court said that objection on the ground that the accused had not made the statement was not a proper one for attacking the admissibility of a statement but merely raised an issue which must be tried by a jury. In so stating the Court was confirming what had long been the practice of the courts in this region when the sole ground advanced for the rejection of a statement attributed to an accused was that the accused had not made the statement.

In R. v. Farley the accused objected to the admission of the statement in evidence on the ground that he had not made it. As in R. v. Charles the trial judge treated his objection as one made on the ground that it was not free and voluntary. That was not a ground put forward by the accused. The judge heard evidence including the evidence of the accused in the absence of the jury. On the jury's return he informed them that he had ruled the statement admissible as a voluntary statement made by the applicant and when he summed up he left the jury only the issue whether or not the statement was voluntary. It was held that the question whether the accused had or had not made the statement was an issue of fact which the jury had to determine

and the withdrawal of that issue from the jury was an irregularity affecting the validity of the trial. In the course of the judgment of the Court delivered by Archer, J. the following passage appears (at p. 65) -

> "The issue as to whether or not a statement made by an accused person is a voluntary statement is for the judge to decide. For the purpose, he is a tribunal of fact as well as law and ordinarily evidence on the issue should be heard in the absence of the jury. The accused person, if the judge admits the statement has the right to cross-examine again the witnesses who gave evidence in the absence of the jury on the circumstances in which the statement was made and it is for the jury to say whether they think the statement was made at all or, if made, whether or not it was voluntarily given. But a statement cannot be successfully objected to merely because the prisoner intends to deny it when the time comes (see R. v. Baldwin). Whether or not he made the statement is in that case a question of fact for the jury to determine like any other fact and all the evidence bearing upon that question must be given in the presence of the jury.
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> The judge treated the objection as one made on the ground that it was not free and voluntary. That was not the ground put forward by the applicant and there was nothing for the judge to try in the absence of the jury when the objection was made. It would have been different if the applicant, while only stating one ground, had also relied on the other, but he persisted with the first ground and did not set up the second ground. Still less was it for the judge to rule that the applicant had made the statement and merely leave it to the jury to say whether or not he had made it voluntarily. The result of the judge's ruling is that the issue whether or not the applicant made the statement has been withdrawn from the jury and evidence, notably the evidence of the applicant himself, has been heard in the absence of the jury."

We do not understand that Court's reference to the case of R. v. Baldwin as being the basis upon which it came to the conclusion that whether or not an accused person made a statement is a question of fact for the jury and that a statement cannot be objected to on the ground that the accused did not make it. Rather, the Court referred to R. v. Baldwin as being consistent with its own view. Whether or not R. v. Baldwin is pertinent to the point is immaterial. The Court was expressing a view that was generally held by the Courts in this region.

In Williams v. Ramdeo and Ramdeo (1966) 10 W.I.R. 397 Fraser, J.A. in delivering the judgment of the Court of Appeal of Trinidad and Tobago said (at p. 398) -

> "In the case of an allegation by the person charged that he made no statement at all, the statement must be admitted and the allegation will fall to be considered along with the rest of the evidence in the case and a verdict must be reached after the consideration of the whole."

The learned judge then said that very much the same point arose in R. v. Farley and he referred to what Archer, J. said on the point in R. v. Farley. In Herrera and Dookeran v. R. (1966) 11 W.I.R. 1 Wooding C.J. who was a party to the judgment in Williams v. Ramdeo and Ramdeo re-iterated what the Court had said on the same point in that case. In Campbell v. R. (1969) 14 W.I.R. 507 the point again fell for determination before the Court of Appeal of Trinidad and Tobago. In that case reliance was placed on the case of R. v. Mulligan (1955) O.R. 240 in support of a submission made on behalf of the appellant that "the trial judge had failed to exercise his discretion with regard to the admissibility of the verbal confession." In dealing with the point Fraser, J.A. who delivered the judgment of the Court had this to say -

