

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CrA. Nos. 80, 81, 83 & 84 of 1998

BETWEEN

- 1. WILFRED BAPTISTE**
- 2. MICHAEL GRAHAM**
- 3. KIRK CHARTER**
- 4. DARREN MOHAMMED**

APPELLANTS

AND

THE STATE

RESPONDENT

**Panel: R. Hamel-Smith, J.A.
J. Permanand, J.A.
M. Warner, J.A.**

Appearances:

**Ms. M. Rose for 1st and 4th Appellants
Mr. R. Rahim for 2nd Appellant
Ms. S. Choate for 3rd Appellant
Mr. R. Dolsingh, S.C. for Respondent.**

Date: April 11, 2001

JUDGMENT

Delivered by R. Hamel-Smith, J.A.

The appellants were charged with the murder of Neville Chin Hong on October 23, 1992 at Indian Walk Road, Moruga. The trial began in June 1998 and on July 8, 1998 the jury returned a verdict of manslaughter. It is against that verdict that the appellants have now sought leave to appeal.

The prosecution's case rested mainly on the evidence contained in the statements obtained from the appellants. Without those statements, the case against the appellants was doomed to failure. The appellants challenged the admissibility of the statements on the ground that they were obtained by force and oppression. The prosecution countered that they had been voluntarily given. The trial judge, after a voir dire in respect of each appellant, ruled that the statements were admissible. This ruling is now the main ground of appeal. To fully deal with it, it is necessary to have a brief summary of the prosecution's case.

On October 21, 1992, a black Laurel motor car, was stolen by four men from a house in Mayaro. On the following day, one Anthony Lalchan said that he saw two of the accused in that car in the vicinity where the murder took place. His evidence was rather tenuous and unpersuasive, particularly as the windows of that vehicle were heavily tinted, making recognition of any passenger inside extremely difficult.

Nevertheless, two days later, on October 23, 1992, at about 9.00 a.m. the deceased had opened his shop in Moruga for business when the appellants and another man pulled up outside in the black Laurel. One of the appellants (Baptiste) remained in the vehicle and the others entered the premises wearing masks. Two of the men had guns and the other two had cutlasses. One of them placed a gun at the neck of the deceased and asked him for money. Suddenly there was an explosion and the deceased fell to the floor and died instantly. All four ran out of the shop and escaped in the waiting car.

A post mortem revealed that the deceased had died from shot gun injuries to his neck. The black Laurel was later found abandoned at Lengua Road with false number plates. In the course of their investigations the police arrested Graham on October 31, 1992. They had found him at Charter's home. Charter himself was not at home at the time. Graham was told of the report and after being cautioned he told the police that he would speak to them at the station. He preferred not to say anything in the presence of Charter's mother. At the station Sgt. Maharaj said that Graham admitted that : *"I was there when the man got shot, but all I had was a cutlass"* and that he had a sawed-off shotgun at the back of his house in Marabella and offered to take the police there. He was taken to the house and there he retrieved the shotgun in a fig patch. He was taken back to the station and again asked if he would give a statement. He said that he would have to make up his mind.

At about 1.30 **a.m.** on November 1, 1992, the officers went to Mohammed's home in Gasparillo. There, they found Charter (a/c Cheesy). He was told of the report and remained silent. Mohammed was not at home. Charter offered to take the police to Point Lisas to find Mohammed. He did so. After being told of the report, Mohammed, too, remained silent. They were taken to the station and there Mohammed, according to Sgt. Maharaj admitted that he was there when *'the Chinese man got shot'* but all he had was a cutlass and he offered to give a written statement. Charter, again according to Sgt. Maharaj, said that while he was present, he did not kill anybody and he too agreed to give a written statement.

The following day, November 2, Baptiste (a/c "Strongy") was seen walking along Harris Street, San Fernando. When he was approached by Cpl. Dyette and told of the report, he remained silent. He was taken to the station in Marabella. When confronted by Sgt. Maharaj that he was a suspect in the matter, Baptiste, according to Sgt. Maharaj, told him that (a) he was the driver of the black Laurel that transported Graham and the others with a bag containing three guns to the Chinese man's shop; (b) the purpose was to rob the man only and (c) he was prepared to give a written statement.

