20/83

IN THE PRIVY COUNCIL No. 35 of 1982

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

JAVAN NEWBOLD — Appellant

- and -

THE QUEEN — Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal in forma pauperis by special leave of Their Lordships of the Judicial Committee given on the 26th day of May 1982 from a judgment of the Court of Appeal of the Commonwealth of the Bahamas delivered on the 6th day of March 1980 whereby the Court of Appeal dismissed the Appellant's Appeal from a conviction and sentence for murder. The Appellant was convicted on the 3rd day of August 1979 before Malone J. and a jury in the Supreme Court of the Commonwealth of the Bahamas of an offence that on the 28th day of January 1979 at New Province he did murder Stellman Brown and was sentenced to death. p.114 p.97 p.78

2. The issues in this Appeal turn on the following provisions:-

Section 42(5) of the Evidence Act, Cap 42.

Sections 13 to 16 inclusive of the Coroners Act, Cap 37.

Section 12(1) of the Court of Appeal Act, Cap 34.

3. (i) Section 42(5) of the Evidence Act, Cap 42, provides:-

"Hearsay evidence may not be admitted, except in the following cases:-

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Statement contained in public record

(5) where the statement is contained in any official record, book or register, kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept"

(ii) Sections 13-16 inclusive of the Coroners Act provide:-

"13. Where any death calling for inquiry or inquest is reported to or comes to the knowledge of any peace officer he shall forthwith cause a report to be made to the Coroner of the district in which he may be stationed and serving.

14. On receiving such report, other than a report of a death of a lunatic person confined in the hospital or asylum and of any person confined in any prison or other place of lawful detention the coroner shall, whenever it is practicable so to do, cause the body to be examined by a duly qualified medical practitioner, with or without a post mortem examination or analysis of the contents of the stomach and intestines, and a report thereof in writing to be made to him; and shall also cause the facts and circumstances attending the death to be carefully investigated under his direction by the police, and a report thereof in writing to be made to him, or shall himself investigate such facts and circumstances.

15. If as a result of the report and investigations the coroner is of opinion that the cause of death is sufficiently apparent and that no further light would be thrown upon the case by a public inquiry, he shall, in place of holding an inquest, draw up a report of the case, with his opinion and the reasons for it, and forward it forthwith to the Attorney General together with the medical report and the information and report furnished by the police or by himself.

16. The report, if approved by the Attorney General, shall be endorsed with his approval and forwarded by him to the Registrar of the Court, to be kept together with the inquisitions as a public document:

Provided that the Attorney General may on receipt of the report direct that an inquest shall be held if a public inquiry seems to him advisable:

Provided also that nothing herein contained shall prevent the coroner from holding an inquest at any time after making the report, if he thinks fit."

(iii) Section 12(1) of the Court of Appeal Act, Cap 34, provides:-

"12. (1) The court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict of the jury should be set aside on the ground that it is unreasonably or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no substantial miscarriage of justice has actually occurred."

4. The principal questions which arise on this Appeal are:-

(i) Whether all official documents which are compiled by Civil Servants for the information of the Crown as a result of enquiry in the discharge of a duty enjoined by law are admissible to prove the truth of a fact in issue notwithstanding the fact that the official record, book or register is not a public document.

(ii) Whether a Report by a Pathologist instructed by the Police during an investigation is admissible in evidence at a criminal trial under common law if the maker of the Report is not called to give oral evidence.

(iii) Whether a Report by a Pathologist instructed by the Police during an investigation

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is admissible in evidence at a criminal trial under Section 42 of the Evidence Act if the maker of the Report is not called to give oral evidence.

