20/83

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

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CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of the Commonwealth of the Bahamas (Blair-Kerr, President, Duffus and Luckhoo JJ.A.) delivered on 6th March 1980, dismissing an appeal by the Appellant from his conviction and sentence for murder by the Supreme Court of the Commonwealth of the Bahamas (Malone J. and a jury) on 3rd August 1979.

2. The principal questions raised by this
20 appeal are:

(i) whether a report prepared by a Government Pathologist (hereinafter called "the autopsy report") was properly admitted in evidence by the learned trial judge;

(ii) if the autopsy report was wrongly admitted in evidence, whether any miscarriage of justice occurred.

3. The evidence adduced by the Crown at the
30 trial may be summarised as follows:

(i) The Appellant and the deceased, Corporal Brown, were 2 of a total of 5 prison officers who comprised the night shift at the First Offenders' Prison on 28th/29th January 1979. The other prison officers were Smith, Cartwright and Miller. The deceased was in charge of the shift.

(ii) At about 10.00 p.m. the deceased called an inspection parade of the officers. The Appellant was improperly dressed and he was reprimanded by the deceased.

32 : 24

(iii) Smith was detailed to work at the gate. At about 10.15 p.m., while Smith was at the gate, the Appellant came into the booth and said:

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"I am going to shoot Brown".

Later the Appellant left and went back to the office.

18 : 30

(iv) Cartwright was sitting on the porch of the office. The deceased was in the office. The Appellant went up to the office and entered the office. The Appellant said to the deceased:

19 : 1

"You scheming but I will teach you how to scheme".

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Cartwright heard no reply from the deceased. The Appellant then sat on a chair in the porch.

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(v) Miller was assigned that night to patrol the compound at the prison. At about 10.40 p.m. he returned from his rounds to the porch to the office. According to usual procedure, while on his rounds he had collected 2 revolvers. He had also collected 10 rounds and placed 5 rounds in each revolver. He put the revolvers in the drawer of the desk. The Appellant approached the desk opened the drawer and took the revolver. Miller was surprised that the Appellant took both revolvers, as even an officer going on the rounds should have taken only one. An officer on the rounds would also take a walkie talkie and a punch clock; the Appellant took neither. It was unusual for an officer assigned to the gate to ask for a gun. In taking the revolvers the Appellant said to Miller:

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10 : 6

"Suppose I start shooting everybody what will you do?".

The Appellant sat on a wall a little

way from the office. The deceased, who had been in the office, left the office and walked towards the gate. After the deceased had gone about 17 feet the Appellant got up and also walked towards the gate. With the Appellant having 2 guns there was "a sort of tension". Miller "had been tense remembering what accused had asked me and because nothing was being said". Miller assumed the Appellant "was waiting for an opportunity to get mad"; "the situation was explosive". 10 : 17 10 : 32 14 : 35

(vi) At about 10.50 to 10.55 p.m., while Smith was in the booth at the gate, the deceased went to the door of the booth and had a conversation with Smith. When the deceased started to leave, Smith saw the Appellant by the side of the booth; the Appellant had a revolver in each hand and he was pointing both revolvers at the deceased. The Appellant said to the deceased: 32 : 42 33 : 14

"Look man I want to talk to you". 33 : 20

The deceased said:

"Don't play around with guns like that". 33 : 22

After those words the Appellant fired a shot and, after a short period of less than a minute, he fired another shot. The Appellant was about 7 feet from the deceased when he fired the first shot. When the first shot was fired Smith could see both the Appellant and the deceased; Smith saw the Appellant fire the second shot but could not see Brown at that time. 33 : 23 33 : 26 33 : 33

(vii) After the second shot was fired the Appellant asked Smith to make a telephone call to someone whom Smith knew and assumed to be the Appellant's girlfriend. Smith told the person whom he telephoned: "Newbold shot Brown". 34 : 2 34 : 19

(viii) As Smith went to make the telephone 34 : 22

call he saw the Appellant pass by the window of the booth; just after the Appellant had passed the window Smith heard another (third) shot. When the Appellant got to the booth he said:

34 : 37 — "Don't be scared. I won't do you anything" The Appellant then had one revolver in his hand; he entered the booth, turned off the light and told Smith to call the Principal Officer, which Smith did. (10)

11 : 8
19 : 21-27 — (ix) Miller had heard 3 or 4 shots; Cartwright had heard 4 shots.

