Privy Council Appeal No. 23 *of* 1949

Cyril Waugh – – – – – – – – – – *Appellant*

v.

The King – – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF JUDICATURE, JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1949

Present at the Hearing:

LORD GREENE
LORD OAKSEY
LORD RADCLIFFE
SIR MADHAVAN NAIR

[*Delivered by* LORD OAKSEY]

This is an appeal by special leave from the conviction and sentence of death passed upon the appellant in the Supreme Court of Judicature of Jamaica on the 1st March, 1949.

The appellant Cyril Waugh was a ranger employed by the Richmond Estate in St. Ann, Jamaica, and one of his duties was to patrol the estate with a gun supplied by the proprietors in order to protect the coconuts from thieves.

On the 25th October, 1948, at about 4.15 p.m. two neighbours, Thomas Ridley and Seaford Tait, heard a single shot fired in the plantation, and the appellant's voice calling for help.

Ridley was the first to reach the spot where the appellant was found holding a gun. Ridley asked the appellant what was wrong and the appellant informed him that he had found a man identified by his description as Phillip Newby with a bag of coconuts; that when challenged Newby dropped the coconuts and threw an iron tool used for husking the nuts at the appellant, but missed him, and then attacked him with a machete or cutlass, whereupon the appellant fired. In reply to Ridley's further question the appellant said "I believe he got the bullet somewhere on his foot, and has gone in the direction of the gully." Ridley saw the bag of coconuts and at a little distance the iron tool on the ground. His story is confirmed by Tait, who saw the bag lying on the ground, and the iron tool in the appellant's hand. According to Tait the appellant said to him that "the man was resisting against him with a cutlass to cut him and he shoot him" and showed the direction in which the man ran.

These two witnesses were led by blood tracks through the plantation to the other side of a gully, where they found Phillip Newby gravely wounded in the lower part of the abdomen and genitals.

When the police arrived the appellant repeated his story, and pointed out the relevant positions of himself and Newby, and a map was subsequently prepared on the information given by him. Later that evening the appellant made a further statement to the police at the police station in the following terms:

> "I am a ranger employed to the Richmond Estate in St. Ann and I live on the property. My postal address is Laughlands. I live three miles from St. Ann's Bay, I knew Phillip Newby by sight but not his name. I always saw him working at Richmond Estate after the crop working in the field. On Monday the 25th October, 1948, about 4.15 p.m., I was patrolling alone on a portion of the property known as Fig Tree Bay with the single barrel cartridge gun belonging to the estate. This section is by the sea-side. On arriving at this section I saw a man carrying a crocus bag with something in it over his left shoulder and a cutlass under his left arm and a piece of iron in his right hand. That was in the coconut plantation and he was coming from the inner part of the property towards the sea-shore. When I first saw him he was about 8 yards from me. A young almond tree was between us and that is why I didn't see him before. I recognised his face to be the man I always saw working on the estate, and whom I got to know later to be Phillip Newby. I called to him saying 'Its you taking the coconuts from down here?' As I said that to him he fling the piece of iron at me that he had in his right hand. He was then about 7 feet from me. The iron didn't catch me. He then drew his machete from under his arm, dropped the bag and started to approach me with the machete raised in his hand. I stepped back and said to him 'stop.' I raised the gun but he didn't stop and I fired one shot at him. He turned and started to run inwards the property towards the river. I ran after him and bawled out 'help, help' several times. I chased him for about 2½ chains in some tall grass and I noticed blood-stains along the path he was running. As I saw the blood I turned back to the bag and then about 3 minutes after I saw Thomas Ridley and Seaford Tait coming. Shortly after I saw Lestre Trench, known as Trenchie, come on the scene. No one was present when the incident between us took place. I showed them where Newby ran and the blood-stains on the grass along the path. A crowd came on the scene, and I took the bag and contents which I found was coconuts and the iron to my house I didn't find the machete. He had run with it. Shortly after the police came and I showed them the bag with coconuts and the iron Newby was carrying and told them of the incident. I then took the police back to the spot and along the path Newby ran. By that time Newby had been taken away to the hospital so I didn't see him. I then went to the St. Ann's Bay Police Station and gave this statement which was read over to me and which is correct."

Newby was not unconscious when he was found, but at the hospital in the night his condition became grave, and at his own request a statement made by him in the presence of the doctor was taken down by the police. This statement was as follows:—

> "I got shot innocently. I was going to bathe going from Llandovery direction and about ½ chain from the sea-side and just about to take off my clothes behind a grass root. I saw a man approach with a gun and he shoot me innocently, and the man say that anybody he saw down there he is going to shoot because they are stealing coconuts down there. I was not carrying any bag with coconuts I was not carrying any iron, not even a pocket-knife. After I shot I feel it, when I feel the shot I try to run because the man say he was going to shoot me. When he fire the shot, he missed the other man. The man has an old grudge for me simply because . . . ."

At this point Newby fell into a coma from which he never recovered.

The police authorities accepting the appellant's explanation decided not to prosecute him but the coroner magistrate on the 10th November, 1948, ordered a prosecution.

After receipt of this order, the appellant was put on trial in the Supreme Court of Judicature before Mr. Justice McGregor and a Jury.