Mohammed was the first to give a written statement. According to Sgt. Maharaj, he began taking the statement at 8.35 a.m. on November 1, 1992. This was completed by 9.45 a.m. In that statement Mohammed explained the part he played in the plan. He said that the intention was to rob the "Chinese man". He was armed with a cutlass when they entered the shop. He was standing by the door of the shop when he heard a shot inside. He immediately ran back to the car, closely followed by the other men. He implicated the other appellants in the commission of the crime.

Later that morning at about 10.20 a.m. Graham gave a written statement to Sgt. Maharaj which was completed at about 11.00 a.m. His statement was later authenticated by the Justice of the Peace, Francis, at about 5.00 p.m. that evening. In his statement he said that they had decided to rob the "Chinese man" to get some money. They had stolen the black Laurel from a woman in Mayaro on the night of October 21, and changed the registration plates. At the scene of the crime they put on masks and he was armed with a cutlass when they entered the shop. He approached the Chinese man and ordered him not to move. He told him that it was a hold up. He saw Charter push a gun to the Chinese man's neck and he then heard an explosion. The Chinese man fell to the ground and they all ran out of the shop and escaped in the black Laurel. They later abandoned the car.

At 11.05 a.m. Charter gave his written statement to Sgt. Maharaj. In the statement he described the part he played leading up to the visit to the "Chinese" shop. He said that Graham had handed him a gun and a mask. The others were armed with either cutlasses or guns. He said that when they entered the shop, Graham placed the shotgun on the neck of the "Chinese man" and told him not to move. He said he then heard an explosion and the "Chinese man" fell to the ground. They all fled the scene. The statement was completed by 12.30 p.m. and authenticated by Francis at 5.30 p.m. that evening.

Baptiste was the last to give a written statement. At about 4.15 p.m. on the following day (November 2), Sgt. Maharaj wrote out the statement. Briefly, in it Baptiste said that he had been told to drive the black Laurel. He had remained in the vehicle while the others had gone in to the shop. He heard the sound of a gunshot coming from the shop. The other men ran back to the car and he drove off with them. His statement was completed at 5.40 p.m. and authenticated by the Clerk of the Peace, Mr. Sookhansingh at 2.58 p.m. the following day.

Apart from other peripheral evidence, there was no other cogent evidence on which to convict the appellants. The prosecution had to rely on the written confessions to secure a conviction. That much is admitted. There was no evidence of fingerprints being

taken either from the shotgun allegedly retrieved or the black Laurel. Whether a forensic exercise was done or not on either of these objects, nothing was produced that implicated the appellants in the commission of the crime. Save for the fleeting glance of two of the accused by Lalchan the day before the killing, no one else was able to identify any of the appellants.

At the trial all the appellants presented an alibi. They challenged the authenticity of the statements, claiming that they were not voluntarily given. Graham in particular claimed that he had been severely beaten by the police and forced to sign the statement which he said had been prepared by Sgt. Maharaj. The trial judge held a voir dire to determine whether the statement should be admitted. After hearing the two police officers and the appellant, Graham, he admitted the statement into evidence.

Mohammed and Charter also challenged the admissibility of their statements but in both instances they claimed that in addition to being beaten, they had witnessed the beating administered to Graham and it was out of fear of a similar beating that they had signed the statements. The admissibility or inadmissibility of their statements was closely linked to the fate of Graham's statement. Baptiste, on the other hand, did not witness the beating of Graham but he complained that he too was beaten and forced to sign his statement.

The main ground of appeal is that the trial judge had erred in exercising his discretion in admitting the statements. This was the common ground in all the appeals but they turned on the fate of Graham's statement. If that was properly admitted the chances of the others being deemed non-admissible was remote. The converse was also true and it is fair to say that the prosecution accepted that the outcome of the appeal turned on whether the judge was correct to have admitted Graham's statement. To this end, it was necessary to view the official transcript taken on the voir dire and that forms part of the Record. Briefly, Graham's argument is that the onus is on the prosecution to establish beyond all reasonable doubt that the statement had been voluntarily given. As regards the admissibility of his statement, on the evidence, counsel submitted, it could not be said that the trial judge did not entertain some doubt as to whether the injuries complained of by Graham were as a result of a beating inflicted by the police officers. If there was reasonable doubt then the trial judge should not have admitted the statement. We shall examine the evidence in relation to Graham's statement to determine whether there is any merit in the submission.

