IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

Criminal Appeal No. 6/2010

BETWEEN:

OMAR DACOSTA HOLDER

Appellant

AND

THE QUEEN

Respondent

Before: The Hon. Sir Marston C.D. Gibson K.A., Chief Justice, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

2013: May 8
2019: July 31

Mr. Andrew Pilgrim QC, Mrs. Kristin Turton and Miss Kim Sealy for the Appellant

Mr. Charles Leacock QC, Director of Public Prosecutions and Mr. Anthony Blackman for the Respondent

DECISION

INTRODUCTION

GIBSON CJ:

[1] This is an appeal against conviction on three counts of murder. The appellant, Omar DaCosta Holder ("the appellant" or "Holder") raised the following grounds:

1. The Learned Trial Judge ("LTJ") erred in law when she failed to leave the defence of insanity to the jury;
2. The LTJ erred in law when she failed to relate the evidence in the case to the law of diminished responsibility;
3. The LTJ erred in law when she allowed the jury to remain in deliberation for a period in excess of three (3) hours contrary to section 41 of the Juries Act Cap 115B;
4. The LTJ erred in law when she failed to direct herself and the jury on the voluntariness of the appellant's written statement;
5. The LTJ erred in law when she failed to analyse the defence of the Appellant;
6. The LTJ erred in law when she failed to analyse the evidence or address the issue of the Appellant's state of mind at the material time;
7. The LTJ failed to properly address the Appellant's fitness to plead; and
8. The verdict is unsafe and unsatisfactory.

[2] Grounds 4 (voluntariness of the appellant's statement) and 6 (failure to analyse the evidence) were abandoned at the hearing before us. For the reasons which follow, however, since the only evidence connecting the appellant to the murder consisted of his own oral incriminating statements dictated to police officers, we find that the conviction is unsafe and unsatisfactory and must be quashed, and the appeal allowed. In this judgment, we will concentrate our attention on the issue of the oral statements and their consequences.

FACTUAL AND PROCEDURAL BACKGROUND

[3] In late March 2005 the appellant moved into a house at Pasture Road, Haggatt Hall, St. Michael owned by Patricia Walrond. Ms. Walrond lived there with

her granddaughter, Sakina, a 20 year-old woman, and Sakina's two children, Shaqkem Gittens, a two year-old boy and Sha-mya Mapp, a two month-old baby girl. On 30 March 2005, Ms. Walrond celebrated her birthday and she invited her two daughters, along with the appellant, to have a drink of apple cider with her. After the celebration, the two daughters left along with Ms. Walrond who went to visit a friend in Lower Burney. The appellant was left in the house with Sakina and her two children.

[4] At about 4:45 a.m. on 31 March 2005, a neighbor saw that Ms. Walrond's house was engulfed in flames. The Fire Service and the Police were summoned and some of the neighbors tried to help extinguish the fire. Despite these efforts, however, the house was soon burnt to the ground. The Police and the Fire Service searched the rubble and found three bodies which were identified as those of Sakina and her children Shaqkem and Sha-mya and which were pronounced dead at the scene. The appellant was not there and so a search was conducted for him. He was later found on a road in Strathclyde and was taken to the District "A" Police Station.

[5] Dr. Stephen Jones, a pathologist, testified to having conducted autopsies on the three bodies. Sakina's body, he stated, had shown signs of severe tissue loss and charring from flame burns. Dr. Jones noted a reddening of the lining of the windpipe as well as a deposit of soot, suggesting that she was still alive

and had inhaled hot air from the fire during the burning process. He also observed a fracture of her left temporal bone which he described as a traumatic head injury caused by moderate to severe force inflicted by a blunt object such as a hammer or a piece of wood. The cause of death was traumatic head injury.