21 : 40 — (x) At about 10.50 p.m. Sgt. Bannister, who was in charge of the prison at the time in question, received the telephone call from the Appellant. The Appellant said:

22 : 3 — "I have just shot Cpl. Brown and used 4 rounds of ammunition". (20)

The Appellant also said:

23 : 9 — "I am willing to surrender but do not send officers with guns".

Bannister informed the Deputy Superintendant of what the Appellant had told him and instructed officers, including Jordan, to investigate. The Appellant telephoned Bannister again and said:

22 : 32 — "I 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". (30)

27 : 28 — (xi) Jordan, a prison officer, heard of an incident on his walkie talkie and telephoned the Appellant. Jordan asked the Appellant what had happened and the Appellant said:

27 : 37 — "Nothing much".

Jordan telephoned the Appellant again and said: (40)

28 : 14 — "I am coming to you, I don't like what I have heard. I will be wearing a black coat".

The Appellant said:

"You can come to me" 28 : 17

(xii) Jordan went to the gate where the Appellant was and asked the Appellant where the gun was. The Appellant took the gun from his coat pocket and gave it to Jordan. Jordan passed the gun to Smith who had walked up behind the Appellant. The Appellant was crying. Jordan stood there for more than half hour until the police arrived; other prison officers came up in the meantime. Jordan saw the deceased with "little holes in the abdomen and back"; when Jordan saw the deceased "he was still". 28 : 35 30 : 31 31 : 37 29 : 13

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(xiii) When Smith received the revolver from Jordan he opened it and took out 5 rounds. Smith searched for the other revolver and found it on the floor in the office; the revolver was empty. Smith handed both revolvers and the 5 live rounds to Cpl. Huyler. Later Smith found what appeared to be the head of a bullet between the booth and the wall. Smith gave the bullet to Miller. 35 : 16 35 : 28 35 : 28 35 : 36

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(xiv) Huyler gave evidence that the serial numbers of the revolvers were 81577 and 108848. He found 3 cartridge cases on the floor of the office and a fourth on the ground just in front of the porch. When a revolver of the type in question is fired the cartridge is not ejected automatically; the cartridges have to be extracted. After being arrested and cautioned the Appellant said: 52 : 43 52 : 46 56 : 26

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"Man I no going nowhere cause I ain't do nuthin". 53 : 8

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Dr. Read, the Government Pathologist, examined the body of the deceased in the presence of Huyler. Huyler saw two wounds that looked like bullet wounds in the deceased's stomach; one looked like an entrance wound and the other like an exit wound. 53 : 12

(xv) On 29th January 1979 Huyler cautioned the Appellant and the Appellant said:

53 : 30 "Brown came playing round me with the revolver and me and him begin hassling and it fired off twice".

53 : 38 Huyler took a written statement from the Appellant. The written statement was of like effect to the said oral statement.

54 : 11 (xvi) On the same day Huyler received a plastic container containing a spent bullet and the death certificate from Dr. Read. On 30th January Huyler collected the spent bullet from Smith. About 2 weeks later Huyler received the autopsy report from Dr. Read. 10

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54 : 37

(xvii) The death certificate and the autopsy report were produced while Huyler was giving evidence. The relevant part of the death certificate (which was Ex. J.N.11) reads: 20

"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 abdomen. 30
Witness my hand this 29th January 1979
(sgd) Joan M. Read MB.BS
......................................"

The relevant part of the autopsy report (which was Ex J.N.12) reads:

"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 40

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

10 (Sgd) Joan M. Read
Dr. Joan M. Read
Pathologist. "

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".

