Privy Council Appeal No. 35 of 1982

Javan Newbold – – – – – – – *Appellant*

v.

The Queen – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE 1983

Present at the Hearing:

LORD DIPLOCK

LORD ELWYN-JONES

LORD ROSKILL

LORD BRIDGE OF HARWICH

LORD TEMPLEMAN

[*Delivered by* LORD BRIDGE OF HARWICH]

This is an appeal from the Commonwealth of The Bahamas and references to courts and statutes in this judgment are to those of The Bahamas. The appellant was tried before Malone J. and a jury in the Supreme Court and convicted on 3rd August 1979 of the murder of Stellman Brown. He was sentenced to death. His appeal against conviction was dismissed by the Court of Appeal on 6th March 1980. Special leave to appeal to Her Majesty in Council was granted on 23rd June 1982.

The sole ground of appeal is that the trial judge wrongly admitted in evidence the report of the pathologist, Dr. Joan Read, who, on 29th January 1979, performed an autopsy on the body of the deceased, Brown, but who was not available to give evidence at the trial in July and August, having then left The Bahamas. The Court of Appeal held by a majority (Blair-Kerr P. and Duffus J.A., Luckhoo J.A. dissenting) that the autopsy report was admissible. The Court, however, decided unanimously that, if the report had been wrongly admitted, the appeal should nevertheless be dismissed under the proviso to section 12(1) of the Court of Appeal Act 1964, on the ground that no substantial miscarriage of justice had actually occurred.

The issue as to the admissibility of the autopsy report turns on the true construction of section 42(5) of the Evidence Act as applied to certain provisions of the Coroners Act.

The Evidence Act provides:—

> " 42. Hearsay evidence may not be admitted, except in the following cases:—
>
> . . . . . (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."

The provisions of the Coroners Act of primary relevance are the following:—

> " 14. On receiving such report [sc. a report of any death calling for inquiry or inquest], ... 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 the result of the reports 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: . . . "

A similar issue as to the admissibility of a pathologist's report had been decided in the same sense as by the majority in the instant case by the Court of Appeal (Hogan P., Georges and Duffus JJ.A.) in two cases (*Kendall Pinder v. R.* and *Gregory Cooper and Errol Pinder v. R.*) in which judgments were delivered on 20th and 21st March 1978 respectively. In neither of those cases, nor in the instant case, was there any evidence of a specific request by the coroner, pursuant to section 14, that the pathologist should examine the body. Indeed, in the instant case, there is nothing to show that the coroner was ever seized of the matter of Brown's death at all or took any action in relation thereto. Section 18 of the Coroners Act provides for the adjournment of an inquest whenever any person is charged before a magistrate with the homicide of the deceased and the section appears to contemplate that a conviction of homicide will obviate the necessity for an inquest verdict. It appears to their Lordships that a probable implication from this provision, although not spelt out in terms, is that whenever a person is charged with homicide before a magistrate at a time before the coroner has taken any action, as very probably happened here, the coroner's duties under Part III of the Act (which comprises sections 9 to 18) are suspended until conclusion of the trial.

However that may be, the essential reasoning on which the Court of Appeal based its decision in all three cases is sufficiently expressed in a

passage from the judgment of the Court in *Gregory Cooper,* which the majority judgment in the instant case cited and relied on, as follows:—

> " 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 a 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 the section.
>
> Although it would be desirable to have more direct evidence on the point in future, we think 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 and consequently was admissible under section 42(5) of the Evidence Act . . . . "

Their Lordships feel grave doubt whether an autopsy performed in anticipation of a statutory request can properly be treated as if performed in response to a statutory request. The argument for the respondent, however, has more formidable obstacles to overcome than this.