(iv) In this case if the Report of Dr. Joan Read (exhibit JN12), the Pathologist instructed by the Police, was not admissible in evidence, whether the Court of Appeal would have been right to apply the proviso to Section 12(1) of the Court of Appeal Act and dismiss the Appeal notwithstanding that the said Report was wrongly admitted in evidence.

p.97 l. 17 to p.103 l.27

5. The evidence was summarised in the judgment of the Court of Appeal as follows:-

"The deceased and appellant were both prison officers. During the night of 28th/29th January, 1979 the shift, of which they were members, consisted of the following men:-

Corporal Brown (deceased) - in charge of the shift
Raymond Smith
Matthias Cartwright
Earthlin Miller
and Javan Newbold (accused)

Corporal Brown paraded his men at 10p.m. Accused was improperly dressed, and he was reprimanded by Brown. The accused usually did duty at the prison gate; but, on this occasion, Brown detailed Smith for duty at the gate. Shortly after Smith assumed duty at the gate, the accused appeared and said to Smith: "I'm going to shoot Brown". At this time Brown was in his office nearby and Cartwright was on the porch of the office. Cartwright said in evidence that the accused came into the office and said to Brown: "You're scheming but I'll teach you how to scheme".

In the meantime, Miller had gone on the first patrol of the Main Prison and First Offenders' Prison. While on patrol, he had drawn two .38 revolvers and 10 rounds of ammunition. The revolvers were numbered respectively 81577 and 108848. The rule apparently is that officers on patrol carry a loaded revolver. Upon returning from his rounds at 10.40 p.m. Miller loaded each revolver with 5 rounds and put them in a desk drawer in the porch of the office. Shortly afterwards, the appellant appeared, opened the drawer and took possession of the two loaded

revolvers. He said to Miller: "Suppose I start shooting everybody, what will you do?" Miller said something to the effect that he would get out of the way; and the accused then went and sat on a nearby wall.

Miller's evidence was that he then saw Corporal Brown walk towards the gate and that the appellant got up and started to follow him. Smith, who was still on duty at the gate, said in evidence that Brown arrived at the gate and went over to the door of the booth and spoke to him for a minute. The time, according to Smith, was then between 10.50 or 10.55 p.m.

As Brown turned to leave the booth, Smith said he saw the appellant nearby with two revolvers in his hand; that he pointed the revolvers at Brown saying: "Look man, I want to talk with you"; that Brown said: "Don't play around with guns like that"; that the appellant then fired one shot and after a short interval fired another shot. Smith said that the appellant was about 7 feet from Brown when he fired the first shot; and that after the appellant fired the second shot he gave Smith a telephone number and asked him to give a message to his (the appellant's) girl-friend. As Smith went to make the call, he saw the appellant pass by the window of the booth and he heard another shot. Smith telephoned the appellant's girl-friend and told her that the appellant had shot Brown. After making the telephone call, he saw the appellant coming from the direction of the office. As he approached, he said to Smith "Don't be scared, I won't do you anything". At this time the appellant had only one revolver in his hand. The appellant entered the booth and switched off the lights. He then told Smith to telephone the Principal Officer - Smith did so and handed the phone to the appellant.

It would appear that it was to Sergeant Bannister that the appellant spoke because Bannister testified that about 10.50 p.m. the appellant spoke to him on the telephone and said: "I have just shot Corporal Brown and used four rounds of ammunition. I am willing to surrender, but do not send officers with guns".

As to the number of shots fired, the evidence of the witnesses varies somewhat. Smith says he heard three shots. Cartwright and Miller were not eye witnesses to the shooting although they heard shots coming from "the direction of the gate". They were scared and ran way and hid

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for a time. Each of them thought they heard four shots.

Another officer named Jordan heard a message on his radio about the shooting. He phoned the appellant and asked what happened. The appellant's answer was: "Nothing much". Jordan said he phoned the appellant again and said: "I am coming to you; I don't like what I have heard. I will be wearing a black coat". The appellant replied: You can come to me". 10

By this time, a number of officers were approaching the area of the gate, and the appellant phoned Bannister and said: "I can see the officers coming towards me. I can see them but they can't see me. I remind you not to send any officers with guns".

Jordan approached the appellant and asked him to come to him, which he did. Jordan said to him: "Where is the gun?" Whereupon the appellant took a revolver out of his pocket and 20 handed it to Jordan. Jordan passed it to Smith who was standing nearby. Smith took five live rounds out of it.