(xviii) Richard Crum, a special agent of the F.B.I., examined the 2 revolvers (one 20 of which had come from the Appellant and the other from the office), the 5 cartridges (which had been taken by Smith from the revolver which came from the Appellant), the 4 cartridge cases (which Huyler had found in or near the office) and the two bullets one of which had been found by Smith and the other of which Dr. Read had given to Huyler). Crum said that the 30 2 spent bullets had been fired by revolver 81577; that the 4 cartridge cases had been fired from revolver 81577; and that the 5 live cartridges had been loaded in revolver 108848 and that an attempt had been made to fire each of them. 49 : 32 49 : 42 50 : 8

4. The autopsy report and the death certificate were committal documents. Copies of both documents were supplied to the Appellant's 40 counsel at least 3 months before the trial. When the prosecution sought to adduce the autopsy report and the death certificate in evidence no objection was made on behalf of the Appellant to the admissibility of those documents.

5. The evidence adduced on behalf of the Appellant at the trial may be summarised as follows:

(i) The Appellant said that while he, Smith and the deceased were at the 50 gate the deceased started to poke the 54 : 21

Appellant in the side with a revolver. The Appellant thought the deceased was going to shoot him. The Appellant and the deceased started to wrestle for the revolver; while they were wresting two shots went off. The Appellant then ran behind the booth. The Appellant saw the deceased walking away, up the hill. The Appellant saw the deceased hold his stomach, begin to stumble and go towards the grass; the deceased stumbled out of the Appellant's view; the deceased went in the direction of the pea patch. Then the Appellant called Bannister and told him what had happened. Thereafter Jordan telephoned the Appellant. Jordan went to the booth; the Appellant took a gun from a shelf in the booth and gave it to Jordan. The Appellant said he gave Smith the telephone number to call his family, but did not tell him to telephone anyone in particular nor his girlfriend. The Appellant asserted that he had been detailed to the gate, which was his regular post and that he had a right, when at the gate to have a revolver on his person. The Appellant denied that he had taken 2 revolvers from the desk drawer; he said he had taken one of two revolvers which were on the desk. The Appellant denied that he had told Smith that he intended to shoot Brown; he denied that he had said to Miller "Suppose I start shooting everybody what will you do?"; he denied saying to the deceased "You scheming but I will teach you how to scheme".

[Margin references: 66 : 8 and 12; 67 : 25; 59 : 13; 60 : 18; 61 : 14; 61 : 26; 62 : 25; 62 : 2; 62 : 34. Line numbers: 10, 20, 30, 40]

73 : 12 (ii) Consuelo Harvey, the Appellant's girlfriend, gave evidence to the effect that she had not received the telephone call which Smith had referred to in his evidence.

76 - 78 6. The Appellant's case was put by his counsel to the jury upon the basis that the Appellant had been attempting to take the revolver away from the deceased, that the Appellant had no intention to kill the deceased and that it was a case of accident. It was not urged on behalf of the Appellant that the cause of the deceased's death was anything other than a bullet wound. 50

7. Malone's J's summing-up to the jury included a summary of the evidence advanced on behalf of the prosecution and the Appellant. In dealing with the death certificate and the autopsy report the learned trial judge said:

"In due course Dr. Read performed the post mortem on the body of Corporal Brown which had been found now in a southerly direction from the booth in the peas patch. And in the course of her post
10 mortem Dr. Read found a bullet at the base of the bladder of the deceased. That bullet and the bullet which Smith found at 4.20 a.m. were sent to Mr. Crum and with them the gun, the shells and the five rounds of live ammunition. Mr. Crum's evidence is that the two spent bullets sent to him were fired by a particular gun and that all the bullets were shot from the same gun as the bullet which Mr. Crum himself fired and compared with the other bullets.