> "In considering Mulligan's case it is important to understand that the law now applied by this court is different from what the Court of Appeal for Ontario held to be the law in 1955. Mulligan was charged for theft and robbery. After having been arrested and warned Mulligan made an oral statement which allegedly implicated him in the robbery. No notes of the statement were made by the police officers at the time or later. At the trial an objection was made to the admissibility of the statement. It was contended that before a trial judge can decide that an alleged statement was voluntary he must decide that it was in fact made. Holding that the only thing he had to decide was whether the statement was voluntary the trial judge admitted it. On appeal it was argued that the trial judge must determine two factors firstly, whether or not the statement was made, and secondly, if the statement was made whether it was on the Crown to prove affirmatively to the satisfaction of the trial judge both that the statement had been made and that it was a free and voluntary statement. The Court of Appeal for Ontario accepted that argument and allowed the appeal holding, per MacKay, J.A. (1955) O.R. at pp. 248, 249):

> 'that the trial judge should first have ruled whether, in his opinion, there was some evidence fit to go to the jury that the statement alleged to have been made by the appellant was his statement; if he thought there was not, he should have rejected the statement, and not permitted evidence of it to be given before the jury. If, on the other hand, he thought there was evidence fit to go to the jury that the accused had made the alleged statement, he should have allowed the evidence to be given before the jury ....'
>
> In arriving at this view the court was clearly of opinion that 'with one exception there appear to be no decisions on the matter' and consequently, treating the matter at large, it concluded that the trial judge had to determine firstly, whether the statement was in fact made; and secondly, whether it was made voluntarily.
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> That is not our view of the law and the course pursued by courts in the West Indies has been different. Where there is raised the issue as to whether or not a statement was made it seems to us that such an issue is clearly one of fact to be determined solely by the jury in their consideration of the evidence as a whole. It is an issue which obviously touches the credibility of the witness who propones it and of the accused who denies it."

Fraser, J.A. after referring to the cases of R. v. Farley; Williams v. Ramdeo and Herrera and Dookeran v. R. said that it was abundantly clear that what was said in R. v. Mulligan differed from the approach adopted by West Indian Courts and he concluded that in considering the admissibility of a statement where the issue is not whether it is voluntary but rather whether it was in fact made, the tribunal must admit the statement and leave the issue of fact to be determined by the jury.

The Court of Appeal of Guyana has also had to deal with a similar point. In Lindon Harper v. The State (1970) 16 W.I.R. 353 no doubt was cast on the view expressed by Archer, J. in R. v. Farley though there was a division of opinion among the members of the Court as to what the appellant had put forward at his trial as his ground of objection to the admissibility of the statement sought to be tendered in evidence. Similarly in The State v. Terrence Fowler (1970) 16 W.I.R. 452 a similar conclusion was reached by the Court. Luckhoo, C. had this to say (at p. 458) -

> "How wrong would it have been if the trial judge had taken upon himself the liberty of ruling at the voir dire, on the admissibility of the statement as a matter of law on the ground that it was, or was not, free and voluntary, when the accused had assumed the stand that it was not his statement. This attitude negatived the necessity for a judicial ruling in the absence of the jury, which could only arise if the statement was his, but the allegation was that it was not free and voluntary. So that for the judge to have assumed jurisdiction on such an issue would have been to deal with a matter which, on the evidence taken, did not call for judicial adjudication. Had the judge assumed such a jurisdiction and admitted the statement as being free and voluntary, this extraordinary situation would have arisen: He would have had to tell the jury that what weight, if any, they would wish to attach to the statement would be for them, but that on his ruling, the statement having been admitted, they were bound to give due consideration to it and determine its weight, probative value and effect; whereas on the actual defence raised, the direction required was that if they accepted what was said by the defence or were in reasonable doubt on the matter, they would be entitled to reject the contents of the statement, without limiting their consideration only to its weight, value and effect as in the former situation. It could then be seen how improper it would be to take a step unwarranted by the evidence which might result in restricting the jury's function by depriving them of the right of full and free consideration of purely factual evidence on the wrong assumption that it concerned a matter of law."