Smith knew that the appellant had been in possession of two revolvers; and so he went to look for the other revolver. He found it on the floor of Corporal Brown's office. It was empty. Near the booth, Smith also found a spent cartridge.

The Police were informed and a police party 30 under Corporal Huyler arrived at the prison. Smith handed Huyler the two revolvers, and the five live rounds and the spent cartridge. The number of the revolvers were 81577 and 108848. Huyler found four cartridge cases, three on the floor of the office and one on the ground in front of the porch.

Huyler was shown the dead body of Corporal Brown and Detective Constable Deveaux photographed it. Huyler arrested the appellant. 40

Dr. Joan Read, the Government Pathologist arrived shortly afterwards. Corporal Huyler said in evidence that, in his presence, Dr. Read examined the dead body of Corporal Brown and that he saw two wounds that looked like bullet wounds in the deceased's stomach. The body was then conveyed to the mortuary and it was photographed there by Constable Deveaux the following day. Huyler also went to the mortuary that day

where he met Dr. Read who performed a post-mortem examination on the body of Corporal Brown. Huyler received from Dr. Read a plastic container which contained a spent bullet and a death certificate. Two weeks later he received from Dr. Read a report relating to the post-mortem examination. The death certificate and the report were admitted in evidence without objection by Counsel for the appellant.

The death certificate (exhibit JN11) so far as relevant reads as follows:-

> "The Births and Deaths Registration Act, section 24(1) (b) Medical Certificate of the Cause of Death .....
> I hereby certify that I performed an autopsy on Stellman Brown; .... that he died on 28th January, 1979 at Fox Hill Prison and that to the best of my knowledge and belief the cause of his death was ..... bullet wound of the abdomen.
>
> Witness my hand this 29th January,1979
>
> (Sgd) Joan M. Read MB.BS
>
> ....."

Dr. Read's report (exhibit JN12) consists of three pages. Page 1, so far as relevant, reads as follows:-

> "The Rand Pathology Laboratory Princess Margaret Hospital .....
>
> re. Stellman Brown Autopsy Findings. On Monday, January 29, 1979 at 11.15 a.m. I performed an autopsy on the body of Stellman Brown. ..... There was a bullet entry wound on the left side of the abdomen inches below and to the left of the navel. The bullet entered the abdomen in a downwards and left to right direction and cut through the common iliac artery. A bullet was found close to the base of the bladder .... There was a second bullet entry wound on the left side of the back inches above the left hip bone and inches from the spine. The bullet went under the skin and left the body through an exit inches in front of the entry wound .....
> I recovered the bullet, placed it in a container which I labelled and handed it to Det. Cpl. Huyler
>
> (Sgd.) Joan M. Read
> Dr. Joan M. Read
> Pathologist."

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Page 2 of the report contains further details of what Dr. Read found at the autopsy, and on page 3 are the words "cause of death: Bullet wound of abdomen".

pp.48-52

The two revolvers and the ammunition were examined by a special agent of the FBI who subsequently gave evidence at the trial of the appellant. The agent's evidence was that in his opinion the two spent bullets were fired by the revolver serial number 81577; and that each of the four cartridge cases found in the office and porch were also fired from revolver No. 81577.

As regards the five live cartridges, the witness said he noticed that four of them had a firing pin impression near the edge of the primer. The fifth had two such firing pin impressions. His opinion was that each of those firing pin impressions was made by the firing pin in revolver 108848. In other words, that these five cartridges had been in the chamber of that revolver and that an attempt had been made to fire them. The serial number on the cylinder of 108848 was different from the number on the firing pin. Therefore the cylinder could, at some time, have been part of another weapon. At any rate, when test-fired, the witness noticed that the cylinder rotated too far with the result that the firing pin did not hit the primer on the cartridge case fair and square.

The case for the Crown was that the appellant fired at least four, if not five, of the rounds in revolver 81577, deposited it in the office after the shooting, and he also attempted to fire revolver 108848.

