The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 1 of 2010

Between:

DARRONTE LAVAR DILL

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Ward, J.A.
Baker, J.A.

Appearances: Mr M Pettingill for the Appellant
Mr R Field and Mr. C Mahoney for the Respondent

Date of Hearing: **9, 10 & 14 November 2011**
Date of Judgment: **19 March 2012**

Judgment

WARD, JA.

1. On the 16th December 2009 the appellant was convicted of murder of two elderly gentlemen who lived simple lives in a shed close to the waters of a bay in St. David's. They

had retired for the night of Saturday 20th September 2008 one in a lounge chair, the other on the floor.

2. Early on the morning of Sunday 21st September 2008 they were rudely awakened by two thugs, who for no reason other than that they were looking for someone to kill and who found two helpless men who were in the wrong place at the wrong time, pounced on then and inflicted on them very serious injuries from which they soon died. It was a horrific act of sheer, senseless, sadistic brutality committed in a rustic area of Bermuda once known as the isles of rest.

3. To add insult to painful injury after the deceased Brangman had been stabbed four times, had his throat twice cut and his face smashed with stone causing multiple blunt impact facial and head injuries, his body was burnt beyond recognition.

4. The deceased Gilbert was stabbed thirteen times, jumped in the sea to escape his attacker and suffered a watery death. His body was found floating nearby the next morning after the convict, Dill, with cold cynicism had pronounced him dead.

5. After having extinguished two lives that were of great value to others as expressed in the anguished cries of the Victim Impact Statements, the convict, his associate and another man went to church in Somerset at the other end of the island later that morning. The convict's associate is yet to be put on trial.

6. The appellant, in his police interview, presented an unusual insight into a future assessment of his character in expressing the wish that he would not be regarded as a monster.

7. Notice of Appeal was filed on 6th January 2010. There are three Grounds of Appeal. The first is in relation to the admission into evidence of the recorded conversation between the appellant and Roger Eugene Lightbourne Senior on the night of 1st October 2008. The second is in relation to the admission into evidence of the tape recorded police interviews of the appellant conducted on the 1st and 2nd October 2008. Similar principles of law were argued under both heads.

8. Mr. Pettingill, Counsel for the Appellant, submitted that the Court should be concerned about the circumstances in which the confessions of the appellant were obtained by the police. Particular objection was taken to the manner in which Lightbourne Senior, a man with an extensive criminal record was used by the Police at Hamilton Police Station when he was the principal suspect and had an interest in diverting attention from himself.

9. He suggested to the police that they should focus their attention on Darronte Dill who had been his house guest over the relevant period. His plan was that the police should place them in adjacent cells where the police had concealed themselves and listen to their conversation. The plan was accepted but, in addition, on the advice of Crown Counsel, the conversation was recorded. The result was that two police officers, DC Henry and DC Mathurin overheard the conversation between Lightbourne Senior and Dill and it was recorded unknown to the talkers. The police decided to go along with the plan in hope of catching both suspects in the same net. On the following day both of them were charged with murder and the charge against Lightbourne Senior was only dropped after a potential witness, Mr. X, had been discredited.

10. Mr. Pettingill argued that there was an element of entrapment in the investigative method adopted which conflicted with the principles of fairness embodied within the Bermuda Constitution Order 1968 s.6 and s.90(1) of the Police and Criminal Evidence Act 2006 and that the Chief Justice, in the exercise of his discretion, should not have allowed evidence of the conversation to be given by the witnesses who overheard it and recorded it. He argued that such evidence is in breach of the fixed principles and rules of law relating to the treatment of individuals under arrest.

11. The Bermuda Constitution Order 1968 s.6 sets out the provisions relating to secure protection of the law, a fair hearing before an independent and impartial court established by law, the presumption of innocence, informing the accused about the specifics of the charge, ensuring that adequate time and facilities are provided for the preparation of the defence, the calling and the examination of witnesses.

12. The Constitution does not frown upon nor rule out the gathering of evidence by eavesdropping in the manner adopted in this case.

13. Pursuant to section 5(1) (e) of the Bermuda Constitution Order 1968 a person may be deprived of his personal liberty upon reasonable suspicion that he has committed a criminal offence. There was no breach of a constitutional provision in the arrest of the accused.