In the hope that this judgment may help to clarify the law, their Lordships propose to address themselves to the question whether an autopsy report, as such, made in response to an undoubted request by a coroner under section 14, can ever be admissible as an exception to the hearsay rule under section 42(5) of the Evidence Act. The three relevant conditions precedent to such admissibility are:

(1) that the contents of the report amount to a " statement . . . contained in any official record . . . . kept for the information of the Crown ";

(2) that the statement " . . . . was made as the result of inquiry by a public servant . . . . ";

(3) that it was so made " . . . . in discharge of a duty enjoined by the law . . . . ".

If the first condition precedent is to be satisfied, the autopsy report itself must be treated as falling within the words " official record ". This seems to their Lordships to stretch language to breaking point. But suppose it can be so stretched, it is nevertheless impossible to say that it is a record " . . . . kept for the information of the Crown . . . . ". The coroner's report, if approved by the Attorney-General and forwarded to the Registrar pursuant to section 16, is undoubtedly an official record so kept. It was submitted that the words " . . . . together with the inquisitions . . . . " in that section were apt to refer to the medical and police reports made in response to requests under section 14. Their Lordships cannot accept this submission. The word " inquisition " appears to be used elsewhere in the Act to denote the formal conclusion reached at an inquest or inquiry (e.g. in section 18(3) and section 28(2), (4) and (5)). Whatever difficulty there may be in applying this meaning to the plural " inquisitions " in section 16, it is inconceivable that the draftsman should have used this word to refer to the medical and police reports which are expressly mentioned in the immediately preceding section.

In the instant case there was no evidence to show that Dr. Read was a public servant. Her report is headed " The ' Rand ' Pathology Laboratory ". Their Lordships, in the course of argument, were informed by counsel for the respondent on instructions that the " Rand " Pathology

Laboratory is one of two such laboratories maintained by the Government. But when confronted with the absurdity of holding that the admissibility of a pathologist's report made in response to a coroner's request under section 14 depends on whether the " . . . . duly qualified medical practitioner . . . . " referred to in that section happens to be in Government service or in private practice, counsel for the respondent felt constrained to fall back on the submission that any medical practitioner carrying out an examination and making a report in response to a coroner's request under section 14 is performing a public service and therefore becomes a public servant *ad hoc*. Their Lordships cannot agree.

Overriding these considerations is the requirement that the " . . . inquiry by a public servant . . . . " referred to in condition precedent (2) must be made " . . . . in discharge of a duty enjoined by the law . . . . " in order to comply with condition precedent (3). It is plain, in their Lordships' opinion, that the " . . . . duty enjoined by law . . . . " must be a duty which the law imposes directly on the appropriate public servant to make the inquiry in question. The only public servant who has any duty to make inquiry under the relevant provisions of the Act is the coroner himself. The argument advanced that an inquiry made by a third party (the medical practitioner) can operate as a discharge of the duty of the coroner is quite untenable.

Accordingly, their Lordships reach the conclusion that an autopsy report made to the coroner under section 14 of the Coroners Act fails to satisfy any of the three conditions precedent to admissibility under section 42(5) of the Evidence Act. It is right to add that a coroner's report forwarded to the Attorney-General under section 15 and approved and forwarded by him to the Registrar under section 16 would satisfy those conditions. This is unobjectionable, since the procedure under sections 15 and 16 is evidently intended to apply only to straightforward cases, where both the cause and the circumstances of the death are clear and undisputed. On the other hand, if section 42(5) were held to render an autopsy report under section 14 admissible, there is no logical reason why it should not have the same effect in relation to a police report under the same section, a result which the legislature cannot conceivably have intended.

From the instant case and the two earlier cases referred to it would appear that it is not uncommon for a pathologist who has made an autopsy report in a homicide case to have left The Bahamas before trial. It may be the practice, perhaps a necessary one, to engage pathologists from overseas on short term contracts to work in the Government pathology laboratories.