The appellant was interviewed by Corporal Huyler at 8 a.m. on 29th January. When asked whether he wished to say anything, he said:-

> "Brown came playing round me with the revolver and me and him begin hassling and it fired off twice."

He amplified this in a written statement recorded by Huyler the same day. In this statement, the appellant alleged that he was attacked by Brown. Relevant parts of the statement read as follows:-

> ".....(Brown) came back about five minutes later with a thirty eight revolver in his hand and he start playing round with it by poking me in my side with it. So I tried to take it from him and through

us hassling with it, it gone off. I remember hearing it go off twice then he just walk off by the pea patch. When Corporal Brown walked off, he took the thirty eight revolver with him. After he had gone, I check myself to see if any of the shots hit me then all of a sudden I hear Corporal Brown say "Oh Lord, call the doctor" ..... I didn't remember holding the revolver at any time while Corporal Brown had it. I never had the two revolvers that night: I never collected the two revolvers from the office. I did not shoot Corporal Brown. I believe he got shot while we were hassling for the gun."

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At this trial, the appellant gave evidence to substantially the same effect."

6. The Court of Appeal held:-

(i) That the Pathologist's Report prepared by Dr. Read (Ex. J.N. 12) was not admissible at common law as a public document. p.113 l.10

(ii) That the death certificate (Ex J.N.11) was not admissible under Section 42(5) of the Evidence Act. p.113 l.26

(iii) That the Pathologist's Report prepared by Dr. Read was admissible under Section 42(5) of the Evidence Act. p.113 l.18

(iv) That even if the death certificate and Pathologist's Report were wrongly admitted "the cause of Corporal Brown's death was conclusively proved by the admissible evidence on the record", the implication being that they would have applied the proviso to Section 12(1) of the Court of Appeal Act. p.114 l.7 ff

7. COMMON LAW

It is submitted that the Court of Appeal were right to hold that the Pathologist's Report was not admissible at common law as a public document because there was no evidence to suggest that the steps prescribed by Section 15 and Section 16 of the Coroners Act were carried out. It is submitted that the Court of Appeal were accordingly right in their application on the following authorities cited in their judgment:-

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12 CL & F 641 — Irish Society -v- The Bishop of Derry

1885 App Cas 63 at p.643 — Sturla -v- Freccia

/1946/ 1 KB 401 at p. 407 — Lilley -v- Pettit

/1952/ AC84 at p.93 & p.94 — Thrasyvoulos Ioannou & Others -v- Papa

Christoforos Demetriou & Others

8. THE EVIDENCE ACT

Cap 42 It is submitted that the Court of Appeal were wrong to hold that the Pathologist's Report was admissible under Section 42(5) of the Evidence Act.

9. "An Official Record"

There was no evidence that the Pathologist's Report was a report to the Coroner within the meaning of Section 14 of the Coroners Act. The Court of Appeal cited the judgment of Blake J. in Gregory Cooper & Errol Pinder -v- Regina:-

Crim App 47 of 76 and 13 of 78. p.108 l.46

> "In the Gregory Cooper case, which came before this Court at the same session, again the main submission (which was rejected) was that the autopsy report was admissible by virtue of S.4 of the Evidence Act as read with S.1 of the English Criminal Evidence Act 1965. As regards S.42(5), there was no citation of English decisions on the admissibility of public documents at common law. The basis on which the document was admitted was expressed thus:-
>
> "There is no direct evidence that the report was made after a specific request by the Coroner but there is a clear implication that it was made in order to satisfy the statutory requirement and, in our opinion, it would satisfy that requirement if it was made in pursuance of well established practice, the existence of which is recognised and has been confirmed by the Solicitor General, whereby reports of this kind are made in anticipation of a specific request from the Coroner under the provisions of this section.
>
> "Although it would be desirable to have

more direct evidence on the point in future, we think that the implications flowing from the statutory duty and the evidence of what actually occurred in this case are such as to justify a deduction that it was made in discharge of the duty enjoined by the provisions of the Coroners Act (cap 37) and consequently was admissible under Section 42(5) of the Evidence Act ....."