14. Section 90 of the Police and Criminal Evidence Act 2006 reads:-

> *90(1) in any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.*
>
> *90(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –*
>
> *(a) by oppression of the person who made it; or*
> *(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*
>
> *the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.*

15. 90 (8) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

16. The Chief Justice had held, quite rightly, that in carrying out the plan of getting Dill to reveal what he knew of the murders, Lightbourne Senior was not an agent of the police. Counsel argued that in the course of the conversation, Lightbourne Senior was a conduit for the police and the means of oppression. We do not agree. It has to be noted that the police never told Lightbourne Senior what to ask or say and the direction of the conversation was not within the control of the police.

17. In *R v Sang* [1979] UK HL 3 the appellant alleged that he had been induced to commit the offence by an informer acting on the instructions of the police. On appeal before the Privy

Council, it was held that there is no defence of entrapment in English law, that the trial judge cannot exclude evidence of a crime on the ground that it was instigated by an agent provocateur, and per Lord Diplock the method of inducement was not unfair.

18. The underlying principle in the concept of oppression is that an accused must not be unfairly induced to confess to an offence as expressed in the maxim:

> No man is to be compelled to incriminate himself – *nemo tenetur se ipsum prodere*.

19. As to the meaning of a fair trial, Lord Diplock said at page 8:

> *"A fair trial according to law involves, in the case of a trial upon indictment, that it should take place before a judge and jury; that the case against the accused should be proved to the satisfaction of the jury beyond all reasonable doubt upon evidence that is admissible in law; and, as a corollary to this, that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled and the jury receive correct instructions from the judge as to the law applicable to the case, the requirement that the accused should have a fair trial according to law is, in my view, satisfied; for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted."*

20. In *R v Ali and Hussain* [1965] 49 Crim App. R. 230 at p. 239 Marshall J said:

> *"They were left in the room together. They had not, of course, been warned of the presence of the microphone. The police were inquiring into a particularly savage murder and it was a matter of great public concern that those responsible should be traced..... The method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper. If in such circumstances and at such a point in the investigations the appellants by incautious talk provided evidence against themselves, then in the view of this court it would not be unfair to use it against them."*

21. In *Dearing v R* Bermuda Criminal Appeal No. 44 of 1985 a special agent from the United States was placed in a prison cell with a suspected drug dealer from Bermuda to gather evidence against him. In quoting from *R v Murphy* [1965] N.I. 138 it was stated that detection by deception is as old as the constable in plain clothes and the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without occasional resort to it. The question of unfairness to an accused person has to be judged in the light of all the surrounding circumstances. The Court held that it was not unfair to gather the evidence in the manner adopted.

22. It was submitted that Dill was in Police custody and for a police interview on the subject matter to take place a caution would first have had to be administered. It should be noted that Dill was first taken into custody for the incident at Ovations Night Club. Custody for the two murders came later.

23. A timely caution under the Judges' Rules would have alerted Dill to his right to silence, should he so wish. Placing him in a position where he could speak to an older person, in whose house he had been residing over the last five days, was to provide him with an opportunity to talk. But the police had no obligation to Dill to ensure that he remained silent.

24. Counsel argued further that he should have been allowed to contact an attorney even although he had indicated, at the time of his arrest, that he did not want one. Somehow because of his age, just three days short of eighteen years, and the circumstances, it seems to be argued that an attorney should have been thrust upon him. At best an attorney would have been likely to advise him to make no comment, which he did to some questions in any event. Because of his past experience his right to silence was something Dill would have known. It does not follow that he would have accepted that advice, for clearly he felt comfortable unburdening himself to Lightbourne Senior whom he knew well and in whose household he was familiar, for the evidence shows that at a stressful or critical time he had abandoned his grandmother's Pembroke home at Fenton Drive in favour of the Lightbourne's St. David's residence at 31 Tommy Fox Road.

25. Counsel also complained that the method of eavesdropping by having two suspects close by in separate rooms, where any conversation between them could be overheard by two police officers concealed in one of the rooms, was inappropriate as, in the modern police stations in Bermuda, there are specific interview rooms with sensitive recording equipment. We find no merit in this complaint. It is for the police to decide the most effective method of gathering the information needed to solve the crime within the boundaries permitted by law.

26. Counsel argued further that the poor quality of the tape recording rendered it unreliable and it should not have been admitted in evidence.

