40/84

IN THE PRIVY COUNCIL NO. 19 OF 1983

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL

MAURITIUS

B E T W E E N :-

LOUIS LEOPOLD MYRTILE Appellant

and

THE QUEEN Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal in forma pauperis, by leave of the Privy Council (Lords Diplock, Keith and Roskill) given on 18th November 1982, from the judgment of the

P. 151 Court of Criminal Appeal, Mauritius (C.I. Moollan C.J.; V.J.P. Glover J.; R. Lallah J.;) dated 13th July 1982 dismissing your Petitioner's appeal against his conviction for murder before the Court of Assizes (Espitalier-Noel J. and jury) on 6th April 1982, when

P.148 he was sentenced to death.

2. The main questions raised in this Appeal are as follows:-

(i) What is the extent of the Prosecution duty to reveal to the Defence statements made by

witnesses who are called for the Prosecution, and, in particular, does that duty extend to showing all such statements to the Defence so that the Defence can judge for itself whether there are any inconsistencies or other material of use to the Defence?

(ii) What are the principles on which a trial Judge should exercise his discretion to order disclosure of such statements, and, in particular, is the correct principle that the discretion should be exercised in favour of disclosure unless there is some public policy reason against disclosure?

(iii) On the facts of this case, has a miscarriage of justice occurred because of the failure of the Prosecution to reveal certain such statements to the Defence?

(iv) On the facts of this case, has a miscarriage of justice occurred because of the absence of a shorthand note in breach of section 18 of the Mauritian Criminal Appeal Act and the consequent inability of either party to demonstrate conclusively that those inconsistencies that can be detected between the statements of such witnesses and their evidence at trial are the only inconsistencies?

3. The facts of this case are that the Appellant was charged with murder in that, on or about the second day of December 1979 at Clemencia in the District of Flacq he did criminally, wilfully, feloniously, of his malice aforethought and with premeditation kill and murder one Juline Sarah also called Irene. The case for the Crown was that, on the morning of 2nd December 1979 at some time after 7.00 or 7.30 a.m., the Appellant murdered Juline Sarah and concealed her body in a wood near Ti Montagne. He returned to the body later that day in the company of one of the principal prosecution witnesses, Francois Brulecoeur, and coerced the latter in helping him place the body into a gunny bag or gunny bags and carry the body up Ti Montagne until a point came when the said Francois Brulecoeur could escape. The burnt remains of a body were later found on Ti Montagne, and medical evidence indicated that the remains were those of a female. The Appellant (who did not give evidence at trial but did make a short statement claiming innocence from the dock) made a statement to the police denying the offence and denying being on or near Ti Montagne at all on the 2nd December 1979. The principal evidence both of premeditation and an intent to kill (both essential elements of the offence of murder in Mauritius) was the reply allegedly given to Francois Brulecoeur when he asked: "Why did you kill her?". The reply allegedly was "Parce qui li ti ape faire moi di tort".

4. The following witnesses were called for the Prosecution

(the list excludes police officers and experts).

(i) Francois Brulecoeur

P83 to 97 — who gave evidence as to his involvement in the alleged concealment of the body later in the day of the 2nd December 1979.

P98 to 99 (ii) Jeewan Dwarka

who gave evidence to the effect that on the 2nd December 1979 he saw the Appellant and Brulecoeur walk past him towards the estate road (that led to Ti Montagne).

P101 to 104 (iii) Dharandeo Dookhee

who gave evidence that at 7.00 or 7.30 in the morning of 2nd December he saw and spoke to the Accused when he was on Ti Montagne.

P106 to 107 (iv) Cecile Hector

the daughter of the deceased, who gave evidence of her earlier relationship with the Accused and the relationship between him and the deceased.

P108 (v) Satyadev Jawaheer

who gave evidence that he did not see the Accused at all on 2nd December 1979.

P109 (vi) Khemraj Moti

who gave similar evidence to witness (v).