In the course of the judgment in *Gregory Cooper* the Court of Appeal said:—

> " We would take the opportunity to stress the desirability of introducing legislation specially suited to meet circumstances now so commonly encountered and which would permit documentary evidence to be tendered at trials when officials who would normally attend to give oral evidence of the facts recorded in these documents are not available. In many jurisdictions there are provisions for reading depositions in such circumstances. Other statutes make special provision for perpetuating evidence where it is anticipated that witnesses may be leaving the country. The matter needs urgent attention."

Their Lordships would respectfully point out that the appropriate legislation is already available. The Criminal Procedure Code (enacted in 1968) provides, by section 129, that, after a person has been charged with an offence not triable summarily, the deposition of a witness about to

leave The Bahamas and likely to be absent if and when the accused is tried may be taken by any magistrate in advance of the committal proceedings. The accused is to be given notice and to have the opportunity to attend. If the witness is then in fact not in The Bahamas when the accused is tried, the deposition is admissible in evidence pursuant to sections 132 and 165(a)(ii). If this procedure had been followed as soon as it was known that Dr. Read was intending to leave The Bahamas, the present difficulty would not have arisen.

Their Lordships now turn to the question whether, notwithstanding the wrongful admission in evidence of Dr. Read's report, the appeal against conviction was properly dismissed under the proviso. The Board is always reluctant to differ, on such an issue, from the decision of the local appellate court, which is best qualified to assess the likely effect on the mind of a local jury, in the context of the evidence as a whole, of the particular misdirection, misreception of evidence, or other irregularity which occurred in the course of the trial. It was submitted for the appellant that the Court of Appeal had misunderstood the point at issue and failed to apply their minds to the true ground on which it was contended that the material in Dr. Read's report had prejudiced the appellant's trial. It must be accepted that the very short passage in the judgment of the majority (Luckhoo J.A. delivered no separate judgment) addressed to the proviso issue was less than satisfactory. But it is difficult to suppose that the point, which, as will appear, is a very obvious one, was not fully argued before the Court of Appeal, as it has been before the Board, or that the judges of the Court of Appeal failed to apply their minds to it.

Their Lordships bear in mind that this is a capital case calling for the utmost care in the application of the proviso. The criterion they adopt, for which it is unnecessary to cite authority, is that the appeal should only be dismissed if it is clear that any reasonable jury must inevitably have convicted the appellant even if Dr. Read's report had been excluded from the evidence.

The appellant and the deceased were both prison officers at H.M. Prison, New Providence. On the night of 28th January 1979 Corporal Brown was in charge of the detail on duty at the First Offenders' Prison, comprising the appellant, Miller, Cartwright and Smith. Sergeant Bannister was in charge of the Main Prison. When Corporal Brown's detail paraded, he reprimanded the appellant for being improperly dressed. It was common ground that shortly before 11 p.m. Brown sustained two ·38 bullet wounds one of which caused his death. Miller, whose duty it was to patrol the prison, had properly drawn two ·38 revolvers and loaded each with five rounds of ammunition. It will be convenient to refer to these as " revolver A " and " revolver B ".

It is sufficient to summarise in barest outline the direct evidence of Miller, Cartwright, Smith and Bannister, on which the prosecution relied and all of which was disputed by the appellant. Miller, on return from patrol, was sitting at a desk where he had put the two loaded revolvers in a drawer. The appellant came up, took the two revolvers from the drawer and said to Miller: " Suppose I start shooting everybody, what will you do? ". Cartwright heard the appellant say to Brown: " You're scheming but I will teach you how to scheme ". According to Smith, the appellant said to him: " I am going to shoot Brown ". Later Smith saw the appellant holding both revolvers and pointing them at Brown. The appellant said: " Look man, I want to talk to you ". Brown replied: " Don't play around with guns like that ". Smith then saw the appellant fire two shots at Brown at a range of about seven feet and separated in

time by an interval of less than a minute. Sergeant Bannister, in the Main Prison, received a telephone call from the appellant, who said: " I have just shot Corporal Brown and used four rounds of ammunition ".