In this Ruling on admissibility the Chief Justice said at paragraph 12:

> *"The lights were turned out and the jailer left, and a conversation then followed between the defendant and Lightbourne, which the officers both overheard and recorded. Lightbourne, of course, knew of the presence of the officers. I accept the police evidence that he did not know of the fact that the conversation was also to be digitally recorded. The defendant, of course, was unaware of either fact."*

27. The evidence of the tape recording did not stand alone. There were two police officers who also gave evidence of what they heard.

28. In *R v Bailey and Smith* [1993] 97 Crim.App.R.365 two accused, having been lulled into a false sense of security that the cell in which they had been placed was not bugged, made a number of most damning taped admissions which were later admitted into evidence.

29. It had been argued on behalf of the accused that the stratagem adopted of putting the two men together in the cell where their conversation would be recorded, even if not directly contrary to any legislative provision or the Codes of Practice, nevertheless undermined those provisions and more particularly the accused's right to silence and so ought not to provide the Crown with admissible evidence.

30. It was held at page 372 that the recordings of conversations taken in an interview room, which the police have bugged is admissible in law in court. The remaining question was

whether the trial judge should admit it in the exercise of his discretion having regard to the manner in which the evidence has been gathered.

31. Defence Counsel recognized that evidence improperly obtained may nevertheless be admitted for the ultimate question is the probative value of the evidence rather than how it was obtained. However he submitted that the recording of the conversation should have been postponed until after Dill had been allowed to consult an attorney without regard to the convenience of the police and its duty to investigate serious crimes.

32. We do not agree. The police should not be shackled unreasonably in their investigation of serious crimes. In the last five years murders in Bermuda have increased significantly and with a ferocity previously unknown. The isles of rest are experiencing an unaccustomed turbulence.

33. Mr. Pettingill submitted that Lightbourne Senior had led Dill to believe that the police had his clothes, gloves and D N A evidence which was untrue and so weakened any resolve he might have had to remain silent. The reaction of Dill to this information was most instructive. He responded that someone must have found them at Buffy's house which was the place with the trash can in which he said he had thrown the things. Later Buffy's telephone number was found on Dill's SIM Card.

34. The whole purpose of bringing the two suspects together was to encourage them to talk. In addition the DNA of the deceased Brangman and the DNA of the appellant were later found inside the mobile telephone of the appellant who had photographed the burning of Brangman's body.

35. Counsel argued that the language used by Lightbourne Senior to Dill was threatening and oppressive and seemingly that Dill, out of fear for Lightbourne's reputation and perceived power, said what Lightbourne Senior wanted him to say.

36. The recorded conversation revealed no threatening tone by Lightbourne Senior, no encouragement to Dill to accept blame for something he did not do.

37. In addition Defence Counsel submitted that the interview on 1st and 2nd October 2008 was not fair. The attorney sent to Dill by the Legal Aid Office only had a brief ten minutes with his client before the interview began, nor was he given a copy of the recorded conversation between his client and Lightbourne Senior the night before. He challenged the overall fairness of this interview.

38. We have already expressed our view on the fairness of the interview. At this juncture we would only adopt the observation of the Chief Justice in Paragraph 21 of his Ruling of 19 January 2010 that "the details of what the defendant confessed match closely the reality found at the scene and on post mortem examination of the deceased". In our view details such as the number of stab wounds inflicted, the type of books in the deceased Brangman's bag, the observation that the deceased Gilbert wore no shirt, the manner of smashing Brangman's face with stones which were piled up outside the shed and that he was sitting in the chair and just bleeding on, could only have been known by an active participant.

Ground 3

39. The third Ground of Appeal is that the statement of Mr. X, a potential witness, who cast the blame on someone other than Dill, should have been admitted in evidence under section 75(3) of the Police and Criminal Evidence Act 2006 which empowers the trial judge to admit certain documentary evidence if certain conditions are satisfied.

40. In the exercise of his discretion the Chief Justice did not accept that the conditions were satisfied. It was a proper exercise of discretion with which we agree.

41. As a general rule witnesses have to be examined and cross-examined before a jury and not merely submit untested statements. We do not think it was in the interest of justice to admit the statements in evidence. It would most likely have introduced a measure of confusion on the important issue of identification as the substance of the statements was not supported by any other independent testimony. If the appellant wanted Mr. X as a witness, he should have called him. In addition, the motive behind the making of the statements raised very serious issues. The jury should not have been encouraged to speculate on who the second murderer was.

42. For the reasons given above, the appeal is dismissed.

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Ward, JA

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Zacca, P

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Baker, JA