P110 (vii) Marie Maud Lacharamate

who gave evidence that she saw the deceased walking towards Ti Montagne at about 7.00 a.m. on 2nd December.

P111 (viii) Frederick Bulecoeur

brother of Francois Brulecoeur, who gave evidence of the Accused coming to meet Francois at about 11 or 11.30 in the morning of 2nd December.

P112 (ix) Noelie Corteau

sister of the deceased, who gave evidence that the deceased did not call at her home on 2nd December.

P113 (x) Luc Sarah

mother of the deceased, who gave evidence as to the discovery of the remains.

P113 to P114 (xi) Lutchmeenarian Dorah

who gave evidence that he saw both the Accused and the deceased on the morning of 2nd December going towards Camp de Marque (but not together).

P115 to P116 (xii) Roodwantee Padaruth

who gave evidence of seeing broken sugar canes on Ti Montagne on the morning of 2nd December 1978.

P116 to P118

(xiii) James Hector

who gave evidence of the disappearance of and search for the deceased.

5. Counsel acting for the Appellant made a number of requests that the Prosecution disclose the witness statements in their possession, both of witnesses that they proposed to call and of other persons interviewed by them. Such a request was made before the Preliminary Enquiry, and repeated in correspondence before the trial began. When the trial began, Counsel applied again for disclosure. The application and

P49 to P52

the ruling are recorded at pages 49 to 52 of the Record. It is respectfully submitted that the case of Fritjohn v The Queen 1982 Judg. No. 112 cited by the trial judge as authority in support of his refusal to order discovery of the statements, is not directly in point.

6. At the commencement of the trial, the Counsel for the

P49 to P52

Appellant also made a request that the trial judge order a shorthand note of the proceedings, if necessary at the cost of the Defence. The trial judge, in reliance upon the authorities of Regina v Polimont 1979 M.R. 277 and Regina v Ramlochan 1980 Judg. No. 251, refused to make such a ruling, and no shorthand note was in fact made of any part of the proceedings save for the summing up.

7. The statutory provisions relevant to these applications

are as follows:-

(i) Criminal Procedure Ordinance, Cap. 169

59. Every person against whom a criminal information has been filed for treason or felony shall have, if required, a true copy thereof delivered unto him by the Registrar of the Supreme Court five days at the least before the day of trial, as well as a list of the witnesses intended to be produced on the trial, for proving the said criminal information, and also a list of the jury, mentioning the names, profession and places of abode of the said witnesses and jurors.

60. Three days at least before the day of his trial, every accused party shall deliver or cause to be delivered to the Registrar of the Supreme Court, a list of the witnesses, and a notice of the documents for the defence.

61. Nothing herein contained shall prevent the Crown or other prosecutor or the accused from delivering any further list of witnesses, in case it be made to appear, to the satisfaction of the Court, that the party filing such further list was not, at the time of filing his previous list, aware that the evidence of such witnesses was material to the case.

62. If the accused plead without claiming a copy of the criminal information under article 59, or without having such copy delivered to him within the time specified in that article, any objection in respect of such non delivery or defective delivery shall be waived.

63. Any objection by the accused that the list of the witnesses has not been delivered to him according to the provisions of article 59, shall be too late if not made before the first witness is called on the trial.

64. All persons who shall be held to bail or committed to prison for any offences shall be entitled to require and have on demand, copies of the examinations of the witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding six cents for each folio of ninety words. Provided that if such demand shall not be made before the day appointed for the commencement of the Assizes or Sessions at which the trial of the person in whose behalf such demand shall be made is to takeplace, such person shall not be entitled to have any copy of such examination of witnesses, unless the Judge presiding

at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such Judge, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having previously had by the party charged.

65. All persons under trial shall be entitled at the time of their trial to inspect, without fee or reward, all depositions or copies thereof which shall have been taken against them by the committing Magistrate, and any documentary evidence produced on behalf of the prosecution.