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Later in their judgment the Court of Appeal said:-

Crim App No 18 of 1977 Record page 112 line 37

"As in the Kendall Pinder and Gregory Cooper cases, in the instant case, there was no direct evidence that the postmortem examination and report thereof were performed and made respectively after a specific request by the Coroner. However we see no reason to depart from what was said in the Gregory Cooper judgment namely that, having regard to the statutory duty and evidence of what actually occurred it is reasonable to infer that the post mortem and report were performed and made in pursuance of a well established practice whereby reports of this kind are made in anticipation of specific requests from the Coroner under the Provisions of Section 14 of the Coroners Act."

Crim App No 47 of 1976 & No 13 of 1978

10. It is submitted that neither the Court of Appeal nor the Supreme Court at first instance was entitled to infer or assume in the absence of any evidence to support such inference or assumption that the post mortem and report were performed and made in pursuance of the well established practice whereby reports of this kind are made in anticipation of specific requests from the Coroner under the provisions of Section 14 of the Coroners Act.

In the Gregory Cooper case Graham Perkins J. (dissenting) said in regard to Sections 10 to 16 of the Coroners Act:-

"What appears to be clear is that there are certain essential preconditions that must occur before the medical practitioner's report to the Coroner can become a "public document" and be kept as such. Those preconditions are very precisely identified in the Sections I have quoted. It is, perhaps, worthy of note that if the Attorney General does

p.109 l.40

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not approve the Coroner's report and directs that an inquest be held there is not a single provision in the Coroners Act which contemplates that the medical practitioner's report to the Coroner can become a public document. This is no doubt so because the doctor will, in the ordinary course give oral evidence of his findings at the inquest."

"There is not a scintilla of evidence before me that anyone of the several pre-conditions occurred in this case so as to make the Report a public document admissible as an exception to the rule against hearsay."

/1952/ AC 84 at p.92

In the Demetrion case, Lord Tucker said:-

"Their Lordships are ..... of the opinion ..... that the necessary foundation for the admissibility of this document under Section 4 ..... was never established."

It is submitted that it is clear from these passages that where it is sought to introduce a document in evidence under a statutory exception to the hearsay rule, it is incumbent upon the party seeking to introduce such document to establish on the evidence the factual basis for its admissibility.

11. Even if the Pathologist's Report was a report to the Coroner within the meaning of Section 14 of the Coroners Act it is submitted that it was not capable of amounting to an official record unless and until it became a public document pursuant to the provisions of Section 16 of the Act. Before the procedure under Section 16 is carried out the Pathologist's Report is merely a report of his or her opinion to be accepted or rejected by the Coroner or the Attorney General. It is submitted that it is the indorsement of the approval of the Attorney General upon the Coroner's Report that changes its character and the character of the Prthologist's Report and gives them both the status of an "official record".

12. "Made as a result of enquiry by a public servant"

There was no evidence that the Pathologist's Report was made "as a result of enquiry" by the Coroner - see paragraph 9 hereof.

13. It is accepted that the Report was made as a result of enquiry by Dr. Read (her own enquiry), but there was no evidence that she was a public servant. The Court of Appeal appear to have assumed that Dr. Read was the "Government Pathologist", but in fact she appears to have been a registered Medical Practitioner practising at the Rand Pathology Laboratory, Princess Margaret Hospital, who was instructed by the police as pathologist in their investigation. Record p.100 l.3

If Dr. Read was not a Government employee but was an independent doctor it is submitted that she was not a public servant.

14. "In discharge of a duty enjoined by law"

It is submitted that this requirement affects the maker of the statement (in this case the Pathologist), not any maker of an enquiry (which might include the Coroner if he did in fact enquire). If the requirement touched only the maker of an enquiry then any statement made to a Coroner on his enquiry might be admissible if included in his report (whether he accepted it or not).