20 So that, members of the jury, is basically the Crown's case on movements and on the findings of the doctor.

Now there is another point on the findings of Dr. Read that is of importance from the Crown's point of view. Apart from finding a bullet at the base of Brown's bladder, there were three puncture wounds - one just to the left of the navel and in the front of the abdomen and two in the back above the hip. Now what Dr. Read's evidence boils down
30 to - of course, she is not here to give it herself, is that those three puncture holes were in fact caused by two bullets. The one that went in the front of the abdomen ended up at the base of the bladder. But the bullet which caused the exit wound, because one of those holes there is an exit wound, went in on the left side of the back above the hip bone, went under the skin and came out just in front of the entry wound above the hip. Perhaps you will bear in mind that Mr. Smith
40 says that he found a bullet just by the booth. Is it that bullet that passed through and caused the two puncture wounds in Brown's body?

The Crown is saying that if you took those points, if you accept them, there is a man who is perhaps annoyed because his superior officer has ticked him off, and decides to dispose of that superior officer and kill him, and in fact announces his intention to kill him by saying "I am going to shoot him". Then, says the Crown, on the
50 evidence of Smith, the accused, at a distance of 7' takes two revolvers out and fires two shots in the abdomen and into the back; and the Crown is

saying, if somebody takes a .38 revolver, somebody who is not unfamiliar with them, because it is his duty to handle them, and he takes that .38 revolver and fires it at a man, then what other intention can there be other than to kill? On the basis of The Penal Code I read earlier - can it be believed that those actions would not cause death? How could he believe that? And so the Crown says it is a straight case of murder. Brown is dead, by an unlawful act of the accused, without any provocation, without any justification and done with the intention to kill Brown." 10

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8. The Court of Appeal considered the questions referred to in paragraph 2 above. The judgment of the majority of the Court of Appeal (Blair-Kerr, President and Duffus J.A.) was that the autopsy report had been properly admitted in evidence but that the death certificate had been wrongly admitted; the majority held that no harm was done by the wrongful admission of the death certificate as the cause of death was expressed in the same terms in the autopsy report. Luckhoo J.A. was of the opinion that both the autopsy report and the death certificate had been wrongly admitted. The Court of Appeal was of the view (in the case of Luckhoo J.A.) that no miscarriage of justice had occurred and (in the case of Blair-Kerr, President and Duffus J.A.) that, if both the autopsy report and the death certificate were wrongly admitted in evidence, no miscarriage of justice would have occurred; "the cause of Corporal Brown's death was conclusively proved by the admission evidence on the record. The evidence in this regard was overwhelming".

114 : 1 | 20 | 114 : 15 | 30 | 114 : 7

9. Section 42(5) of the Evidence Act, Chap. 42 is as follows:

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

....

(5) Where a 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." 40

10. Sections 13 to 16 (inclusive) of the Coroners Act, Chap. 37, are as follows:

"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 50

report to be made to the Coroner of the district in which he may be stationed and serving.

14. On receiving such a 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
10 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 reports and investigations the coroner is of the opinion that the
20 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
30 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,
> 40 if he thinks fit."

11. In considering the admissibility of the autopsy report the Court of Appeal examined the said provisions of the Evidence Act and of the Coroner's Act, the English common law decisions on the admissibility of public documents as an exception to the hearsay rule and earlier decisions of the Court of Appeal itself.

The Court of Appeal acknowledged that, under the common law, for a public document to be admissible

in evidence as an exception to the hearsay rule it is necessary, inter alia, that such document should have been made for the purpose of the public making use of it and being able to refer to it (Sturla v. Freccia (1860) 5 App. Cas. 623, The Irish Society v. The Bishop of Derry 12 Cl. & F. 641, Lilley v. Pettit 1946 K.B. 201 and Thrasyvoulos Ioannou v. Papa Christoforos Demetrion (1952) A.C.84.). The Court of Appeal referred to the dictum of Baron Parke in The Irish Society case: 10

104 : 15 "In public documents made for the information of the Crown or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made and is for that reason receivable in all cases whether the officer or his successor may be concerned in such cases or not"

and to the interpretation of that dictum by Lord Goddard in Lilley v. Pettit (at p. 406): 20

105 : 44 "In my opinion it is quite clear that the learned Baron did not mean to lay down that every document that may be prepared by a servant of the Crown for the information of His Majesty is a public document. It may be that the words "for the information of the Crown or all the King's subjects who may require the information they contain" should be read as meaning "for the information of the Crown, that is to say, all the King's subjects who may require the information 30 they contain"."