(ii) Criminal Appeal Act

s.18(1)(a) Shorthand notes shall be taken of the proceedings at the trial of any person before the Supreme Court who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal, a transcript of the notes or any part of it shall be made if the Registrar so directs, and furnished to the Registrar for the use of the Court or any Judge.

(b) Additionally, a transcript shall be furnished to any interested party upon the payment of such charge as may be fixed under the Legal Costs Act.

(2) The Governor-General may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.

(3) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the Registrar or by the Governor-General, shall be defrayed, in accordance with scales of payment fixed under the Legal Costs Act, out of money provided by the Assembly, and order of Court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript.

8. The statutory provisions governing the powers of the Court of Criminal Appeal are as follows:-

Criminal Appeal Act

s.6(1)(a) The Court on any appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that

it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of theCourt 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 in any other case shall dismiss the appeal.

(b) The Court may, notwithstanding that it thinks that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered.

9. The Court of Criminal Appeal, in giving judgment on 12th July 1982, held that the provisions of ss. 59 to 65 inclusive of the Criminal Procedure
p.157 1.10 Ordinance were not exhaustive and that they would be bound by the English practice as to the disclosure of witness statements. They then set out their under-
p.157 1.15 standing of the English practice, but did not refer to the "Practice Note" at 1982 1 All ER 734. They held that: "whilst there may be instances where it

would work injustice to refuse to allow Counsel for the defence to look at the statement of a particular witness, the trial Judge was perfectly justified in refusing a motion to allow Counsel to have access to every statement made to the police by each of the
p158 l.30 witnesses, or what the Judge called a "general order", before the trial started." They further disposed of a ground of appeal based upon the absence of a shorthand note on the basis that the Mauritian cases established that s.18 of the Criminal Appeal Act was directory and
p154 l.10 not mandatory and that there were no reasons in the instand case for departing from the established practice of having no such note.

10. The Appellant makes the following principal submissions:-

(i) a trial judge has a discretion whether or not to order disclosure of prior statements of witnesses due to be called by the Prosecution. This discretion must be exercised judicially and consistently from case to case. The relevant principles are now that disclosure should be ordered unless some powerful public policy or other reason demands a contrary result.

(ii) Alternatively, there is a general duty on the Prosecution to reveal such statements to the Defence so that the latter can judge for itself whether or not there are inconsistencies or other material helpful to the Defence.

(iii) Alternatively, a duty on the Prosecution to reveal the statements of Francois Brulecoeur, Dharandeo Dookhee, Cecile Hector, Jeewan Dwarka and Lutchmeenarian Dorah to the Defence arose on the particular facts of this case.

(iv) Further, the trial judge did err in law in refusing to order a shorthand note of the proceedings. The true effect of the English authorities is not that the requirements of the legislation are directory in the sense of giving the Court a complete discretion as to whether to have a shorthand note or not, but that the absence of a shorthand note will not in itself form a sufficient ground of appeal unless the Appellant is able to point to something that might have gone wrong at trial. (See R v Elliott 1909 2 Cr. App. R. 171 at p.172, per Channell J., and R v Le Caer 1972 56 Cr. App. R. 727 at p.730, per Widgery L.C.J.) In this case it is no longer possible to be sure that all inconsistencies between what was said at trial and before trial have been identified.

11. It is submitted that the existence of the discretion outlined in paragraph 10(i) above is beyond doubt (see, inter alia Mahadeo v R. 1936 2 All ER 813 P.C.; Baksh v R. 1958 AC 167; R v Xinaris 1958 43 Cr.App.R.