We must state here that this case is different from the majority of cases in which the accused challenges the admissibility of a confessional statement on the grounds that force was used to elicit it from him. Generally, it is a question of whose evidence the judge believes for the simple reason that there is no medical evidence to support the alleged assault. The accused alleges that he was beaten and the police officers deny that he was. In the final analysis, the judge invariably has to weigh the oral evidence of the one side against that of the other in order to arrive at a decision. The difference in this case is that not only is there evidence that Graham was taken to the hospital while in police custody for medical treatment, but there is medical evidence of injury that is

consistent with his complaint. It fell to the trial judge to determine whether the injuries sustained occurred as the police said they did or as the appellant alleged.

Graham alleged that on October 31, after his arrest in the early morning and after going to several different places he was eventually taken to the police station. Later that day the police officers began questioning him and began to beat him about his body with a piece of wood. They slapped him on his face and beat him on his back. He said that Sgt. Maharaj began hitting him on his buttocks and the back of his legs. In the course of the beating, he raised his foot to parry a blow and was struck on his ankle. He fell to the ground in severe pain. The officers told him they wanted to see how much pain he could endure. This took place at the Homicide office in Marabella. He was later taken to the CID office in San Fernando. There he complained of the injuries to a senior officer who ordered Sgt. Maharaj to take him to the hospital for treatment at about 8pm. At the hospital he said that the police went into the doctor's room before he was allowed in. A short while later he was called in and the doctor treated his injuries. His foot was put in a cast and he was discharged. He was taken back to the CID office but between 1am and 2 am he was again taken to the Homicide office.

He alleged that on the following morning, shortly before he was ordered to sign the statement, he was again beaten on the injured foot. He said that they were standing on his left foot and he could no longer take the pain. As a result and the fear of a further beating he signed the statement. When the Justice of the Peace arrived later that afternoon, he authenticated the statement in the presence of the two officers who had witnessed the statement. The Justice of the Peace simply asked him if the signature was his. He said that he was never asked if he had freely given the statement or not.

The police officers denied that Graham had been beaten as he had alleged. They related a completely different story. They said that when they arrested Graham on the morning of October 31, they noticed that he had a "slight limp". Corporal Phillips said that he saw that his ankle was swollen. They offered to take him for medical attention but he refused. On inquiry by Sgt. Maharaj, Graham is alleged to have told him that he had suffered an injury to his ankle while playing football and to his elbow while wrestling. Phillips said that he took a note of the injury in his pocket diary and on the request of the trial judge produced the diary.

Later that day, the police said Graham complained of pain from the injuries and, according to Sgt Maharaj, at about 8 pm that evening they took him to the hospital for treatment. Maharaj denied that this was at the behest of any senior officer. While his injuries were being attended to they said that Graham told the doctor, in their presence, that he sustained the injuries while playing football and wrestling respectively. The doctor placed his foot in a cast, treated the injury to the elbow and discharged Graham.

The doctor was not called to testify on behalf of the prosecution. No reason was given for his absence but a medical certificate under his hand was produced. Whether this is an acceptable method of discharging the onus on the prosecution need not be decided. Given the stringent requirement however that all the circumstances have to be considered

in order to satisfy the judge that the statement was not obtained by the use of force, one would expect the certificate to give a full account of the injuries and the possible cause, if known. In fact, the certificate provides for full disclosure by requiring the doctor to state "*the nature of the instrument with which the injuries were probably inflicted and the probable degree of force used*".

Sgt Maharaj said that the doctor prepared the certificate in his presence and handed it to him. The certificate stated that Graham had sustained the following injuries:

1. "Ankle sprain and tenderness at medial and lateral aspects of ankle;
2. Elbow injury.....