15. Dr. Read did not write her report "in discharge of a duty enjoined by law" because she was not enjoined by law to perform any duty. She was instructed (or so it appears) in her professional capacity by the police (or, though not on the evidence, by the Coroner) to perform a post mortem and to prepare a Report. She was under no duty to accept instructions from the police or from the Coroner. The only person who is enjoined to take any action by the provisions of the Coroners Act is the Coroner himself.

16. The Proviso

It is submitted that the Court of Appeal were wrong to imply as they appear to have implied at the end of their judgment that even had they decided for the Appellant on the question of the admissibility of the Pathologist's Report they would nevertheless have applied the proviso to Section 12(1) of the Court of Appeal Act. p.114 ll.7-

It is submitted that the correct test to be applied was set out in Anderson -v- The Queen and in Woolmington-v- Director of Public Prosecutions. The proviso is only to be applied in cases where "if the jury had been /1972/ AC 100 at p.107 /1935/ AC 462 at pp 402 to 403

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properly directed they would inevitably have come to the same conclusion".

Lord Guest in Anderson said:-

> "It cannot be the case that the proviso is never applied in murder cases nor can it be the case that for the application of the proviso there cannot be any possible criticism of the summing up. Their Lordships realise that in cases of murder great care must be taken to see that there has been no miscarriage of justice. Further than that they do not consider it wise to lay down any principle."

17. It is submitted that in the instant case it cannot be said that the jury, if they had not had the evidence of Dr. Read's report, would inevitably have convicted. The issue before them was one of credibility. In his address the Solicitor General told the jury that:-

p.76 l.39 to p.75 l.2

> "The question is whether you believe the Prosecution's witnesses as to what they tell you the accused told them and what Smith saw. Or whether you believe Newbold".

p.76 l.6ff, p.24 ff, p.9o l.42 ff, p.92 l.24 ff

Great importance was attached to the Solicitor General in his address to the jury and by the learned Judge in his summing up to the evidence of Dr. Read's Report. Both highlighted the argument that Corporal Brown was shot in the back in order to show that the Appellant's account could not be true. Dr. Read's Report was argued to be the only conclusive evidence to assist the jury in deciding whom to believe. It is submitted that without the Report a jury might have felt unable to convict the Appellant.

18. At the hearing of the Petition for special leave to Appeal their Lordships of the Judicial Committee (Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Bridge of Harwich) indicated that in order to determine this Appeal they ought to have the fullest information before them as to the circumstances in which Dr. Read's Report came to be admitted in evidence. There is appended hereto an Advice from Counsel for the Appellant dated the 28th May, 1982, which raises a number of questions to Mr. James Thompson, Counsel for the Appellant before the Supreme Court and the Court of Appeal, regarding the said circumstances, and a letter from Mr. Thompson in reply, dated the 14th July, 1982, which gives his answers to the said questions.

19. The Appellant respectfully submits that the judgment of the Court of Appeal of the Commonwealth of the Bahamas was wrong and ought to be reversed and this appeal ought to be allowed for the following (among other)

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R E A S O N S :-

(i) BECAUSE the Report of Dr. Joan Read was wrongly admitted in evidence at the Appellant's trial before the Supreme Court, and

(ii) BECAUSE the Appellant has thereby suffered substantial and grave injustice.

SWINTON THOMAS

JONATHAN MARKS

A P P E N D I X

JAVAN NEWBOLD

and

THE QUEEN

A D V I C E

1. In this case we appeared before the Judicial Committee of the Privy Council (Lords Keith, Brandon and Bridge) on the 26th May 1982, when we were granted special leave to appeal in forma pauperis from the decision of the Court of Appeal of the Bahamas.

2. There are two issues in the Appeal. First, was the report of Doctor Joan Read, the Pathologist, rightly admitted in evidence at Mr. Newbold's trial without her being called to give evidence? Secondly, even if the report was inadmissible and should therefore have been excluded, should the Appeal nevertheless be dismissed on the ground that no substantial miscarriage of justice has occurred, the Court of Appeal having indicated that they would have dismissed the Appeal on that basis even had they found for the Appellant on the admissibility point?

