Dudley Holder – – – – – – – – *Petitioner*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF BARBADOS

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 11TH JULY 1978

Present at the Hearing:

VISCOUNT DILHORNE

LORD EDMUND-DAVIES

LORD FRASER OF TULLYBELTON

LORD SCARMAN

SIR ROBIN COOKE

[*Delivered by* VISCOUNT DILHORNE]

On the 6th February 1975 the petitioner was convicted of the murder of his wife Geraldine Holder and sentenced to death. On the 19th February he gave notice of appeal and his appeal was heard by the Court of Appeal of Barbados on the 30th September, the 1st and 8th October 1976, the judgment of that court being delivered on the 17th December 1976. The court allowed the appeal, quashed the conviction, set aside the sentence and ordered a new trial. Their Lordships were not told why it was that so long a period elapsed between the giving of the notice of appeal and its determination two years and four months after the murder was alleged to have been committed.

On the 7th January 1977 the petitioner lodged a petition with the Court of Appeal asking their leave to appeal to the Judicial Committee of the Privy Council. On the 25th March 1977 the Court of Appeal granted leave by virtue of the British Caribbean (Appeal to Privy Council) Order in Council 1962 (S.I. 1962 No. 1087). That Court may grant leave to appeal from a

> " judgment . . . if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great or general importance or otherwise, ought to be submitted to Her Majesty in Council for decision ".

" Judgment " is defined in section 2(1) of the Order as including " a decree, order, ruling, sentence or decision of the Court ". This Order in Council has remained in force since Barbados became independent.

A similar Order in Council was considered in *Chung Chuck v. The King* [1930] A.C. 244 where it was held that it did not confer a new right on the Court of Appeal to grant leave to appeal to the Privy Council in a criminal matter. In *Oteri v. The Queen* [1976] 1 W.L.R. 1272, the Full Court of Western Australia purported to grant leave to appeal to the Privy Council in a criminal matter and Lord Diplock, delivering the judgment of the Board, pointed out that an appeal to the Privy Council in a criminal matter lay only with the special leave of Her Majesty granted upon the advice of the Judicial Committee.

Just as in that case so here, the Court of Appeal has no power by virtue of the Order in Council to grant leave in a criminal matter and their decision to do so is consequently a nullity. On the 22nd June 1978 the petitioner lodged a petition for special leave to appeal to Her Majesty in Council, and the matter came before their Lordships as an application for such leave.

The Federal Supreme Court Regulations, 1958, by Regulation 22 (1) provided that the Supreme Court should on an appeal against conviction allow the appeal if they thought that the verdict of the jury should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and that in any other case the court should dismiss the appeal. This regulation contained the proviso that the court might, notwithstanding that they were of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice had actually occurred.

Regulation 22 (2) reads as follows:

"(2) Subject to the special provisions of this Part of these Regulations the Federal Supreme Court shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."

These Regulations were made applicable to the British Caribbean Court of Appeal by section 12 of the British Caribbean Court of Appeal Order in Council 1962 (S.I. 1962 No. 1086) and to the Barbados Court of Appeal by the Supreme Court of Judicature Act 1966 (Act 39 of 1966).

The petitioner sought special leave to appeal from the Order of the Court of Appeal on the ground that in view of the passage of time since the killing of his wife, the interests of justice did not require a new trial. It was also contended on his behalf that the Court of Appeal was wrong in its conclusion that certain evidence given by a witness for the prosecution at the trial, Mr. Everton Licorish, and evidence of an alleged confession made by the petitioner was admissible. It was contended that without such evidence there was no case for the petitioner to answer and that therefore the new trial should not have been ordered.

Regulation 22 (2) does not impose any fetter on the exercise by the court of its discretion to order a new trial or lay down any guidelines as to the exercise of that power. Their Lordships do not intend to attempt to lay down any guidelines or desire to impose any fetter on its exercise. No doubt the court entrusted with the power to order a new trial will, when considering the exercise of its discretion, have regard to many matters, including the gravity of the charge, the time that has elapsed since the alleged commission of the offence and whether it is possible

to hold a proper new trial were one ordered. As Lawton L.J. said in *R. v. Turner* (1975) 61 Cr. App. R. 67 at page 79:

> " It is in the interests of the public that criminals should be brought to justice, and the more serious the crimes the greater is the need for justice to be done ".

In *Nirmal v. The Queen* (unreported) the Judicial Committee did not uphold an order for a new trial made by the Fiji Court of Appeal when the only object of the new trial would have been to have given the prosecution an opportunity to make out a new case or to fill gaps in the evidence. In *R. v. Saunders* (1973) 58 Cr. App. R. 248, Lord Widgery C.J. said at page 255:

> ". . . it is not in the Court's knowledge that it has ever before been contemplated that a retrial should take place some three and a half years after the original offence was committed. A delay of one year, perhaps two years, is not uncommon, but none of us can remember a case in which it has been thought right to order a retrial after such a long period when regard is had to the fact that this appellant has already stood his trial once, and has been in prison for a number of years and would, if a new trial is ordered, have to run the gauntlet and the hazards and prejudice of being tried, again."