In the section reserved for the nature of the instrument and degree of force used the doctor stated that the injuries were *probably inflicted (with a) " blunt trauma"*.

After his discharge, Graham was taken back to the police station. At about 10am the following day Sgt. Maharaj said that Graham agreed to give a written statement. At about 11am it was taken down in writing and signed by him. The confession, he said, was freely given and signed by Graham. At about 5pm that afternoon he said that the Justice of the Peace arrived and authenticated the statement as being true and voluntarily given by Graham.

The Justice of the Peace was not called to testify on the voir dire. The prosecution submitted to the court that he had by then become 'senile' and was therefore not able to testify. No medical certificate to this effect was produced. The prosecution nevertheless, in support of the voluntariness of the statement, tendered the authentication of the statement by the Justice of the Peace for the purpose of relying on the truth of the statement. That evidence, in our view, in the absence of the viva voce evidence of the Justice of the Peace, was hearsay and inadmissible.

The issue is whether on the whole of the admissible evidence on the voir dire one could safely say that the prosecution had established that the injuries were not as a result of any beating at the hands of the police. If there was any reasonable doubt it had to be resolved in the appellant's favour.

In *Director of Public Prosecutions v Ping Lin* [1975] 3 All ER 175 (HL), their Lordships held that the onus was on the prosecution to satisfy the judge beyond reasonable doubt by showing that the statement had not been obtained either by fear of prejudice or hope of advantage excited or held out by a person in authority. The judge had to determine the issue as one of fact and causation i.e. whether the prosecution had proved that the statement had not been made as a result of something said or done by a person in authority. To satisfy the rule, the prosecution was required to place before the court all *the surrounding circumstances* and it was on the totality of all those circumstances that the judge had to make his finding on whether the statement was a free and voluntary one. This rule is strictly applied and it means that all persons who dealt with the accused in connection with the statement had to be called.

In *Ping Lin*, it was stated that the judge's findings should not be, as a general rule, disturbed merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases. They should only be disturbed if the Court was satisfied that the judge had made a completely wrong assessment of the evidence or had failed to apply the correct principle.

In this case, it cannot be said that all the witnesses involved were called to testify. Neither the doctor nor the Justice of the Peace was called. It may be that the doctor, who was a Nigerian citizen, had left the country and that the Justice of the Peace was indeed senile. Whatever the position, there was no admissible evidence produced to explain their absence. It is true that in lieu of the doctor being called, the police produced a medical certificate from him. In the final analysis that would not have assisted the jury having regard to the allegations on both sides as to how the injuries came about.

It is clear from his decision that the trial Judge accepted the police officers' version of events that the injuries complained of were sustained prior to arrest and that Graham had told the doctor the source of his injuries. This meant that the trial judge must have accepted that the reference in the certificate to *'blunt trauma'* was in effect the same as, or at least consistent with, the appellant having sustained the injuries while playing football and wrestling respectively. We are concerned with whether this was based on a proper assessment of the evidence and all the circumstances.

In analysing the evidence, it seems to us that one first had to consider what the appellant was alleged to have told the doctor in the presence of the police officers. According to the police, the appellant told the doctor the exact cause of his injuries. Nothing could be clearer than being told that he had sustained the sprained ankle while playing football and the one to his elbow while wrestling. If he did tell the doctor that, then it is neither unreasonable nor farfetched to assume that the doctor would have reflected that in his certificate. It was far simpler and certainly more precise to state "injury sustained while playing football (or wrestling)" than to use the expression *"blunt trauma"*, a term generally reserved for injuries sustained by a severe blow, usually inflicted by a weapon or instrument with a flat or heavy edge.

It is more likely than not, therefore, that had Graham indeed informed the doctor of the cause of his injuries, as the police had alleged, the doctor would have so recorded them in the certificate. From a purely commonsense point of view, the expression *"blunt trauma"* is more consistent with and probably aptly describes a blow to the ankle with a piece of wood or other hard instrument than it is with one sustained from a tackle or fall while playing football. Since the onus remained throughout on the prosecution, it is this inference the prosecution had to dispel. The certificate by itself was not sufficient to do so. A further explanation was required and without the doctor's testimony the doubt could not be dispelled. It left to conjecture the cause of the injury, an injury which the appellant had claimed was administered while in custody.

