~~HH.C~~

33/1963

IN THE PRIVY COUNCIL No 16 of 1963

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

74157

B E T W E E N

BILLY MAX SPARKS ... Appellant

- and -

THE QUEEN ... Respondent

C A S E FOR THE APPELLANT

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1. This is an appeal from the Supreme Court of Bermuda where on the 28th January 1963 the Appellant, an American citizen serving in the United States Air Force in Bermuda, was arraigned before the Chief Justice and a jury of twelve men, on an indictment charging him that he did on the 3rd November 1962 in Warwick Parish, Bermuda Islands, indecently assault Wendy Sue Bargett (hereinafter called "Wendy") a girl under the age of fourteen years contrary to section 324(1) of the Criminal Code. p.1

2. On the 12th February 1963 the jury by a majority verdict found him guilty of the said offence and he was sentenced to two years' imprisonment. p.88, l.30

3. By an Order in Council dated the 30th day of May 1963 the Appellant was granted special leave to appeal against his said conviction. p.122

4. The questions which arise for determination in this appeal are

a) Whether a statement made orally by the child alleged to have been assaulted by the Appellant (she being at that date just under 4 years of age) was admissible in

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p.129, 1.10 evidence. The statement was made to the child's mother, Sylvia Ann Bargett, very shortly thereafter, and was proved by her in evidence before the Magistrate. It was highly favourable to the
p.2. accused. The A.G. argued that this statement was inadmissible. The Defence asked that it should be admitted. The learned Chief Justice excluded it. This matter is dealt with more fully in paragraphs 5, 6 and 7 of this Case.

b) (i) Whether certain statements involving a confession of the alleged offence deposed to by certain Police officers as having been made by the Appellant in their presence and hearing on Sunday 4th November 1962 were proved by the prosecution to have been voluntary statements so as to render them admissible, ought in law to have been admitted. Their admissibility was in the first instance dealt with in course of a "trial within the trial". The case and the evidence for the Defence were that they were induced by threats or promises but the learned Chief Justice allowed the jury to hear certain of these statements for reasons given in his judgment delivered at
p.36 the end of the "trial within the trial". The Appellant will humbly submit that the reasons given by the Chief Justice for his decision are unsustainable (inter alia) because they were based upon the assumption that the evidence of the Appellant and his wife as to the circumstances in which these statements were obtained was true. On that assumption, the statements were, it is submitted, clearly inadmissible. This error on the part of the learned Chief Justice was vital since as he himself said
p.116, 1.30 apart from these statements there was no evidence that the Appellant was guilty.

(ii) At a later stage in the hearing the Police admitted that their purpose in taking the Appellant to the Police Station in the afternoon of 4th November 1962 was to "get
p.43, 1.42 him to admit the offence". If the learned
p.44, 1.48 Chief Justice was right in his original ruling that there were no threats or promises rendering the statements inadmissible (and the Appellant will submit he was not) then at this later stage the learned Chief Justice ought either to have stopped the case on the ground that there was at

that stage no admissible evidence from which the jury could infer or find guilt on the part of the Appellant or should have ruled in his discretion that the evidence was of so slender and unsatisfactory a character as to render it unsafe to allow the case to go to the jury.

c) Whether there were such breaches of the Judges Rules (Nos. 2, 3 and 7) as to have made it incumbent upon the learned Chief Justice in the proper exercise of his discretion to have excluded the statements referred to in (b) supra.

5. The facts relevant on the first of these questions can be shortly summarised as follows:-

On Saturday, the 3rd November 1962, at about 8 p.m., Mrs. Bargett, the mother of Wendy who had her fourth birthday a few days before the trial, took her to the Bermuda Bowl where Mrs. Bargett intended to play bowls at the bowling-alley. Wendy was left asleep on the back seat of the car; the doors were not locked, and all the windows were closed except the front louvres which were left open for ventilation. According to her mother, Wendy was of an age and had sufficient knowledge and intelligence to be able to open the doors of the car had she wished to do so. Visits were made from time to time to the car during the course of the evening to see how Wendy was, and when Mrs. Bargett saw her at about 9 to 9.15 p.m. she was "very fast asleep". At about 9.30 p.m. a Mrs. Tribley, a friend of Mrs. Bargett, went to the car and saw that one of the rear doors of the car was open and Wendy was missing. The police were informed and a search made. Wendy had been wearing two pairs of panties and these were found under or near a car in the car park at about 10.15 p.m. A little while later, probably about 10.50 p.m. to 11 p.m., a police officer arrived carrying Wendy, and, on seeing her, Mrs. Bargett fainted. When she recovered, Wendy was put on her lap and she noticed that Wendy had some blood on her finger. At this stage Mrs. Bargett's evidence before the examining Magistrate proceeded as follows:-

p.2
p.3
p.3 1.9
p.3, 1.16
p.4
p.6, 1.22
p.15, 1.10
p.3, 1.33

"I lifted up her dress and I found blood on her body. I do not recall Wendy Sue saying

p.129, 1.5

anything to me at that time. But she did say that I should have looked the other way. Then I asked her (Wendy) who took her out of the car. I asked her this and she said that she did not know. I then asked her what did the person look like, and she said that it was a coloured boy. She did not say anything more after that."

p.51, l.40 The child was taken to hospital where Dr. Shaw (who died before the trial took place and whose evidence was read) found that she was bleeding from the vagina, that there were scratches and a stretch tear of the hymen. His view was that nothing larger than a finger had passed through. There were some other minor abrasions on the child.