In Harper's case Persaud, C.J. (Ag.) had expressed himself thus (at p. 359) -

> "It was canvassed before us that an accused person is entitled to raise both the question of admissibility and the question whether he did or did not make the challenged statement, and it was also urged that in this case this was the question. I have already expressed my opinion that this was not so; but even if it were so I do not agree that an accused person is permitted to raise what can be described as a double-barrelled attack on the statement, for with what logic can he say, "I did not make that statement, but if it is found that I made it then I did not do so voluntarily"? The absurdity of the argument is heightened if one were to reverse the order, that is to say, "I made that statement but I did so under an inducement (or threat as the case may be) but if it is found that there was no inducement (or threat) then I say I did not make the statement."

Before leaving the reported cases cited to us reference should be made to the case of R. v. Paul Whittaker C.I.A. No. 5 of 1974 (unreported) decided by this Court on November 21, 1974. The judgment in that case was brought to our attention by Mr. Macaulay after the hearing had been completed. There a confession, as

the judgment records, was challenged on several grounds but principally on the ground that it was a complete fabrication composed by a police officer and that the accused was forced to sign it for fear of some physical harm that had been threatened him. Before the statement was admitted the trial judge held the usual trial within a trial and came to the conclusion that it was a voluntary statement. The Court said that the position thereafter was that it was for the jury to decide what weight they should attach to it, bearing in mind the circumstances in which it was taken. The Court observed that to that end the detective officer who took the statement was cross-examined at length with the object of showing that the statement given by the accused was forced from him and that it was a statement to which no weight at all should be attached. It does not appear from the judgment that the point in issue in the instant appeal was ever canvassed before the Court in Whittaker's appeal.

To summarise it would appear from the Canadian case of Mulligan and from the African cases cited to us that the Courts in Ghana East Africa and Ontario take the view that it is for the judge after a trial within a trial to decide whether there is some evidence that the statement attributed to the accused is his statement and if so, if it is a free and voluntary statement. The West Indian Courts on the other hand have taken the view that while an objection to the admissibility of a statement attributed to an accused person on the ground that the statement was not free and voluntary is properly for the judge or magistrate to decide upon a trial within a trial, where allegation is made that the statement was in fact not made or given by the accused the statement must be admitted in evidence without a trial within a trial being first held and the question whether the accused made it and if he did what weight is to be attached to it must be left for the jury's determination. Further, the Court of Appeal of Guyana has held that it is not legally possible for an accused person to object to the admissibility of a statement attributed to him on the ground that it

was not a free and voluntary statement and also alternatively on the ground that he did not make or give the statement.

In order to decide between the two competing views placed before us we might with profit start our consideration of the problem by a reference to the opinion of the Judicial Committee of the Privy Council delivered by Lord Sumner in Ibrahim v. R. (1914-15) All E.R. Rep. 874 at p. 877 where it was said that it has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. As Lord Salmon in D.P.P. v. Ping Lin (1975) 3 All E.R. at p. 187 observed that is a restatement of what Lord Coleridge, C.J. said in R. v. Fennell (1881) 7 Q.B.D. 147 at pp. 150, 151. It is common ground that it is for the prosecution to satisfy the judge or magistrate as the case may be beyond reasonable doubt that the statement is a voluntary one. This the prosecution may do where no issue is raised as to the admissibility of the statement by a witness laying the foundation for its admissibility by testifying as to the circumstances under which the statement was made or given. Where issue is raised that the statement was not voluntarily given evidence upon the issue is normally heard in the absence of the jury (a trial within a trial). Should the judge not be satisfied that it was voluntary he will not admit it in evidence. Should he be satisfied that it was a voluntary statement he will, unless in the exercise of his discretion he excludes it because of a contravention of the Judges' Rules or otherwise, admit it in evidence. But what is the judge's duty where, when the statement comes to be tendered, it is objected to on the ground that it is not in fact his statement? Is he required to try the issue as to whether or not the accused made the statement in the same way as he would have to try the issue on a question of voluntariness? Mr. Macaulay submitted that he must, save that he is required only to make a prima facie finding in that regard