30n; R v Charlton 1972 V.R. 758 as explained in Maddison v. Goldrick 1976 1 NSWLR 651). There is, however, no clear exposition in any of the authorities as to the principles on which the discretion should be exercised. In England, the background now would be the "Practice Note" at 1982 1 All ER 734, and all material not falling into the categories set out in paragraph 6 of that Note would normally be disclosed. If, accordingly, an application was made to a trial judge for disclosure of material not falling into any of these categories, it is submitted that the trial judge would, and should, grant the application because to do otherwise would be to discriminate between defendants arbitrarily. It is submitted that it would be relatively simple for the trial judge to establish whether the material did, in the eyes of the Prosecution at least, fall into any of the categories. The report of Maddison v Goldrick supra contains the following passage from the Court of first instance (at p.686 letter E):- "Well, is there anything in that Brief that in the interests of public policy you seek to have shielded from inspection? You understand what I am putting to you? A. I understand fully what you are putting to me. No, it is His Worship's ruling that it remains in the Court. As I said before, I have nothing to hide, I am as open as a book, but I feel obliged again, and I repeat, these first statements are my own hearsay, and are resumes of the statements.

BENCH: Yes, not concerned at the moment Sergeant with what is not admissable in form; ,,, WITNESS: A. Well I have no objection to the Record under public policy."

There was nothing about the Appellant's case to prevent the trial judge from asking similar questions. He did not do so because, it is submitted, he misconceived the principles on which his discretion should be exercised and thought that he should refuse discovery unless some special reason was shown.

12. The desirability of the above approach is supported by a number of matters, summarised in the following passage from Archbold "Criminal Pleading, Evidence and Practice", 41st Edition, London 1982, para 4-179:-

> "Once again, the question arises as to whether the defence are entitled to see this statement in order to be able to judge for themselves whether there is a discrepancy, and if so whether it is material. Implicit in the observations of Humphreys J. and Avory J. in R v Clarke 1930 22 Cr.App.Rep. 58 is the view that the defence are so entitled, but that case was concerned with a previous written description of the accused given by the police officer to his superior.

Further, there have been cases where, in view of their particular circumstances, judges have ruled that the defence should be allowed to see statements made to the police by witnesses for the prosecution: see R v Hall 1958 43 Cr.App. R. 29, R. v Xinaris 1958 43 Cr.App.R. 30n. In the absence of any authority to the contrary it is submitted that the practice of revealing to the defence the previous statements of prosecution witnesses which are relevant to their evidence is not only wholly unobjectionable but is very mushc in the interests of justice. This practice is largely followed at the Central Criminal Court. Oral as well as written inconsistent statements of witnesses can be both put in cross-examination and, if not admitted, proved under Denman's Act. It is submitted that it is wholly wrong for the Crown not to furnish the Defence with such material and thus prevent them from exercising their rights under that Act. Quite apart from the "inconsistency" point there is the further consideration that a witness may have forgotten or omitted in evidence some part of his statement which may, unbeknown to the Prsecution, be most material to the defence ase."

13. An alternative way of viewing this matter is to say that the Prosecution are under a binding duty to disclose such statements, at least unless there are powerful reasons of the sort outlined in paragraph

6 of the "Practice Note" not to do so. It is clear that such a duty arises once the Prosecution became aware of any inconsistency, but there are difficulties in limiting the duty to this situation. First, the Prosecution may take a different view from the Defence as to what constitutes a material inconsistency or may not be aware of parts of the defece case that would be assisted by the relevant statement. Secondly, as a matter of practice the Prosecution are unlikely to give as close attention to the question of whether there is an inconsistency as the Defence. Thirdly, as the instant case reveals, there is no adequate way in which a decision of the Prosecution can be reviewed, since in normal circumstances no one but the prosecution will see the relevant statements. In almost all cases, the Defence will not know whether anything material has been kept from them. If the Prosecution has made a mistake, it will never come to light, and even if there is an appeal, it will be doomed to failure (unless the Appellant's submissions above are accepted) because it will be impossible to point to any wrong exercise of discretion by the judge or breach of duty by the prosecution.