6. At the commencement of the trial, it was
pp. 2, 5 admitted on behalf of the prosecution that evidence of Wendy's statement to her mother was inadmissible, and ought not to be put before the jury, on the ground that, although this complaint by the child was recent, as the child was only aged 3 and was not being called as a witness, and, as consent was not material, whatever was said by the child was hearsay and inadmissible. It was urged on behalf
p.8 of the Appellant that this evidence went to the identity of the person who committed the offence and ought to be before the jury so that they should be apprised of the fact that, according to the child, the person who took her out of the car and who assaulted her was a coloured boy and could not therefore have been the Appellant who was neither coloured nor a boy. This evidence was of the greatest importance because there was no evidence to identify the Appellant as the guilty party, and the only other evidence against the Appellant consisted of statements made or alleged to have been made by him to or in the hearing of Police Officers. This question of identity was of added importance because the Appellant had never been confronted with or identified by the child in spite of his repeated requests that this be done.

7. The learned Judge, after hearing argument,
p.9, l.10 ruled that evidence of the child's statement to her mother the same evening was not admissible and the whole of the ten day trial proceeded before the jury without their ever being told that the Appellant had at the very outset been exonerated by the victim of the assault. In R. v. Christie 1914 A.C. 545 a small boy aged 5 years was the

complainant of an indecent assault. The mother said in evidence that the boy after the offence had said "That is the man" and pointed to or touched the accused. The child gave unsworn evidence but was not asked about the statement. It was held by a majority of the House of Lords that this statement (but not the particulars of what the boy said had been done to him) was admissible against the accused person on the grounds that the statement went to identification. It is a fortiori that such evidence should be admitted where it is in favour of an accused person and amounts virtually to his exoneration.

8. The Appellant, a staff sergeant serving in the United States Air Force, was a married man aged 27, the father of three young children and of irreproachable character. He had come off duty from the Control Tower at the Airport at 4.45 p.m. Saturday night, and he went with some friends to a bar where he had some drinks. From then on he was drinking fairly steadily and his case was (and it was never disputed) that he became very drunk so that his recollection of the evening was very vague. The times and the order of events during the evening were in fact almost entirely pieced together by his wife and friends who gave evidence at the trial. From the Airport bar the Appellant and a friend, Sgt. Donovan, went to the Swizzle Inn where they had more drinks and met other friends including one Sergeant Cochrane who invited the Appellant to his house to celebrate his (Cochrane's) birthday. En route to Donovan's house (in Cochrane's car) the Appellant drank out of a bottle of neat sloe gin. At Donovan's house he had another drink; from there he went in his own car (it having been left at Donovan's house) to Cochrane's house where he saw Cochrane and his wife at about 8.45 to 9.0 p.m. He was later seen by Cochrane backing his car from their house. He was next seen at the Bermuda Bowl, although there was conflicting evidence by prosecution witnesses about the times. A Mrs. Klemmer who was previously acquainted with the Appellant said that she saw him there between 9.0 p.m. and 9.10 p.m. and he was then drunk. A witness named Simons said he saw him there between 9.50 and 10.10 p.m. Another witness Richardson said that he saw the Appellant moving his car out from one of the parking places near to the Bermuda Bowl, and that the Appellant's car touched another car in

p.56, l.15

p.5, l.21

p.7, l.16

p.7, ll.28,36

doing so. He put the time at about 9.15 or 9.20 p.m. After this the Appellant was seen again at Cochrane's house which was not very far from the Bermuda Bowl. The party was still going on although a number of guests had left.

9. The Appellant entered Cochrane's house for the second time at about 10 to 10.15 p.m. He
p.82, l.13 was seen by witnesses called by the prosecution at the front porch just before coming in, and
p.10, l.1 they noticed the little girl Wendy following him into the driveway to the front porch and into
p.13, l.14 the house. He was drunk, but the evidence was
p.82, l.20 that he said he had found her near a church which is almost adjacent to Cochrane's house, and that
p.57, l.16 she was crying and asking for her Mother, and that she had followed him to the house. The
p.73, ll.2,22 Appellant also said that his car had run into a ditch, and some of those present went out and helped him to recover the car from a nearby ditch and at one stage required the assistance of a truck to pull it out. Attempts were made to see if neighbours could assist in tracing Wendy's parents, but without success, and so the
p.15, ll.10,17 police were informed. At about 10.45 p.m., a police officer arrived; he said in evidence that Wendy was in good spirit, and that she spoke to him. He took Wendy away with him. The Appellant
p.67, l.28 arrived home at about 11.55 p.m. when he was berated by his wife for getting so disgracefully drunk and also for going out without her, as she had expected to go to the Cochrane's party with him and had in fact rung them up to find out
p.67, l.40 where the Appellant was. She was very angry and they slept apart that night.