Lord Widgery's observations were related to England. In some other territories the process of justice may operate more slowly. Their Lordships would not be prepared to hold that the decision of the Court of Appeal was wrong on account of the time that had elapsed when that decision was given. They would not think it right to interfere with the exercise of discretion by that court unless it was clear that that court had erred by taking into account matters to which it ought not to have had regard or by not taking into account matters to which it should have paid attention. To order a new trial merely to enable the prosecution to present a new case would not in their Lordships' view be a proper exercise of discretion. Their Lordships do not know to what matters the Court of Appeal in this case had regard when making its decision, but they see no reason to conclude that that court either failed to have regard to matters to which it should have had regard, or erred in taking into account matters which it should not have done.

Unfortunately, neither counsel for the petitioner nor counsel for the prosecution was able to give any information as to the causes of the delay in the determination of the appeal. When one of the grounds of appeal is delay, it is desirable that counsel should be provided with information as to the reasons for it. A petitioner cannot rely on the passage of time that has occurred which has been brought about by dilatoriness on his part. An undue length of time has passed since the determination of the appeal due in part to the application for leave to appeal being made to the Court of Appeal and to the delay until June 1978 in lodging the petition for special leave to appeal. Mr. Blom-Cooper did not seek to rely on such delay as a ground for reversing the order for a new trial.

The case for the prosecution at the trial can be summarised as follows: Holder was charged with the murder of his wife " sometime between the 1st day of September, 1974, and the 4th day of September, 1974 ". Mrs. Holder was last seen alive on the 1st September. Her dead body was discovered on the 4th September. Mr. Licorish testified that he had seen Mrs. Holder enter her house a little after 10 p.m. on the night of the 1st September. He lived on the opposite side of the road to her.

That was the last time she was seen alive. A little later Mr. Licorish saw Holder lurking behind the fence to his, Mr. Licorish's, house and saw him go into his wife's house through the front door. Mr. Holder was not living there then. At about 11.20 p.m. Mr. Licorish said he heard Mrs. Holder shout,

" Murder, murder I beg you Dudley don't kill me, Lord have mercy ".

In cross-examination Mr. Licorish said that he did not take this shouting seriously because he was accustomed to " hearing her hollering for murder at night. Sometimes she inside hollering for murder and sometimes she outside by the gate ". On the evening of the 4th September the body of Mrs. Holder was found in the bedroom of her house. She had been stabbed four times in the chest.

At the time no objection was taken to Mr. Licorish testifying as to what he heard Mrs. Holder shout, but on appeal to the Court of Appeal it was contended that this evidence should not have been admitted. This contention was based on evidence later given by Dr. Brathwaite. He first saw the body of Mrs. Holder at 9 p.m. on the 4th September. The next day at 9 a.m. he performed a postmortem. The body was in a state of decomposition. In his evidence in chief he said she had been dead for more than 48 hours. In cross-examination he said the probable number of hours which had elapsed since her death was 36 to 48 and that he was prepared to put the upper limit at 54 hours, i.e. 3 p.m. on Monday the 2nd September. He was not prepared to say that she had died at the earliest that Monday night or at the latest the Tuesday morning. He was not asked whether in his opinion the state of her body was consistent with her having been killed on the Sunday night. In the course of his evidence he drew a distinction between what was probable and what was possible.

If Mrs. Holder could only have been killed after 3 p.m. on the 2nd September, then the evidence of Mr. Licorish as to what he had heard Mrs. Holder say on the night of the 1st September was not admissible as evidence, for it was not evidence relevant to murder after that time on the 2nd September having been committed by him.

If, on the other hand, the state of her body on the 5th was consistent with her having been killed on the night of the 1st, Mr. Licorish's evidence as to the shouts he had heard and what he had heard said was clearly relevant.

In *Ratten v. The Queen* [1972] A.C. 378 Lord Wilberforce delivering the judgment of the Board said at p. 387:

> " The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on ' testimonially ', i.e. as establishing some fact narrated by the words."

He cited the following passage from the judgment of the Board in *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965, 970:

> " Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

In *Ratten* it was held that evidence that the deceased had a few minutes before her death sought to speak to the police on the telephone and that her voice was hysterical and that she sobbed was admissible. At page 389 Lord Wilberforce referred to a statement made by a victim of an attack or by a bystander indicating directly or indirectly the identity of an attacker and said:

> " The test " [as to admissibility] " should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received ".