108 : 8 The Court of Appeal stated that the important question was whether S.45(2) is a statutory modification of the English common law in relation to the essentials of those public documents of the nature of surveys, inquiries and inquisitions which are admissible in evidence as
110 : 12 exceptions to the hearsay rule, and decided that the said provision was not such a modification.
111 : 20 The Court said that effect had to be given to 40 the plain meaning of the words of S.42(5) and that the words "kept for the information of the Crown or for public reference" were not to be
111 : 23 read conjunctively; the court observed that "for the information of the Crown" and "for public reference" are in no sense synonymous
111 : 10 expressions. The Court also observed that although it must be presumed that the Legislature in 1904 (when S.42(5) was enacted) was cognisant of the decision in Sturla v. Freccia, there was 50 no reason at such time to think that the dictum of Baron Parke in The Irish Society case would

be interpreted conjunctively, as it was by the Divisional Court in Lilley v. Pettit in 1946. The Court of Appeal held that the autopsy report was in fact "kept for the information of the Crown" as it would clearly assist the police in their investigation into the facts and circumstances attending the death. 113 : 3

The Court of Appeal referred to the requirement in S.42(5) that the document be "an official record, book or register" as distinct from a "public document", and concluded that the autopsy report was such "an official record...kept for the information of the Crown". 111 : 26 113 : 13

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The Court of Appeal also held that the autopsy report had been "made as the result of enquiry by a public servant in discharge of a duty enjoined by the law". The relevant "law" was contained in S.5 10-16 of the Coroners Act and it was reasonable to infer that the post mortem and the autopsy 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 S.14 of the Coroners Act. 111 : 33 112 : 44

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12. In considering the admissibility of the death certificate the Court of Appeal examined the provisions of S.24(1) of the Births and Deaths Registration Act, Chap. 194. The Court concluded that the death certificate had not been made in discharge of any duty enjoined by any law. Consequently the Court concluded that the death certificate was not properly admitted in evidence, and the contrary was not contended for by the Crown. 113 : 27

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13. The Respondent respectfully submits that the autopsy report was properly admitted in evidence at the trial as it was a document which satisfied the requirements of S.42(5) of the Evidence Act. The requirements of the said provision and the manner in which the autopsy report satisfied such requirements are set out in the judgment of the Court of Appeal and summarised at paragraph 11 herein.

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14. The Respondent respectfully submits further that the Court of Appeal was correct in stating that no miscarriage of justice occurred by the wrongful admission in evidence of the death certificate, as the cause of death was expressed in the same terms in the autopsy report.

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15. The Respondent respectfully submits yet

further that the Court of Appeal was correct in its unanimous conclusion that, even if both the autopsy report and the death certificate were wrongly admitted in evidence, no miscarriage of justice occurred. The Respondent respectfully refers to the evidence adduced at the trial and summarised in paragraphs 3 and 5 herein and to the matters in paragraph 4 herein. From the said evidence the inference that the deceased died of a bullet wound was irresistable. As to matters in the autopsy report going beyond the cause of death, the Respondent will respectfully submit that from the said evidence it was overwhelmingly clear that the Crown had established beyond reasonable doubt that the Appellant had intentionally caused the death of the deceased by an unlawful act.

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16. The Respondent therefore respectfully submits that this appeal should be dismissed for the following (among other)

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R E A S O N S

(1) BECAUSE the autopsy report was properly admitted in evidence by the Supreme Court of the Commonwealth of the Bahamas

(2) BECAUSE, even if the autopsy report was wrongly admitted in evidence, no miscarriage of justice occurred.

MARK STRACHAN.

No. 35 of 1982

IN THE PRIVY COUNCIL

O N   A P P E A L

FROM THE COURT OF APPEAL OF THE
COMMONWEALTH OF THE BAHAMAS

B E T W E E N :

JAVAN NEWBOLD — Appellant

\- and -

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

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