10. The next day, Sunday, the Appellant had to be on early morning duty at the Airport, so he
p.57, l.38 got up at 5 a.m.; before he left he apologised to his wife for his behaviour the night before. He went to the Airport to work, but decided that he would not in fact work any air traffic because of his drinking the night before and because of his lack of sleep. During the morning he was told by his wife that the police wanted to see him about the child he had found the night before. He went home at the end of his shift at
p.15, l.27 about 12 a.m. At about 12.30 p.m. Detective Constable Oliver and Detective Constable Leng both went to the Appellant's house and saw him in the presence of his wife. Detective Constable Oliver said that he told him who he

was and what he was doing. He told the Appellant that he understood he had found a child in Khyber Pass and asked the Appellant if he would give a statement of the circumstances in which he found the girl. The Appellant agreed to do so and Detective Constable Oliver said that he wrote down a statement at the Appellant's dictation. This statement - Exhibit 5 - was as follows:- p.15, l.32 p.15, l.35

"On the evening of Saturday, Nov. 3rd. 1962, between 8-30 and 9-00 p.m. I went to a party at the residence of S/Sgt. Cochrane on Khyber Pass, Warwick. I had a few drinks. I had been drinking earlier and I was pretty high.

I left the party in my car and set off westward along Spice Hill Road. After about 1/4 - 1/2 mile I ran into a ditch and spent some time trying to get out. I then set off to walk back to the party for help. At the church just west of Cochrane's I saw a little girl, I think she was standing still, she was crying and saying something about her mother. I thought she possibly belonged to someone at the party and so I took her to the house. I told the people there I had found her near the church then tried to arrange for help to get my car out. I remember Clayton Camaron asking the number of the Police then I left. I did not go back in the house again. As far as I can figure it, it must have been close to 10 p.m. when I found the girl and I just got the impression that she was lost and frightened."

11. The evidence as to who provided the information contained in the statement Exhibit 5 was unsatisfactory in that the police officers gave conflicting evidence about it. The learned Judge said in his summing up that it was beyond dispute that it was the Appellant's wife who gave the information regarding the times at which the Appellant was at various places. The Appellant was unable to remember his movements owing to his drunken state. The Appellant stated in evidence that he told the police officers that he did not remember where he had been most of the night before because he was so drunk, and that his wife furnished the information which he could not supply and p.96, l.40 p.22, l.20 p.58, ll.24,25

he told them he could not remember. Mrs. Sparks also gave evidence to the same effect, namely, that she had got the information from various
p.32, l.38 phone calls she had made that night. Detective
p.78, l.26 Constable Leng confirmed that this was so, and
p.22, l.20 that the Appellant's wife did help him with details as to times and places etc. when he was making the statement. Detective Constable Oliver, however, although agreeing that the Appellant said he could not remember about his movements the night before because he had been
p.41, l.45 drunk, stated that the Appellant's wife did not supply any information about his movements the night before, although, he said, the Appellant's wife "did say something about having telephoned to try and find out where he was." Contrary to
p.44, l.33 this again, the same police officer later in his evidence said that the accused's wife did supply some of the information in the statement and that she helped over the times.

12. After the police officers had taken the statement they left the house. The Appellant, after another argument with his wife about his
p.58, l.52 drunken state the night before, ate a sandwich and went to bed, as he was due to go on duty at the Airport again at midnight. Between 2.30 p.m.
p.15, l.37 and 3.0 p.m. the same two police officers, having meanwhile made further enquiries, returned to the house and, having got the Appellant out of bed, saw him again in the presence of his wife and took him to the police station for questioning. He arrived at the police station at about 3.30 p.m. and, although three police officers continuously questioned and cross questioned him, he was not cautioned until about 5.30 p.m. when, it is said, he made the first statement mentioned below.

13. The circumstances of the second visit by the police officers and the subsequent questioning at the police station and the way in which statements were made or alleged to have been made by the Appellant were the subject of a "trial within a trial" as certain oral statements alleged to have been made by the Appellant and a statement in writing which he signed were the subject of objection on the part of the Appellant as being inadmissible.

p.16, l.18 The statements fell into four parts:

(a) Sgt. Bean who took up the questioning at the end of the afternoon at about 4.45 p.m. was
p.25, l.4 alleged to have put the question "The last

time the little girl was seen was at 9.20 at the Bermuda Bowl. The next time she was seen she was in your company. Have you any idea how she got there?". To which it was said the Appellant replied 'I did it'. p.17, l.18

The learned Judge excluded this as the words did not seem to follow as a natural answer to the question, and the Judge was left with 'misgivings'. p.39, l.6

(b) Immediately after the words "I did it" the Appellant, according to Sgt. Bean, was cautioned and then 'elected' to make a statement which was written down by Police Constable Oliver. The Appellant's version was that the language was based on questions put by the police. This statement which became Exhibit 9, was in the following form:- p.25, l.10 p.125

> "I have been told that I am not obliged to say anything unless I wish to do so, but whatever I saw will be taken down in writing and may be given in evidence. (Signed) Billy M. Sparks.
>
> On Saturday the third of November, 1962 while drunk, I was at the Bermuda Bowl parking lot and did give a little girl a ride in my car. I remember her walking to me in the parking lot and I believe I just opened the car door and she climbed in, I don't know. I remember driving along Spice Hill Road and I either parked or ran off the road, I don't know which. I took hold of her and put my finger between her legs. I tried to get the car started, I tried to push it but it wouldn't start. I don't know how I got to the party. I guess I must have walked. The girl was with me when I got to the party. I thought that by leaving her there she'd get home. I'm very sorry and ashamed."

(c) A telephone conversation the accused had with his wife at the police station.

The police evidence was that the accused said 'Honey I did it'. And after a pause 'All the proof in the world'. Another pause. Then 'You know how drunk I was'.