14. The Appellant in the instant case did not see the relevant statements (now to be found annexed to this Case) until, in the case of those of Francois Brulecoeur, some time after Your Lordships granted leave, and in the case of the remainder, shortly before the Case was drafted. At trial, Brulecoeur

p87 L50
p88 L8

had denied making more than one statement, although in fact he made three. it is submitted that, without recourse to the wider submissions above, the Prosecution should have revealed the statements of Brulecoeur in these circumstances. It is further submitted that examination of the statements reveals at least the following inconsistencies or other matters that might have assisted the Defence, and that should have led the Prosecution to reveal the statements:-

(i) Dharandeo Dookhee gave evidence at trial that he spoke to the Appellant on the morning of 2nd December 1979. In cross-
p102 1.20 examination he said "I speak normally. The accused talked loudly. I spoke as I am doing now." He made two statements to the police, neither of which was revealed to the defence. The two differed radically from each other. Part of the first read as follows:- "From the road itself I looked in the direction of the mountain near the pineapple plantation in a lane, I saw at a distance of about thirty gaulettes a person whom I well know [the Accused] ... I did not talk and I did not notice if he was holding something in his hand". Part of the second read:- "from there I was, I shouted loudly. I told him "My aunts say that there are thieves there; they have not been able to collect the wood. Popol answered me "I am picking some mangoes". In his summing up,

the trial judge said that he was sure

p144 1.3 the jury would regard the evidence of Dookhee as very important, and it is accordingly submitted that material which might have led to an attack on his credit is of equal importance.

(ii) Francois Brulecoeur

(a) The statement made to the police is clear to the effect that the body was placed in only one gunny bag. The evidence at the Preliminary

p.29 1.1 to 30 Enquiry was to the same effect although the language is not so clear. At trial, Brulecoeur insisted

p.54 1.58 there were two gunny bags. He was

p.88 1.30 to 40 cross-examined vigorously on this issue. The point could have been made with far greater force had the initial statement been available to the Defence.

(b) A crucial part of this evidence of premeditation was the evidence of

p84 1 40 to 60 the remark allegedly made by the accused that the deceased had done him "trop beaucoup le tort". Examination of the statement made to the police shows that a similar remark is allegedly made after and not before the Appellant had threatened

Brulecoeur and asked him to ehlp place the deceased in the gunny bag.

(c) At trial Brulecoeur said "I did not run away because at the time he was telling me "trop beaucoup de tort"

p.90 1.36 he had the sabre in his hand. According to the police statement the sabre was lifted after this remark.

(d) The language of the following passage at trial is very different from the equivalent passage in the police statement.

Trial:- "While he was climbing after a distance of about 10 gaulettes I put the tente down and escaped. I

p.85 1.10 ran away ..."

Police statement:- "When Popol Mertil took the body on his shoulder he asked me to take the bag and place it on the road near the pineapple plantation, later he would collect it. And I took it and I left it on the road."

(iii) Lutchmeenarian Dorah, purported at trial to

p.114 1.13 be able to remember the colour of the shirt allegedly worn by the accused. The police statement taken on 5th December 1979 reveals

that he said he could not remember the type of shirt then.

(iv) Cecile Hector gave a substantially different account of her relationship with the accused from that contained in the police statement. This account was relevant because the alleged motive for the killing was the poor relationship between the Appellant and the deceased caused by the history of this relationship.

p106 to p107

(v) Jeewan Dwarka: His evidence at trial made no mention of the length of time he had allegedly had the accused and Brulecoeur under observation. It is apparent from the police statement that this was supposedly quite considerable. This issue is of course important because on matter on which Brulecoeur was extensively cross-examined was the presence or absence of a litre bottle of water. Dwarka said at trial that neither said Brulecoeur nor the accused were holding anything except the bicycle.

p98

p 99 1.40

15. The Appellant respectfully submits that the judgment of the Court of Criminal Appeal of Mauritius was wrong and ought to be allowed with costs, for the following (amongst other)

REASONS

1. BECAUSE the learned trial judge was wrong to refuse to order the Prosecution to produce copies of statements of witnesses they proposed to call to the Defence.

2. BECAUSE there was a breach of s.18(1)(a) of the Criminal Appeal Act at trial.

2. BECAUSE the Prosecution wrongly refused to disclose relevant witness statements to the defence.

RICHARD DRABBLE

NO. 19 OF 1983

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