There is no doubt that four shots were in fact fired from revolver A. Four empty cartridge cases, proved by the evidence of a forensic scientist to have been fired from this weapon, were in due course recovered from the floor of Brown's office or nearby. These must have been removed by hand by someone after the shooting as the revolver did not automatically eject them. The empty revolver was also found in the office. Only two bullets fired from revolver A were found. One was not far from where the body of Brown was found on some open ground. The other was handed to the detective who attended the autopsy by Dr. Read, inferentially having been extracted from Brown's body. Both Miller and Cartwright said they heard four shots fired with an interval after the first and the other three in quick succession. Cartwright heard a sharp scream of pain after the second shot. Smith, after the two shots which he saw fired, heard one further shot.

After the shooting it was not disputed that revolver B was handed by the appellant to one Jordan, who was not present at the time of the shooting. It was then fully loaded and was in due course handed to the police. The evidence of the forensic scientist established that an attempt had been made to fire this weapon. Each of the five live rounds taken from revolver B bore the mark of the firing pin, which owing to some fault in the mechanism, had failed to strike the cartridge case centrally.

Photographs of the body of Brown were in evidence. Their Lordships have seen them. They clearly show three bullet holes in the body. One is in the right hand side of the lower abdomen. The other two are in the left rear quadrant of the body above the left buttock and hip. The two holes are separated by no more than two inches. It is obvious even to a layman's eye that these are an entry and exit wound caused by a bullet passing through the body just beneath the surface of the flesh. It would no doubt require an expert to determine which was the entry and which was the exit wound.

The appellant's account, outlined in a statement to the police on the night of the shooting and amplified in evidence, was that he had taken the loaded revolver B when he went on duty at the gate. Brown came up to him with revolver A, demanding a cigarette from him, poking him in the side and threatening him with the revolver. The appellant tried to grab the revolver from Brown. A struggle ensued in the course of which the revolver went off accidentally twice. One of the appellant's answers in cross-examination was: " His hand was between us. All I can say is the gun went off between us ". After the second shot Brown walked away carrying the revolver. Brown then held his stomach and said: " Oh Lord, Newbold, call the doctor ". The appellant denied that at any time after the shooting he had been to the office where the empty revolver A and the four empty cartridge cases fired from it were later found.

The only factor of significance which the autopsy report of Dr. Read added to the evidence summarised above related to the flesh wound in Brown's back. It was her opinion that the bullet hole nearer to the spine was the entry wound and that in the side of the body above the left hip the exit wound. The report having been admitted in evidence, the impossibility of Brown having accidentally shot himself in the back was understandably stressed both by the Solicitor-General in his final address to the jury and by the judge in his summing up. The complaint made on behalf of the appellant is that this may have been the crucial factor in the jury's decision to convict him.

It is to be observed that acceptance of the appellant's evidence in preference to that of the prosecution witnesses who gave direct evidence of what they saw and heard predicates an elaborate conspiracy to give false evidence between Miller, Cartwright, Smith and Bannister. But that apart, the direct prosecution evidence was entirely credible and consistent and was substantially corroborated by the circumstantial and objective evidence of the finding of revolver A, the two bullets and the empty cartridge cases fired from it, and the firing pin marks on the live ammunition in revolver B indicating attempts to fire it. The appellant's account, on the other hand, leaves that objective evidence unexplained and indeed inexplicable.

Finally whether the bullet which caused the flesh wound in Brown's back passed through the body in one direction or the other, it was quite beyond belief that it could have been caused by the accidental firing of the revolver in Brown's hand in the course of such a struggle as that described by the appellant.

Their Lordships are satisfied that, if Dr. Read's report had not been in evidence, any reasonable jury must nevertheless have returned a verdict of guilty. Any other verdict would indeed have been perverse. Accordingly, their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

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In the Privy Council

JAVAN NEWBOLD

v.

THE QUEEN

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LORD BRIDGE OF HARWICH

Printed in the UK
by HER MAJESTY'S STATIONERY OFFICE
1983