(d) This was called a confession by inference. Leng stated that the Appellant gave the impression that he wanted to be detained as
p.21, l.37 he would not like to face his neighbours and friends.

14. The important aspects of the evidence given in the absence of the jury were as follows:-

p.17, l.13 Detective Constable Oliver's account was that the Appellant was not under arrest and that up to the time Detective Sergeant Bean had joined him and Leng at the police station at about 5 p.m. he had not yet made up his mind to charge the Appellant with the offence. He said it was more
p.17, l.28 convenient to question him at the police station than at his home, although he could have taken him out and questioned him in the police car, which he had sometimes done before. He and
p.20, l.1 Detective Constable Leng worked together as a team and had discussed with each other asking the Appellant to go to the police station and they had decided to do so. Either he or Detective Constable Leng could have decided to
p.20, l.10 charge him. He removed the car seat covers (which had had some blood marks on them) without asking permission of the accused. He had not made up his mind to charge the Appellant until
p.20, l.12 he said to Detective Sergeant Bean "I did it".
p.20, l.16 He stated that the Appellant was their number one suspect. (It should be pointed out that later when evidence was given in the presence of the jury the evidence of both police officers on this matter changed in vital respects. Detective
p.42, l.20 Constable Oliver said that Mrs. Sparks asked if her husband was a suspect and that either he or Leng said "No - if he were a suspect we would tell you". Leng said that Mrs. Sparks asked if
p.46, l.23 her husband was a suspect; he did not nor did Oliver say "no, if he were we would tell you". This was untrue and conflicted with their earlier evidence).

Detective Constable Leng's account was that he strongly suspected the Appellant at the time
p.21, l.7 but had not made up his mind to charge him
p.23, l.18 until he said "I did it". When they "fetched the Appellant from his house" he had a strong suspicion that he had committed the offence. If the Appellant had refused to come, he did not know what he would have done. He was not under arrest and he did not tell him he was a suspect. Although he was convinced he was the man they

wanted when they got to his house, Detective Constable Leng could not explain why he told the examining Magistrate that if the investigation had been in his hands he would have charged the Appellant with the offence before he said "I did it". p.23, l.27

15. As to the circumstances of the questioning by all three police officers once the Appellant had been taken to the police station, Detective Constable Oliver's evidence was that Detective Sergeant Bean joined them at about 5 p.m. (They had arrived at the police station at the latest by 3.30 p.m.), Bean then put the question referred to above and the Appellant made the reply "I did it". There was no threat or promise. The Appellant was in the constables office. Detective Constable Oliver was with him from 3.30 until 5 p.m. except for a few minutes, and when he did go out either Detective Constable Leng or Detective Sergeant Bean or both were with him. The Appellant asked to be taken before the child to see if she could identify him. The Appellant mentioned rape but Detective Constable Oliver told him to forget rape. Detective Constable Oliver may have told the Appellant that nothing more than a finger had been put into the child's private parts. Detective Sergeant Bean only questioned the Appellant once and that was the occasion referred to at 5 p.m. when the Appellant was alleged to have answered "I did it". Detective Sergeant Bean may have told the Appellant that they had proof that the Appellant was at Bermuda Bowl. As soon as the Appellant answered Bean's question "I did it" Detective Constable Oliver cautioned him. Detective Constable Oliver then recorded the statement Exhibit 9. At about 6.10 p.m. Detective Constable Leng answered the telephone; it was the Appellant's wife and Detective Constable Oliver told him he could speak to her.

p.17, l.13
p.18, l.3
p.18, l.10
p.18, l.20
p.18, l.24
p.125

He listened and heard "Honey, I did it". A pause. Then he said "All the proof in the world". Another pause, then "You know how drunk I was". Detective Constable Oliver then stated that he and Detective Constable Leng "reconstructed" the Appellant's movements the previous evening to the Appellant. During the recording of the statement Exhibit 9, he did not ask the Appellant any questions. The Appellant dictated it. He was not questioned after signing the caution and uttering the first sentence of the statement.

p.18, l.37
p.19, l.14

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Detective Constable Oliver said he did not think the Appellant was asked how the child got in the
p.19, 1.20 car. He had been asked earlier if he had given a little girl a ride in his car. Detective Constable Oliver agreed that the Appellant was
p.19, 1.30 saying, throughout, that he did not know where he had been the night before. Detective Constable
p.19, 1.32 Oliver said that "We told him where he had been and that we could prove where he had been - at the Bermuda Bowl". The Appellant did say "If you can prove I was at the Bermuda Bowl, all right, I was there". The Appellant may have been asked
p.19, 1.40 'Didn't you give a little girl a ride in your car?'