leaving it to the jury if he is satisfied that the statement was made and and that it is a voluntary statement, to decide whether it was in fact made by the accused and to attach such weight as they think fit to it if they find that the accused did make it. Some assistance may be derived on this aspect by a consideration of the case of Hitchens v. Eardley (1871) 2 L.R.P. & D. 248. In that case as the headnote states "in an administration suit, the only question at issue before the jury was, whether, M.D., through whom the defendants claimed was legitimate. The defendants, after producing prima facie evidence of the legitimacy of M.D., tendered his declarations in evidence. The plaintiffs objected to the admissibility of these declarations and tendered evidence on the voir dire for the purpose of showing that the declarant was not a member of the family. The Court being of the opinion that the defendant had made out a prima facie case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on voir dire tendered by the plaintiffs. In the course of his ruling on the point Lord Penzance said at pp. 249, 250 -

> "I am not aware that the question has ever been raised in the same form. The rule of law on the subject is perfectly plain. It is that when a witness is called to give evidence of the declarations of a person whose connection with the family is in question, the judge is to decide whether this connection is established. It is obvious the application of this rule must lead to some practical difficulties, where the person whose declarations are tendered and objected to is also the person whose legitimacy is the question in the suit, and the Court must do its best to meet those difficulties in a practical way. The defendants propose to give evidence of declarations of the person whose legitimacy is in dispute, and it is suggested by Mr. Matthews that, in order to determine whether these declarations are admissible, the Court ought to have the whole of the evidence in the suit on both sides. The effect of taking that course would be to postpone the reception of the evidence of these declarations until all the rest of the evidence in the case had been produced, and then practically to hear the whole of the evidence over again, together with those declarations. I do not know that a verdict, founded on evidence given on the voir dire, would be sustainable, so that both sides would have a right - not only to call all their evidence on the voir dire, but to call it over again on the issue before the jury. This shews the inconvenience of the course suggested

> by the plaintiffs' counsel. It is impossible to lay down an abstract rule on the subject, for each case must be determined by its own facts. There is some degree of evidence in the case as it now stands that the declarant was a member of the family. The question is whether enough has been done by the defendants to make out a sufficiently strong prima facie case of the declarant's legitimacy. It can only be a prima facie case, because it will be impossible to come to any conclusion until the other side has been heard. It cannot be denied that a strong prima facie case has been made out, and I think it will be better that I should at once admit these declarations, for the purpose of having the whole case laid before the jury. The jury will understand that they will ultimately have to form their own opinion upon the matter, in the full light of the whole of the evidence. I think the ends of justice will be better served by taking this course than by taking the course suggested by Mr. Matthews, because what I now say as to the declarant's connection with the family is said on imperfect evidence, before the full evidence in the case has been produced. Therefore nothing that falls from me in this early stage of the case can in the slightest degree affect the opinion of the jury. I rule that I am sufficiently satisfied of the declarant being a member of the family for the purpose of admitting the declarations, and I reject the evidence tendered by the plaintiffs on the voir dire.
>
> The jury ultimately found a verdict for the defendants."

We think that for like reasons a similar course to that adopted by Lord Penzance in the abovementioned case ought to be taken where objection is raised on the ground that the accused did not make the statement attributed to him. Once the prosecution adduces evidence that the accused did make the statement sufficient prima facie proof has been given that he did and a trial within a trial is not to be embarked on. But if a further issue is raised that the statement was not voluntarily made or given then a trial within a trial should be held on that issue so that the judge may give his ruling thereon. If the statement is admitted in evidence it will be for the jury to decide whether in fact the statement was made or given by the accused and if they conclude that he did, to determine what weight should be attached to it. Such an issue (as to voluntariness) may be raised directly by or on behalf of the accused when the statement is sought to be tendered in evidence but if not so directly raised it might nevertheless be raised by material contained in the evidence so far adduced or by the nature of the cross-examination of the prosecution's witnesses

and this is so even if such an issue might appear to be in conflict with the ground of objection actually taken to the admissibility of the statement by or on behalf of the accused. This is so because the trial judge or magistrate is always required to be satisfied beyond reasonable doubt as to the voluntariness of the statement before he can proceed to admit it in evidence. Such a course indeed avoids the untenable situation which would otherwise arise if objection were taken to the admissibility of a statement on the sole ground that it was not made by the accused and after its admission in evidence further testimony shows that it was not or might not have been given voluntarily.

