[2023] JMCA Crim 63

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO 39/2016

JAMAR BLAIR v R

Sean Osbourne and Aston Spencer for the applicant

Daniel Kitson Walters for the Crown

25 and 28 July 2023

Criminal Law – Murder – Confession – Whether actions of persons not in authority prior to applicant giving cautioned statement rendered taking of statement unfair – Whether cautioned statement wrongly admitted – Whether the conviction cannot be sustained having regard to the evidence

Criminal Law – Murder – Sentence – Whether sentence manifestly excessive

ORAL JUDGMENT

D FRASER JA

Background

[1] On 15 April 2016, following a trial in the Home Circuit Court for the parish of Kingston before Shelly-Williams J ('the learned trial judge') and a jury, the applicant was convicted for the murder of Millicent Olive Knight committed on 30 November 2010. On the 15 April 2016, he was sentenced to imprisonment for life at hard labour, with the stipulation that he should serve 20 years before becoming eligible for parole.

[2] On 9 April 2019, a single judge of appeal refused his application for leave to appeal his conviction and sentence. As is his right, he has renewed his application before the court.

The case for the prosecution

[3] On 30 November 2010, Millicent Olive Knight was shot and killed in her home in the Greenwich Town area of Spanish Town Road. The applicant, a child of 17, was held by citizens and subsequently taken into custody by the police. The applicant indicated he wished to give a cautioned statement. The applicant had no lawyer, and no duty counsel was available. He gave a cautioned statement in the presence of two Justices of the Peace and his uncle, implicating himself in the murder. Also, he subsequently participated in a police interview (question and answer) in the presence of his attorney-at-law and uncle, during which he indicated the type of firearm he used to commit the murder and where he found it.

[4] At trial, after a *voir dire* during which the applicant agreed that he gave the cautioned statement freely, but that he told a lie, the learned trial judge admitted into evidence both the cautioned statement and the question and answer. In the cautioned statement, the applicant said he had shot the woman in her house, and he did so because, according to him, "[s]he a obeah mi". In the question and answer he was able to tell the police that the gun he used was a .45 that he had found under a tree root in Greenwich Town which he had possessed for about a month.

The case for the defence

[5] The applicant gave an unsworn statement from the dock in which he admitted giving the cautioned statement but said at the time he had been fearful for the life of his family, and that is why he told a lie on himself.

Ground of appeal

[6] Before this court, counsel for the applicant sought and was granted leave to abandon the initial grounds of appeal, and instead relied on one supplemental ground, that the conviction cannot be sustained having regard to the evidence.

Summary of Submissions

Ground 1

Counsel for the applicant

[7] Counsel submitted that although the police did what was reasonably expected of them in the taking of the cautioned statement, the surrounding circumstances were such that the learned trial judge erred in admitting it. The circumstances counsel adverted to were that, on the defence case, the applicant, a child, was taken into custody by the police who found him tied up. This was after he had been accosted and beaten by men who accused him of being involved in the shooting murder of a woman in his community.

[8] Counsel contended that the actions of members of the public against the applicant, which were likely operating on his mind when he gave the statement, were consistent with torture, amounting to cruel and degrading treatment, thereby making the admission of the statement of the applicant unfair. Therefore, there being no other evidence against the applicant, he should not have been called upon to answer. He relied on the authorities of **Williams v The Queen** [2006] UKPC 12; **Peart v The Queen** 68 WIR 372; **R v Wray** [1971] S C R 272 and the Judges' Rules.

Counsel for the Crown

[9] Counsel for the Crown submitted that the correctness of the admissibility of a cautioned statement in evidence is determined by asking two questions: first, whether it was admissible as a matter of law, that is, was it voluntary in the sense identified particularly by para. (e) of the Judges' Rules; and second, whether it should be excluded due to unfairness: see **Hunte and Khan v The State of Trinidad and Tobago** [2015] UKPC 33.

[10] Counsel advanced that all the evidence pointed to the statement having been voluntarily given such as i) he was allowed to eat a meal provided by his relatives before he gave the cautioned statement; ii) during the *voir dire,* he said he was comfortable; and he said he gave the account freely and of his own free will. Counsel further highlighted that no suggestions were made during the trial by learned counsel

for the applicant that any of the police officers involved had acted in any manner which would have rendered the cautioned statement or question and answer involuntary.

[11] Counsel also submitted that, as the law requires, the interests of the applicant as a child were protected by the steps taken by the officers involved. He relied on the case of **Bertram Clarke and Arthur Robinson v R** [2021] JMCA Crim 51.

[12] Accordingly, counsel advanced that the learned trial judge was correct in holding that the cautioned statement and question and answer were voluntarily given and should be admitted; it being a matter for the jury whether or not the cautioned statement was a lie, based on the reasons put forward by the defence during the trial.