p.20 16. Detective Constable Leng's evidence was that Bean joined them at about 3.50 or 4 p.m. Detective
p.21, 1.3 Constable Leng admitted that he had said to the Appellant that it was his opinion that he (the Appellant) had taken the child out of the car at the Bermuda Bowl, had driven her along Khyber Pass, indecently assaulted her and afterwards took her to a party on the pretext of having found her. He
p.21, 1.7 strongly suspected him but had not made up his mind to charge him until he said "I did it". Then Detective Constable Oliver cautioned him and the Appellant 'elected' to make a statement. The Appellant had maintained (during the questioning) that he could not remember what had happened the night before and he had said so before. He said
p.22, 1.20 he had been drunk, and that was why he could not remember. Detective Constable Leng said he told
p.22, 1.26 him he had been seen at the Bermuda Bowl, and he might have told him that he had also been at a house in Khyber Pass in addition to the Cochrane's house. When the police officers told the Appellant of what they knew about his movements, he accepted
p.22, 1.35 that he had been at the Bermuda Bowl and that he might have been at a party in a house at the Khyber Pass. When he (Leng) reconstructed the crime, the Appellant denied the offence and
p.22, 1.38 insisted that he had found the child wandering on the road. Detective Constable Leng agreed that
p.24, 1.1 the Appellant's wife had phoned earlier in the course of the questioning, and that he (Leng) refused to let her speak to the Appellant because he was being questioned. He said in answer to a question by the learned Judge that he could not explain why he did not permit the Appellant's wife
p.24, 1.17 to speak to him the first time she rang up; nor
p.24, 1.21 could he explain why he did not tell him.

17. Detective Sergeant Bean's evidence was that he first went into the office where the Appellant

was at about 4.45 p.m. After the Appellant had said "I did it" he was cautioned by Detective Constable Oliver. Before he went into the room, he had discussed with Detective Constable Oliver and Detective Constable Leng their questioning of the Appellant, and Bean understood that the Appellant could not remember being at the Bermuda Bowl after 9 p.m. the previous evening. He (Bean) regarded the Appellant as being suspect number one. p.25, l.3 p.26, l.40

18. The Appellant also gave evidence in the absence of the jury. His case on this aspect of the questioning was that he had made it clear to the Police Officers that he did not remember where he had been that night because he was drunk. The police told him there were witnesses. He said that, if witnesses said he was at the Bermuda Bowl, he must have been. Detective Sergeant Bean asked him if he would give them a statement. He said "a statement about what?"; he could not remember anything. Detective Sergeant Bean said he wanted a statement to avoid embarrassment to his family and friends; that if investigations went further, there would be more publicity. After Detective Sergeant Bean left the room, the questioning continued and Detective Constable Leng said "We could get you for drunken driving, hit and run, leaving the scene of an accident, and molesting a child. All we want is a statement about the child". Detective Constable Leng reconstructed the crime to him and he was subjected to questioning. Detective Sergeant Bean suggested he should confess. Eventually he made the statement Exhibit 9. The statement was made in answer to questions and suggestions. He said he had got to the point that he believed the police officers when they said he had done it. He accepted that if they said they had proof, then they had. He eventually made this statement in the circumstances above stated in order to prevent embarrassment to his family and friends and to avoid publicity, and to remove his wife from the island; Detective Constable Leng had told him that, unless he made a statement, his wife would have to remain on the island for the investigations and trial. Detective Constable Leng also told him that he probably would not be prosecuted by the civil powers if he made a statement. Detective Constable Leng further said it would be worse for him if he did not make a statement and that he could be prosecuted for the motoring offences. As to the telephone conversation with

p.26
p.27, ll.7,30,32
p.27, l.33
p.32, l.17
p.27, l.40
p.28, l.14
p.28, l.30
p.30, l.40
p.30, ll.50,52
p.31, l.5
p.31, l.11

his wife, he said "all the proof in the world",
p.30, 1.12 because that is what the police said.

19. In the course of his ruling at the end of the "trial within the trial" the learned Judge posed the following questions:

p.36 (1) Was any promise of favour or any menace or undue terror made use of to induce the Appellant to confess?

(2) If so,

(a) Was such promise or menace directly connected with the charge or was it collateral?

(b) Was the Appellant so induced by such promise or menace to make the confession sought to be adduced?

(3) If there was an inducement,

(a) Was it one 'calculated' to make the Appellant's confession an untrue one?

and (b) Did the inducement continue to operate at the moment of the confession?

He said that he was assuming that the Appellant's
p.37, 1.9 version of his interview with the police was the true one.

He then referred to the various specific inducements alleged:

p.37, 1.15 A. That the police told the Appellant they could
p.37, 1.40 'get him' for drunken driving, leaving the scene of the accident etc.

p.38, 1.22 The learned Judge said that these did not relate to the charge and must be ignored.

p.37, 1.31 B. That the Appellant would not be prosecuted in the civil courts if he made a statement.

The learned Judge held that this could not be an inducement because the military courts
p.37, 1.37 would be more severe.

C. That if the Appellant would not make a statement, 'it would be worse for him'; it would
p.37, 1.40 mean more publicity and would be embarrassing to his family and friends.

The learned Judge found that this was the only possible inducement but, if made, it did not continue to operate at the moment of the confession, because the subsequent caution had the effect of removing all expectation (of advantage) from the Appellant's mind. p.38, l.25 p.38, l.38

The learned Judge excluded the first "confession" relied on by the Prosecution - the oral statement "I did it" which was not even an answer to the question put - because he had misgivings about it and thought it would be safer and fairer to the accused to exclude them. p.39, l.7

As to the written statement Exhibit 9, the learned Judge said that the inducement (if any) did not continue to operate at the moment of making the statement "for the reasons given earlier", i.e., because the Appellant admitted that he was properly cautioned and that the meaning of the caution was clear to him. p.39, l.10

The learned Judge also found that as regards the statements made by the Appellant during the telephone conversation with his wife, "Honey they say I did it; I guess I did it", or "I must have done it because they say I did it", there was no inducement operating then. Finally the learned Judge admitted as evidence the statement that the Appellant asked to be detained so that he would not have to face his family and friends, on the grounds that this was not such an inducement as would render such evidence inadmissible. p.39, l.21 p.39, l.38