In the instant case while it is true that the ground of objection taken to the admission of the statement attributed to the appellant was stated by Mr. Witter to be that the appellant denied making the statement as well as putting his signature thereto - in other words that the statement was manufactured by the police and what purports to be the appellant's signature thereto is a forgery - yet by way of cross-examination it was suggested to Insp. King that the appellant was beaten and subjected to torture to get him to make a statement and indeed subsequent to the admission of the statement in evidence sworn testimony was given by the appellant to a similar effect and the testimony of Mr. Winston Spaulding and of Dr. John Martin adduced with a view to lending support to the appellant's allegations in that regard. The learned trial judge faced with that evidence gave the following direction -

> "In so far as the statement that is alleged to have been made by the accused is concerned, you will have to decide first of all whether you believe that the statement was made, because obviously if you do not believe that that statement was given to the police at all, then you cannot act on it any more than you can act on that statement given by Angelita Gauntlett and her evidence, if you do not believe that the accused man told her what she said he told her.

"If you feel that the statement was given by the accused man to the police, then you will have to decide what weight you are going to attach to that statement, and for that purpose you are entitled to take into consideration his evidence, the evidence of the doctor, the evidence of Mr. Spaulding as to the injuries which he tells you that he received before the statement was given. If you believe that he gave that statement and he gave that statement because he was beaten by the police or tortured by the police, then it is for you to say what weight if any, you attach to that statement.

Of course, crown counsel has just told you that the prosecution does not admit that he was beaten by the police, certainly not by Inspector King, and the prosecution says that they are unaware as to how the injuries were sustained, assuming of course that the injuries were sustained.

Members of the Jury, in so far as that is concerned, the evidence is that the accused man was taken into custody on the 16th of January, the date on which he gave himself up to the police, and that he has been in custody ever since. In those circumstances it seems to me that the only conclusion which you can arrive at, if he was injured he must have been injured while he was in custody, even if Inspector King was not involved, it is for you to decide whether they were inflicted by the police, and if you believe that they were, it is for you to determine what weight you attach to any statement he might have given to the police thereafter.

/If he was injured while he was in custody,

Then of course, depending on the weight which you attach to the statement, it is for you to say whether what was contained in the statement is true, either in whole or in part. These broadly speaking, are the first things which you will have to consider and decide in considering the case for the prosecution in so far as the accused man is concerned."

And at the close of his summing up the judge said -

"Then in so far as his injuries are concerned, you will remember that he gave you a vivid account of the injuries which he says he received at the hands of the police. He told you of being beaten. He told you of being tortured and I won't weary you by going into the details of that, members of the jury. He has certainly brought two witnesses to support his evidence in so far as his receiving injuries are concerned. As to the extent of that injury, of course, that may be another matter but both Mr. Spaulding and Dr. Martin have come forward to give evidence. Mr. Spaulding has told you of the injuries which he saw on the accused man when he visited him at the police station and Dr. Martin has told you of the injuries he saw on the accused when he examined him on the 25th. It is for you to say what you make of that evidence and I think I dealt with this already, in indicating to you how this evidence might affect your consideration of the statement alleged to have been given by the accused to the police."

Clearly if the learned trial judge had held a trial within a trial when the accused's statement was tendered he would have been in a position to say whether or not the statement should be admitted in evidence. Instead the jury were left in the directions given to make what they could of the relevant evidence bearing on the issue of duress raised by that evidence once they found that the accused did make the statement. They in effect were left to decide the issue of voluntariness as well as the question of what weight should be given to the contents of the statement.

We think therefore that the learned trial was in error when he did not hold a trial within a trial on the issue of voluntariness which we are of the view was raised by the cross-examination of the prosecution's witness ~~es at the trial~~. Had he done so he would have properly determined that issue as a matter of law and thus the question of its admissibility.

In the circumstances the appellant's conviction cannot stand and must be quashed and the sentence set aside. We feel that in the interests of justice there ought to be an order for a new trial which we accordingly direct ~~should take place~~ at the current session of the Home Circuit Court.