The expression "*blunt trauma*" in the certificate therefore was bound to leave the trial judge with that lurking suspicion that Graham had never told the doctor anything and that the likely cause of the injuries was reflected in the language used in the certificate. The note allegedly taken by Cpl. Phillips, in itself, apart from being self serving, could not have been the deciding factor to remove that doubt.

At the end of the day, the crucial question for the trial Judge was whether the injuries were sustained while in custody. The prosecution had to resolve this beyond all reasonable doubt. As credible as the trial judge may have found the police officers that was not sufficient to satisfy the doubt that must have arisen on the certificate. Credibility in our view was not the deciding factor on the *voir dire*. When the two conflicting accounts are laid side by side, the missing link had to be contained in the medical certificate. The words '*blunt trauma*' called for clarification before the trial judge could accept that they in fact meant that the injuries were sustained while playing football (and wrestling), particularly in circumstances where the precise cause of the injuries was known to the doctor at all material times, at least according to the police.

Sgt. Maharaj claimed that the doctor had prepared and signed the certificate in his presence. To the point, it must have been apparent to him that in stating that the *injuries were inflicted with a "blunt trauma"* the doctor was not faithfully reflecting in the certificate what the appellant had allegedly told him. One would have expected him in those circumstances to ask the doctor to be more specific and explanatory as to the true cause. It may be argued that he never expected the appellant to suggest that he was beaten and was therefore willing to accept the doctor's description of the cause of the injuries. That may be so but he can hardly be heard to deny that '*blunt trauma*' is an expression more consistent with a beating with an instrument with a heavy edge (in circumstances where the cause is unknown) than with one sustained while playing a game (where the cause is known). Therein lay the reasonable doubt and it is apparent that in assessing the admissible evidence as a whole the trial Judge failed to give any or any sufficient consideration to the fact that the medical certificate weighed more heavily in favour of the appellant's version of events. It cannot safely be said therefore that the trial judge was satisfied that, even on a balance of probabilities, the injuries were caused as the prosecution claimed. There is that lurking doubt that had to be resolved in the appellant's favour.

The prosecution in those circumstances would have failed to prove that the statement was voluntarily given. It should not have been admitted. The consequence of this is that the entire case for the prosecution has been tainted. Charter in particular testified that he was in the adjoining room when Graham was beaten and the fact that he was able to see what they were doing to him must have put him in fear. When they began to beat Graham the following day he again saw what was happening and, being afraid, he accordingly signed his statement that day.

Mohammed, too, in his amended grounds of appeal, presented a similar argument. He too had seen Graham being beaten and he testified that Sgt. Maharaj had told him that if he did not sign "*I will break your foot like Graham*".

The position of Baptiste on the other hand, is somewhat different. He did not witness the beating of Graham but he objected to the admission of his statement on the ground that he, too, had been beaten. It is true that it is not the law that if three men join in a criminal enterprise and the evidence is not sufficient against two of them the third goes free. While it was not the case for the prosecution that Baptiste had gone into the shop and shot Chin Hong, he was the driver of the black Laurel but, from the evidence, nevertheless part of the joint enterprise. But it seems to us that had the jury rejected the case against the other three men as they most likely would have done if the statements had not been admitted, they would have not found against Baptiste.

If, on the other hand, the trial Judge had withdrawn the case from the jury in respect of the other three, not having admitted the statements, the chances of the case against Baptiste succeeding would have been slim indeed. In any event, it is more likely than not that had the trial judge not admitted the statements of the other three because of the impropriety on the part of the police, he would have been hard pressed not to direct an acquittal of Baptiste also. It could not be safe to allow his conviction to stand once the convictions of the three others are set aside.

The appeals are accordingly allowed and the convictions and sentences are quashed.

R. Hamel-Smith
Justice of Appeal

J. Permanand
Justice of Appeal

M. Warner
Justice of Appeal.