20. It is respectfully submitted that the learned Judge's ruling on these statements was wrong. The vital issue which the learned Judge should have considered was whether the prosecution had satisfied him that in all the circumstances the statements were "free and voluntary". It is submitted that the question is correctly set out in Halsbury's Laws, Volume 10, para 860 "admissions or confessions of guilt made by a defendant before his trial can only be proved against him if they were made freely or voluntarily in the sense that they were not obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority". Further, when the learned Judge was dealing with certain of the inducements, he said "it was important to point out that the Appellant did not suggest that on any of the occasions he was being asked or p.37, l.47

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induced to make a confession. He referred
p.38, l.3 throughout", said the learned Judge, "to a 'statement' which could have been a denial equally as well as a confession". This, it is submitted, is quite wrong. The Appellant made it clear that he was saying that what the police were after was a confession, an admission that he had committed the
p.28, l.26 offence. He said that Detective Constable Leng
p.32, l.2 said "All we want is a statement about the child";
p.27, l.51 Detective Constable Leng then reconstructed the crime to him: "You were at Bermuda Bowl ... you took her in your car and drove up Spice Hill Road, parked and indecently assaulted the child ..." He
p.28, l.26 said that "he suggested I should confess", and
p.29, l.20 that he signed the confession because he got to the point where he believed them. In fact the Appellant was throughout using the word "statement" in its common American connotation of "a statement admitting the charge". The learned Judge founded himself in the last resort on the view that the subsequent caution had "the effect of removing all expectation" from the prisoner's mind, but there was no evidence whatever to support this as the prosecution never ventured to put that question; indeed all the evidence was the other way, particularly if, as the Judge said he was doing, the Judge accepted the Appellant's story as to the questioning. It is submitted that the mere fact of cautioning in the circumstances which occurred did not and could not remove the effect of the inducements, threats, fear and pressure to which the Appellant had been subjected for about two hours. The reasons given by the learned Judge for his finding appear to have been based on the view that the meaning of the caution was clear to him, but to understand a caution is not the same thing as to obliterate the effect of two hours subtle persuasion.

21. In R. v. Baldry (1852) 2 Den C.C. 430 Pollock C.B. held that the ground of the exclusion of a confession was that "it would not be safe to receive a statement made under any influence of fear". And "such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury" (page 442). Lord Sumner in R. v. Ibrahim (1914) A.C. 599 (citing R. v. Baldry with approval) said that "It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence Judges have thought it better to reject it for the administration of justice".

As to what is meant by "free and voluntary", the

classis statement is by Cave J. in R. v. Thompson (1893) 1 Q.B. 12 at page 17 quoting Lord Coleridge C.J. in R. v. Fennell (1881) 7 Q.B.D. 147 at page 150: "The rule laid down in Russell on Crimes is that a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises however slight, nor by the exertion of any improper influence. It is well known that the chapter in Russell on Crimes containing that passage was written by Sir E.V. Williams, a great authority on these matters." The same principle was repeated in Kuruma v. The Queen (1955) A.C.157 at page 205.

In the light of these principles it is submitted that "improper influence" was made manifest by all the surrounding circumstances of questioning, cross questioning, the 'reconstructing' of the crime and of the Appellant's movements by the police officers, culminating in the Appellant's "brain-washed" attitude induced by that state of affairs that, as the police officers said he had done it, he might as well admit it because he was by then almost believing that he had in fact committed the offence.

It is therefore respectfully submitted that even at that stage the evidence as to the making of the statements was unsatisfactory and the statements ought not to have been admitted in evidence, on the grounds that the prosecution had not shown that they were made as "free and voluntary statements" and that the reasons given by the learned Judge for admitting such evidence were inadequate and wrong.

22. It is to be observed that the learned Judge in his ruling as to admissibility did not deal at all with the submissions on behalf of the Appellant that the statements were obtained contrary to the Judges Rules. The points involved are as follows:

As to Rule 2: The evidence showed that the police must have made up their minds to charge the Appellant when they went to his home on the second occasion, because they stated he was the number one suspect, and they had decided that he was the man they were looking for. Detective Constable Leng had gone even further in saying

p.20, l.15
p.23, l.23
p.26, l.40

p.23, l.27 before the Magistrate that "if the investigation had been in my hands I would have charged the accused with the offence before he said 'I did it'". It was common ground that he was not warned or cautioned at all until about 5 p.m. and there was very considerable evidence that he was questioned and cross-questioned by three police officers in turn for not less than two hours before he made any statement which would appeal or did appeal to the police. It is submitted that the police officers, having made up their minds (as they obviously had) to charge him with the offence, ought to have cautioned him at the outset.

As to Rule 3: It is submitted that the Appellant was in fact in custody at the Police Station. This was established, not only by the aforementioned circumstances, but also by the facts that the police had removed some of his property, the car seat covers, without his
p.20, l.20 permission or his knowledge; that they had refused on more than one occasion to permit his wife to speak to him on the telephone, and had not even informed him that she had rung up, and had told her that it was out of the question for him to speak to her. The learned
p.40, l.25 Judge expressed the strongest disapproval of this behaviour.

p.18, l.2
p.19, l.14
p.19, l.40
p.22, l.37
p.23, l.17
p.23, l.49 As to Rule 7: There was cogent evidence that the Appellant was cross-examined on his statements and that the confession in particular was not his wording, but was built up on wording used by the police officers.