Later at p. 391 he said:

> " On principle it would not appear right that the necessary association should be shown only by the statement itself . . . Facts differ so greatly that it is impossible to lay down any precise general rule: it is difficult to imagine a case where there is no evidence at all of connection between the statement and principal event other than the statement itself, but whether this is sufficiently shown must be a matter for the trial judge. Their Lordships would be disposed to agree that, amongst other things, he may take the statement itself into account."

In the present case, as has been said, Mr. Licorish heard Mrs. Holder shouting, " Murder, murder I beg you Dudley don't kill me, Lord have mercy ", and the case is complicated by the fact that he was accustomed to " hearing her hollering for murder at night ". In the light of that evidence, even if the evidence of what she said was admissible and admitted in the exercise of judicial discretion, it is clear that the jury should have been warned that it might not be safe to conclude that at the time her husband was in the process of killing her or about to kill her and that if they accepted evidence as to what she shouted, it might be safe only to conclude that there was a row between her and her husband. They might, if they accepted the evidence as to what she shouted, hold that it was her husband who was in the house with her. The naming of her husband supported Mr. Licorish's evidence that he had seen the petitioner, who was not then living there, enter the house.

The Court of Appeal held that Mr. Licorish's evidence as to the shouts was rightly admitted by the trial judge. They said that the jury was not bound to accept Dr. Brathwaite's upper limit as the time within which the murder took place and that the shouts were in essence part of something that was going on. That they were part of something going on does not of itself render them admissible as evidence. To be admitted it had to be shown that what was going on was the drama which culminated in Mrs. Holder's death, and in the light of Dr. Brathwaite's evidence that was not shown.

It is indeed unfortunate that Dr. Brathwaite was not asked whether it was possible or probable that she might have been killed on the night of the 1st September. That not having been asked, their Lordships are inclined to the view that the evidence as to what Mrs. Holder shouted was not rightly admitted. If inadmissible, that does not of itself show that the order for a new trial should not have been made.

On the 10th September Mrs. Pierce saw the accused lying in the bush. He had one hand in a sock. It was later found that he had a badly infected wound in his left arm. He asked her to call an ambulance for

him and said that he had had nothing to eat for six days and had six black-outs. He was taken to hospital where he was seen between 4.30 and 5 p.m. by Dr. Sears. Dr. Sears said he was conscious and well orientated but could have been delirious before he examined him. At 11.20 that morning Inspector Whittaker saw the petitioner in the hospital. He had taken a long statement from the petitioner at the mortuary on the 5th September. On the 10th September Inspector Whittaker asked the petitioner if he knew him. The answer was, " Yes Inspector. I glad you come. I killed my wife and I feel I should dead too ". Inspector Whittaker said the petitioner appeared fully conscious and Corporal Trotman, who was present, said that he appeared to be quite normal.

Admission in evidence of this confession was objected to on the ground that it was not the product of a conscious and deliberate will, evidence having been given that in view of his condition the petitioner had " almost definitely " been delirious at times. After a trial within the trial the judge admitted the confession, observing that there was no medical evidence that he was delirious when he made it. The Court of Appeal upheld his conclusion. In their Lordships' view on the evidence given at the trial, it is not possible to conclude that they were wrong in doing so.

The petitioner did not give evidence but made a statement from the dock.

In their Lordships' view the passage of time that occurred between the murder and the decision of the Court of Appeal is not such as to show any error on the part of the Court of Appeal in the exercise of their discretion to order a new trial. It was not suggested that a proper trial cannot now take place. Even if Mr. Licorish's evidence as to what he heard Mrs. Holder shouting is excluded, there would appear to be a case for the accused to answer. He was seen to go into her house late on the 1st September after she had entered it. That was the last time she was seen alive. She was stabbed in the chest and on the 10th September the petitioner confessed to having killed her.

In these circumstances their Lordships saw no reason to grant special leave to appeal from the order of the Court of Appeal. They regard it as important that the trial should take place without delay. At that trial it will be for the trial judge to rule on the admissibility both of the evidence as to what Mrs. Holder shouted and as to the confession in the light of the evidence as it then emerges. In reaching his conclusions on those questions he should not allow himself to be influenced in any degree by the conclusions reached on them at the earlier trial or by the Court of Appeal. If he should decide that the evidence of what the deceased woman said is admissible he should then, of course, go on to consider whether in the exercise of his discretion he should exclude it on the ground that its admission would be unduly prejudicial to the accused. Their Lordships, however, would not wish anything that they have said to be taken as an indication as to the manner in which his discretion should be exercised. For these reasons their Lordships humbly advised Her Majesty to refuse the application for special leave.

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In the Privy Council

DUDLEY HOLDER

v.

THE QUEEN

DELIVERED BY

VISCOUNT DILHORNE

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