3. At the hearing of the Petition for special leave to appeal, the Privy Council indicated that in order to determine the second issue they would want to have the fullest information before them as to the circumstances in which Doctor Read's report came to be admitted in evidence. We would therefore suggest that our Instructing Solicitors ask Mr. Thompson of Counsel, who conducted Mr. Newbold's Defence in tbe Bahamas, a number of questions. We apologise if these appear to be peremptory in tone. No discourtesy is intended thereby. The questions simply reflect the enquiries made by the members of the Board when considering the applicability of the proviso.

The questions are as follows:-

(i) When was Doctor Read's report first shown to Mr. Thompson?

(ii) At that stage was it open to the Defence to have an independent Pathologist examine the body of the Deceased?

(iii) If the answer to (ii) is yes, did an independent Pathologist examine the body of the Deceased, and, if not, why not?

(iv) Whether or not an independent Pathologist examined the body of the Deceased, was such a Pathologist ever instructed to express an opinion on Doctor Read's report?

(v) Were there committal proceedings in this case? If so,

(a) What form did they take?

(b) Did the Defendant give evidence at those proceedings?

(c) Did Doctor Read give evidence at those proceedings?

(d) If Doctor Read did not give evidence, was her report put in evidence by the Crown at those proceedings?

(e) If Doctor Read's report was put in evidence at those proceedings, was objection then taken?

(f) If Doctor Read's report was put in evidence at those proceedings was any application made that she should be called to give evidence in person at the trial?

(vi) Was any application made at any time at or before the trial that Doctor Read should attend the trial to be cross-examined? If not, why not?

(vii) Where was Doctor Read at the time of the trial?

(viii) At the trial was objection taken by the Defendant to the admissibility of Doctor Read's report? /We have Mr. Thompson's answer to this question in his letter of the 11th May 1982 but should prefer to see his answers all contained in one document/.

(ix) If objection was taken by the Defence to the admission of Doctor Read's report at the trial, what was the extent of the argument before the Court on the question of admissibility? Did the Judge give a ruling? Did he deliver a Judgment? If so, is there in existence any notice of that Judgment?

(x) Following the admission of Doctor Read's report, was consideration given to applying for an adjournment to enable Doctor Read to be called or to enable an independent Pathologist to be instructed, and, if not, why not?

(xi) Is there provision in Bahamas law for agreement of facts or statements in criminal cases? If so, was there any suggestion by the Crown that the Defence agree Doctor Read's report? If so, was any such agreement forthcoming?

(xii) How did it come about that the Court of Appeal in the Bahamas were under the impression that Doctor Read's report was admitted without objection being taken by the Defence?

4. The Privy Council clearly anticipated that the information provided to them for the hearing of the Appeal would be in an agreed form. Following the hearing of the Petition we spoke to Mr. Strachan who appeared for the Crown and his Instructing Solicitors will no doubt be making enquiries of their own as to how Doctor Read's report came to be admitted. As soon as the information we have requested from Mr. Thompson is to hand, we would be grateful for a sight of it in order that we can consider drafting a statement for agreement by those representing the Crown.

SWINTON THOMAS Q.C.

JONATHAN MARKS

4 Pump Court,
Temple,
E.C.4.

28th May, 1982

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Our ref: JMT;tlt
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14th July, 1982

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DATE STAMPED
RECEIVED 19 JUL 1982

Dear Sirs:

re: JAVAN NEWBOLD v. THE QUEEN

I refer to your letter of 1st June, 1982 and would offer my apology for the tardy reply thereto which was due to unforeseen local problems.

The following are replies to the Advice of Counsel:-

(I) Dr. Reed's report was first brought to my attention or seen on or after the 4th day of July, 1979, the date of the opening of the July Sessions of The Supreme Court.