The learned Judge did not deal at all in his interim ruling with the submission made by the Defence that the Judges Rules were applicable and had been infringed. This was peculiarly a matter for him and involved his coming to a conclusion on certain crucial issues of fact. A decision on this issue was vital because it was quite clear that, if the statements were ruled out, there was no evidence against the Appellant at all.

23. After the "trial within the trial" the evidence was reiterated in the presence of the jury, and the admitted statements were formally proved before them. Detective Constable Oliver said that on the occasion of his visit (with Detective Constable Leng) to the Appellant's house on the second occasion, the

Appellant asked if he was a suspect. Detective Constable Oliver answered that "a lot of people were suspect". He said that Mrs. Sparks asked "Is my husband a suspect, and is he being arrested?" and that either he or Detective Constable Leng replied "No", and if he was a suspect he would tell her. This answer by Detective Constable Oliver was plainly untrue; the officers had already made it perfectly clear that the Appellant was in fact their number one, and indeed only, suspect. p.42, l.15 p.42, l.17 p.20, l.15 p.21, l.8 p.23, ll.18,23 p.26, l.40

Further, Detective Constable Leng in his evidence subsequently denied that they (that is, he or Detective Constable Oliver) said "No, if he were a suspect we would tell you". This was in direct conflict with Detective Constable Oliver's evidence referred to above. Again, Detective Constable Oliver said that the Appellant may have said "If I am a suspect, why not have the little girl see me" and that he "certainly did say that sometime that day" and that he and Detective Constable Leng both said it was not possible. Detective Constable Leng, however, asserted categorically that the Appellant did not say anything about wanting the child to see him, an assertion which is so out of keeping with the Appellant's whole attitude throughout, and so much in conflict with all the other evidence as to be unworthy of credence. p.46, l.28 p.42, l.26 p.46, l.37

Detective Constable Oliver gave further evidence as to how the questioning of the Appellant proceeded, i.e., when one police officer finished, the other began. He admitted that he told the Appellant that the police had witnesses to prove he had been at the Bermuda Bowl at about 9 p.m., and said that the Appellant at "the very beginning" had stated that he could not remember the times of events the night before. p.42, l.44 p.42, ll.47,51

24. In the course of cross examination Detective Constable Oliver then made the startling admission that "the purpose of taking the accused to the Police Headquarters was to get him to admit the offence." In re-examination it was sought to reduce the effect of this, but not very successfully. The witness said "When I said I took the accused to Police Headquarters to get him to admit the offence that was not the sole purpose. I agree my answer given to Diel gives the impression we wanted to get accused to admit the offence at p.43, l.44 p.44, l.42

all costs". The learned Judge pursued this question to see if the police officer really meant what he said, and he clearly did. As
p.44, 1.48. recorded his answer to the Judge was "I could not say it was not our purpose in taking the accused to Police Headquarters to get accused to admit the offence". These vital answers, it is submitted, destroyed completely and at once the whole foundation of the Judge's ruling on the admissibility of the Appellant's statements, written and oral. If the purpose of taking the Appellant to Police Headquarters was to extract a statement, it is impossible to suppose that he was not under arrest and to imagine that no inducements were held out to achieve the purpose would be somewhat ingenuous. It is submitted that the learned Judge should there and then have stopped the case.

25. The trial was however allowed to proceed and, after evidence from Detective Constable Leng and Detective Sergeant Bean, the Appellant was called
p.56 and gave his recollection, such as it was, of his movements during the Saturday night, finally ending up at Cochrane's house. He said he remembered his car getting stuck after talking to Mrs. Cochrane, but did not remember getting out of the car. He
p.57, 1.15 did remember that while he was on the way back to the Cochranes' house he saw a little girl in the road near to the house. She was crying and said something about her mummy. He took her inside the house. He could not remember if he drove home and did not in fact remember getting home, but did recall that he and his wife had 'words', his wife complaining that he had gone out without her.

p.58, 1.26 As to the first statement, Exhibit 5, he said that his wife furnished the times and some of the places where he had been. He then explained what occurred when he was being questioned at the police station. He said that Detective Constable Leng told him that there were things in his first statement Exhibit 5 that were wrong and that the police had witnesses who said he was at the Bermuda Bowl. The Appellant said that he did not remember being there. Detective Constable Leng, who did most of the questioning, said that they had witnesses who placed him in another house in Khyber Pass and that he had been seen there and talked to people. Detective Constable Leng told the Appellant that he was their main suspect and that he thought he (the Appellant) had assaulted the child. The Appellant told him that it was impossible that he could do such a hideous thing. Detective Sergeant Bean said