At the trial the prosecution put in the statements made by the prisoner to the police, and called Ridley and Tait who gave the evidence above stated. They also produced a surveyor to prove a map prepared mainly on the information given by the prisoner as checked by the police, and the Government chemist to prove that the shot was fired at a distance of from 2 to 3 feet. They also produced formal evidence as to the clothing of the deceased, and medical evidence as to the cause of death.

The only other evidence produced by the prosecution was the dying statement of the deceased.

Counsel for the defence objected to the admission of this dying statement on the ground that it was incomplete, but the learned Judge ruled that it was admissible except for the unfinished sentence.

In his summing up the learned Judge emphasised the importance of a dying statement, and directed the attention of the Jury to the fact that the accused did not give evidence on oath.

At the very outset he blamed the police for not prosecuting in the first instance. He said: "It seems quite clear that until the papers reached the Resident Magistrate as Coroner for this Parish the police seem to have considered 'Oh here is a thief a coconut thief who has got his deserts, let us get rid of it in the easiest possible way.' How such an idea could have remained in the minds of any responsible officer, any officer of experience after they had read that statement which the deceased gave on the night that he was shot I do not know."

He proceeds: "You have got to adjudicate this case I may almost say on unsworn statements. Two men were present at the time. One has since died, and the other has not seen fit to go into the witness-box and tell you what happened. He is relying on statements which he made from memory afterwards, and has not seen fit to go there in the witness-box and say 'the statement that I gave is true word for word, and I stand up here and submit myself to cross-examination to have my story tested.' He has not done it. Why not? You are entitled to ask yourselves that. Two persons were present; one is dead and the other is in the dock and he does not tell you his story."

At eight other places in the summing up reference is made to the failure of the appellant to give evidence, for example in dealing with the doctor's evidence as to the direction of the shot he said "But as I have said before, the prisoner has not told you how it happened you have not been able to ask him one question; the one person alive to-day to tell us what happened, does not see fit to go there (pointing to the witness-box) and tell you what happened."

On the other hand dealing with the dying statement the learned Judge impressed upon the Jury the value of such a statement made in the certainty of death, and failed entirely to point out that it is clearly designed as a defence of the injured man against the allegation that he was stealing coconuts, and that the reference to a third person missed by the shot is almost unintelligible in view of the fact that the shot was fired at the deceased at point-blank range.

The Jury at first disagreed, but subsequently returned a verdict of "Guilty with mercy."

The Judge thereupon sentenced the appellant to death.

The appellant applied for leave to appeal to the Court of Appeal Jamaica under section 15 Cap. 431 of the Laws of Jamaica but leave was refused.

Special leave to appeal to His Majesty in Council was granted on the 28th July, 1949.

Counsel for the appellant contended before their Lordships' Board that there has been in this case a grave miscarriage of justice by reason of the learned Judge's comments on the appellant's absence from the witness-box, by the admission of the unfinished dying declaration of the deceased, by the failure to warn the jury of the danger of accepting a dying declaration as equivalent to sworn evidence upon which the witness might have been cross-examined and by other misdirections.

The law of Jamaica is the same as the law of England both as to the right of a judge to comment on a prisoner not giving evidence and as to dying declarations.

Whilst much of the summing up is unexceptionable there are certain parts of it which in their Lordships' view do constitute a grave departure from the rules that justice requires and they are therefore of opinion that the conviction must be quashed.

It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment. Here the appellant had told the same story almost immediately after the shooting and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place.

In such a state of the evidence the learned judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course. The question whether a prisoner is to be called as a witness in such circumstances and on a murder charge is always one of the greatest anxiety for the prisoner's legal advisers, but in the present case their Lordships think the prisoner's counsel was fully justified in not calling the prisoner and the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt.

Apart however from this question, their Lordships are of opinion that the dying declaration was inadmissible because upon its face it was incomplete and no one can tell what the deceased was about to add; that it was in any event a serious error to admit it in part and that it was a further and even more serious error not to point out to the jury that it had not been liable to cross-examination. (See Taylor on Evidence, 12th Edn. § 721 and 722, and the cases there cited, Phipson, 7th Edn., p. 310, and *Ashton's* case, 1837, 2 Lewin, 147.) It was also a misdirection to tell the jury that there was no evidence as to the place of the shooting except the dying declaration and the appellant's statements. There was in fact the evidence of the prosecution's witnesses Ridley, Tait and Sergeant Wright which demonstrated the falsity of the dying declaration on this point. It was also improper to tell the jury that the bag of coconuts and the iron might have been mentioned to the deceased by the prosecution witnesses when those witnesses had been asked no questions on the subject.

The only admissible evidence which in any way told against the appellant's account was the fact that the cutlass was not found but as this might easily have become hidden in the long grass, or among the canes, or in the gully, it was not a matter upon which much reliance could be placed.

For all these reasons their Lordships are of opinion that the conviction must be quashed and they have humbly advised His Majesty accordingly. In all the circumstances of the case they think the appellant ought to have the costs of the appeal.

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In the Privy Council

CYRIL WAUGH

v.

THE KING

DELIVERD BY LORD OAKSEY

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