Discussion and analysis

[13] In **Peart v The Queen**, the Judicial Committee of the Privy Council reaffirmed the settled principle that the criterion for the admission of a statement is fairness, with the voluntary nature of the statement being the major factor in determining fairness. Thus, while if it is involuntary it will not be admitted, if it is voluntary, that constitutes a strong reason for admitting it, even if it has been obtained in breach of the Judges' Rules. However, as fairness is the overriding criterion, a court may rule that it is unfair to admit a statement even if it was voluntarily given.

[14] In this case, the challenge to the admissibility of the statement does not sound in the actions of the police, which counsel for the applicant conceded could not be faulted. That concession was rightly made. The court commends the police for the diligent way in which they took all reasonable steps to observe and protect the interests of the applicant. Having ascertained that the applicant was a child and that he had no attorney-at-law, exhaustive attempts were made to secure duty counsel to protect his interests. That effort having borne no fruit, to ensure his rights were guaranteed, two JP's were enlisted and two close adult relatives, his step-father, who was like his father, and uncle, were allowed to feed and speak to him privately before he gave the statement. His uncle was in the air-conditioned room along with the JPs and the police, where the statement was taken. And best of all, the applicant himself declared on oath during the *voir dire,* that during the taking of the statement he was

comfortable, not nervous and he freely gave the statement, with the qualification that it was a lie. The overriding objective of protecting the interests and welfare of the applicant, who was then a child, was therefore achieved: see **Bertram Clarke and Arthur Robinson v R** at para. [107].

[15] The challenge to the admissibility of the statement is subtler, though misguided. It is that the taint of fear, prejudice and oppression caused by the beating and tying up of the applicant by members of the community was operating at the time the statement was given, thus making it unfair to admit it in evidence. The applicant indicated on the *voir dire* that he was no longer concerned about the safety of his family, as the person who had threatened them that day was no longer here. Presumably, that explained why he now felt free to profess that what he said in the cautioned statement was a lie.

[16] This contention is, however, wholly unmeritorious. It has long been settled that evidence of any promise or threat from someone who is not in authority, prior to the time when a confession is made to the person in authority who recorded the confession in question, is insufficient to render that confession inadmissible: see Archbold Criminal Pleading Evidence and Practice, Thirty-Sixth Edition para. 1109 and the cases cited therein. There being no credible challenge to the process overseen by the police before or during the recording of the cautioned statement and the question and answer, the learned trial judge, in the proper exercise of her discretion, was duty bound to admit both documents into evidence. The learned trial judge correctly ruled that the question whether the applicant lied in the cautioned statement was, "a matter that should be decided by the jury and as such the jury can decide what weight, if any, is to [sic] place [sic] on it".

[17] A second supplemental ground was filed that the sentence was manifestly excessive and in written submissions there was the complaint that the learned trial judge did not follow the classical principles of sentencing. However, the ground was not pursued during oral arguments, though it was not formally abandoned. We are of the view that counsel for the applicant was correct in his restraint.

[18] While the procedure as outlined in **Meisha Clement v R** [2016] JMCA Crim 26 was not followed sequentially, the learned trial judge did identify a starting point of 25 years and considered aggravating factors including that i) the applicant sat on a roof top and watched the deceased for an hour; and ii) he murdered her because he thought she was "obeahing" him. The learned trial judge also considered several mitigating factors, including, i) the applicant's good community report; ii) he had no previous convictions; iii) his age of seventeen years at the time of commission of the offence; iv) he had a young family; and v) he was a productive member of society. The learned trial judge also gave him full credit for the time he spent in pre-sentence custody.

[19] When the sentences in comparable murder cases provided by counsel for the Crown are considered, in particular the period stipulated to be served before parole, in none was the pre-parole period less than 20 years, even where the matter was resolved by a guilty plea: see **Lincoln McKoy v R** [2019] JMCA Crim 35; **Lloyd Forrester v R** [2023] JMCA Crim 20; **Kevin Young v R** [2015] JMCA Crim 12; **Demar Shortridge v R** [2018] JMCA Crim 30; **Tyrone Gillard v R** [2019] JMCA Crim 42; **Cornelius Robinson v R** [2022] JMCA Crim 16; **Troy Smith v R** [[2021] JMCA Crim 9 and **Gawayne Thomas v R** [2022] JMCA Crim 11. Therefore, in the circumstances of this case where the applicant was, after a full trial, convicted of a brazen daylight murder committed with a firearm on a person within the sanctity of her home, it cannot be successfully maintained that the sentence imposed on the applicant was manifestly excessive.

[20] There being no merit in the arguments advanced, the application for leave to appeal conviction and sentence should be refused.

[21] Consequently, the order of the court is as follows:

(1) The application for leave to appeal against conviction and sentence is refused.

(2) The sentence imposed is reckoned to have commenced on 15 April 2016, the date it was imposed.