"Listen Sparks, we can prove this thing. We have proof that you were at the Bermuda Bowl at the time the little girl was missing". Detective Sergeant Bean said further that if the Appellant would confess the investigation would end there; if he did not confess, he would go on investigating and asking questions of people and embarrassing his family and friends. The Appellant asked to be identified by the child. Detective Constable Leng said that they could charge him with drunken driving, hit and run, leaving the scene of the accident and assaulting the child. The Appellant understood that if the assault could be cleared up, he would not be charged with the motoring offences. Detective Constable Leng reconstructed the crime and his movements as he believed them to have taken place. The Appellant then said that Detective Sergeant Bean, after he had come in a second time, said "Listen Sparks, we have the proof; it's time you made a statement to end the investigation and straighten it out". By statement the Appellant understood "confession". The Appellant then stated the circumstances in which it came to be made. He was questioned about the statement and said the police suggested the wording, putting it to him how they said the assault had been committed. When he signed it he felt that they had (as they said) all the proof in the world and he was practically believing it was possible he had done it. He expected, by signing it, to end the embarrassment to his wife and friends and that she would get off the island. He knew his wife had rung up and he heard Detective Constable Leng say that it was "completely out of the question" for him to speak to her. He said that when he was allowed to speak to his wife and said the police had "all the proof in the world" he did consider the police had all the proof in the world because they told him they had. He said that nothing but a confession would have satisfied the police and that was the reason for his being there. He felt that he was half believing the police or, if he had done it, he must have been insane.

p.60, l.20
p.61, l.3
p.61, l.20
p.60, l.14
p.60, ll.21,24
p.61, l.40
p.61, l.48
p.62
p.62, ll.29,36
p.62, l.38
p.62, l.47
p.66, l.30
p.65 l.9
p.65 l.33

26. The Appellant's wife gave evidence as to what she knew of the Appellant's movements on the Saturday night and she spoke of the visit by the police officers to the house. She asked the police if the Appellant was a suspect, and they

p.67

said "No, if he were, we would tell you". She also confirmed the telephone conversation she had with the Appellant at the police station.

p.71 27. The deposition of an Airman called Mason was read because he had left for Germany. His evidence was confined to setting out the Appellant's movements on the Saturday evening as he knew them. He said that the Appellant was very drunk, and he (Mason) and others helped to rescue the Appellant's car from a ditch. He remembered the little girl being at Cochrane's house. Sgt. Donovan and Staff Sgt. Cochrane also gave evidence setting out the course of events of the Saturday evening. The Appellant was at their house at about 9.10 p.m. and was last seen backing his car out of their driveway. The deposition of a Miss Ruffing was also read. p.81 She was at the Cochranes' house and saw the Appellant arrive. The Appellant told them that p.82, l.20 there was a little girl outside and that she had followed him from the church. He said that he asked her where her mother was and she said she did not know. The little girl did not appear to be hurt and although she was whimpering a bit, she calmed down very quickly.

p.89 28. That being the state of the evidence, the learned Judge summed up to the jury. It is respectfully submitted on behalf of the Appellant that this summing up was not entirely adequate in some respects, particularly in so far as it concerned the onus of proof. The learned p.93, l.14 Judge on a number of points indicated to the jury p.95, l.10 that there were conflicts of testimony and that p.98, l.26 it was for them to resolve these where they p.99, l.7 occurred. This is not consistent with the onus p.105, l.46 of proof being throughout on the prosecution and p.116, l.16 any doubt redounding to the benefit of the accused. It is accepted that it is for a jury to decide whether or not Statements admitted were voluntary statements and as to the weight to be given to statements proved before them, and for this purpose are entitled to form their own view as to the circumstances in which they were obtained. But in certain cases the whole damage is irretrievably done once a "confession" is known to the jury, and the present is, it is submitted, just such a case: once a Judge has ruled that a statement is voluntary and admits it, it is hardly realistic to expect them to ignore what has been passed as valid evidence.

29. The Appellant therefore submits that the said conviction was wrong and that this appeal should be allowed for the following amongst other

R E A S O N S

1. BECAUSE the statement made by the child to her Mother as to the identity of her assailant was admissible evidence which should have been admitted and placed before the jury;

2. BECAUSE it was manifestly unjust for the jury to be left throughout the whole trial with the impression that the child could not give any clue to the identity of her assailant;

3. BECAUSE the Judge was wrong in his ruling as to the admissibility of the challenged statements both as regards what constituted improper inducements and also as regards the effect of a caution in removing prior inducements;

4. BECAUSE the evidence at the time the Judge gave his ruling as to the admissibility of the challenged statements was quite inadequate to establish that those statements were free and voluntary;

5. BECAUSE the Judge failed at that stage to give any ruling at all on the application of the Judges' Rules, the infringement of which, if applicable, was manifest;

6. BECAUSE the evidence at that stage showed that the Appellant was in fact under arrest and that the Police had decided to charge him so as to make the Judges' Rules applicable;

7. BECAUSE the subsequent admission in the presence of the jury by one of the police officers that "the purpose of taking the Appellant to Police Headquarters was to get him to admit the offence" undermined the Judge's ruling as to the admissibility of the challenged statements, demonstrated their inadmissibility;

8. BECAUSE the said admission was proof that the Appellant was under arrest so as to make the Judges' Rules applicable and the trial ought not to have continued before a jury which had heard the challenged statements without the Judge having considered whether he ought to admit them in the light of the non-compliance with the Judges' Rules;

9. BECAUSE the subsequent direction of the Judge to the jury as to disregarding the challenged statements if they were not satisfied as to their being voluntary could not in this case cure the fatal flaw of the jury having been apprised of evidence which was inadmissible in law.

NORMAN N. FOX ANDREWS

ANTHONY ALLEN

No 16 of 1963

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF BERMUDA

B E T W E E N :

BILLY MAX SPARKS Appellant

- and -

THE QUEEN ... Respondent

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