(II) I would say there was none in the circumstances. However, if at the time of the Preliminary Investigation, it was even anticipated the services of Dr. Reed would not have been available, such a request could have been made. In any event, the deceased was buried on 2nd February, 1979 and the Trial held in late July, 1979, during which the Pathologist's absence was first brought to the attention of the Trial Judge and the Defence. Consequently, the Prosecution relied on the Court of Appeal decisions in Gregory Cooper and Kendal Pinder for the admission.

(III) There was no independent examination because of the circumstances noted in Paragraph (II).

(IV) No.

(V) Yes. (a) Committal Proceedings were conducted in accordance with the provisions of Section 113 et seq. of The Criminal Procedure Code 1968, hereinafter called the Code.

(b) The Defendant elected not to cross-examine any witnesses and reserved his defence.

(c) It was not necessary for the doctor to attend the C.P.

(d) The doctor's report was submitted and accepted in evidence under the provisions of Section 117 of The Code.

(e) Does not arise.

(f) No application was anticipated or deemed necessary since by virtue of the proviso to Section 163 of The Code, the doctor was expected to give oral evidence and be cross-examined as per Section 164 of The Code.

(VI) No. As previously mentioned, the Defence was unaware of the doctor's absence or the Crown's inability to produce her until after the commencement of the Trial. The provisions of Section 163 were expected to apply.

(VII) The Defence had no knowledge of the doctor's whereabouts and to the best of my knowledge, neither did the Prosecution. According to hospital authorities, the doctor, without any advance notice, commenced terminal leave on 1st June, 1979 and shortly thereafter left the Commonwealth without a forwarding address.

(VIII) Formal objection was indeed taken at the trial but the Judge and the Prosecution opined the Court was bound by the decisions of Cooper and Pinder.

(IX) The submission based on the effect of Sections 14 et seq. of The Coroner's Act and Section 42 (5) of The Evidence Act was short-lived for the reasons set out in Paragraph (VIII). The Trial Judge, supported by the Solicitor General, definitely gave an oral ruling on the objection. The only reference to the particular

point appears on Page 58, line 5 of the original transcript in the evidence of P.W. No. 10, Detective Corporal Samuel Huyler , and shortly before his cross-examination. Trial Judges do not have the assistance of Court Stenographers or mechanical means for the recording of evidence, although there is provisions for same in The Supreme Court Act. The Transcript of a Trial is composed solely by the Presiding Judge in his discretion.

(X) No consideration was given the question of seeking an adjournment for the purpose of calling Dr. Reed since none of the authorities could locate her. In any event the Crown's reliance on the admissability of the report under Section 42(5) was upheld. The Defence consequently decided that the admission thereof was a ground for Appeal. Neither was the question of whether to call an independent Pathologist considered, the deceased having been buried five (5) or more months before.

(XI) There is no such provision. The prosecution must prove all facts on which it relies; ref. Section 73 et seq. of The Evidence Act.

(XII) I note the Court of Appeal's statement to the effect thatthe relevant Report was admitted without objection and can offer no explanation therefor especially since the question was in fact argued at both levels of the proceedings. In fact the first amended ground of Appeal dealt with the question of admissability and from my notes, I extract the following quote:-
"In the Court below on Page 58, the Learned Trial Judge permitted the same under Section 42 (5) - Evidence Act and 14 Coroner's Act, even though there was objection to the same ..... It is my humble submission that this evidence was so prejudicial and so likely to influence the jury that no matter what care the Learned Judge took at the hearing, he could not cure the irregularity ..... probability that the improper admission turned the scale against the accused and that the jury was so influenced....."

It should be noted that although I agreed to represent the Appellant at his trial, I was not present at the Preliminary Inquiry due to appearances in the higher courts.

Enclosed please find copies of The Code and The Evidence Act for your convenience.

I await your comments.

Yours faithfully,

Sgd. James M. Thompson

James M. Thompson

No. 35 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

JAVAN NEWBOLD — Appellant

- and -

THE QUEEN — Respondent

CASE FOR THE APPELLANT

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