[6] As to two-year old Shaqkem, Dr. Jones concluded from the reddening of the airways and the soot deposition that he, too, was breathing at the time the fire started and had died from smoke inhalation injury. However, with regard to the two-month old baby, Sha-mya, the doctor noted that the body was so severely affected by flame burns that it couldn't be really assessed for injuries. There was no reddening of, or soot deposits in, the airways. Dr. Jones stated that he could not "be specific about the exact cause of death except that, considering the circumstances, and that the child appear to have been dead before, [and he believed] that it was an unnatural process."

[7] In cross-examination, Dr. Jones stated that he had not carried out any analysis of a hammer head which, he admitted, he had been shown for the first time at trial. Nor was any mention made to him of blood on the hammer head. He noted that blood would not survive a strong fire and, since the hammer head was made of iron, and the test for haemoglobin in the blood was in fact a test for iron in the blood, it was unlikely that such a test would yield useful results.

[8] There was also evidence from Station Sergeant Leroy Woodroffe that the hammer head had been found among the debris beneath the back bedroom. He recalled that the appellant had been brought to Haggatt Hall on the morning of 31 March 2005, and that when shown the hammer head and asked if he knew anything about it, the appellant said nothing. The hammer had no initials, signatures or other identifying marks on it.

[9] The appellant was charged on 1 April 2005 with the murder of the three deceaseds.

The Crown's Case

[10] The Crown's case against the appellant was predicated largely on several oral statements attributed to the appellant as well as a so-called "written" statement which he allegedly dictated but refused to sign. Two of the statements implicated him in the offence. The first occurred on 31 March 2005 when Ms. Patricia Walrond and some other persons went in search of the appellant. She recalled seeing him on Strathclyde in Bank Hall, and, on asking him "[w]hat happened that the house burned and the children, why [you] didn't try to save the children?", the appellant replied: "Not me. Not me. The police do it." On cross-examination, Ms. Walrond noted that there had never been any quarrels between the appellant and any other occupants of the house, and she had never seen him act violently toward any of them. In her deposition before

the magistrate during the preliminary inquiry, she testified that she "did not see the accused light any fire or burn my house."

The Appellant's Oral Statements

[11] It should be noted that no *voir dire* was conducted since the appellant never disputed the reliability ("voluntariness") of the statements and never alleged that he was in any way forced or induced to make the statements. He merely said that those statements were not his, a question of fact for the jury. (See, below, para [29]).

[12] Inspector Lionel Ward, who was a station sergeant at the time of the occurrence, stated that on the afternoon of 31 March 2005, he and Sgt. Winston Bynoe saw the appellant, and told him that he had reason to believe that he, the appellant, had set the fire which caused the death of the three victims. The appellant then gave an oral statement which Inspector Ward recorded in his notebook from which he was about to read. The appellant's attorney objected "on the basis that any orals allegedly written or recorded by. . .the Inspector were never made by my client." The trial judge ruled that "[t]his is a matter of fact for the jury", and gave permission for the statements to be read into the record.

[13] Inspector Ward stated that the appellant told him: "I ain't want no lawyer. My father tell me talk to you." He invited the appellant to initial the notebook

containing the oral statement but the appellant refused to do so. The notebook statement read by Inspector Ward was as follows:

> "My Creator tell me to make a sacrifice and I hit she and the children in the head with a hammer and then light the bedroom she was in and my bedroom with a candle. I drag she out of the bed and she went down on the floor with she hands cross under she chest and I ran away naked."

When Inspector Ward asked the appellant about the scratches which he had observed on the appellant's neck and back and lacerations under his feet, the appellant replied: "I get them when I ran away through the bushes."

[14] Inspector Ward then asked the appellant if he wanted to give a written statement to which the appellant replied "yes", and when asked if he wanted to write the statement, the appellant replied, "[w]rite the thing." At 4:30 p.m. on the same day, the inspector took an official form, prepared the headings and wrote out the preamble in accordance with the Judges' Rules. On completion, he read the preamble to the appellant who signed the preamble. The inspector also read to the appellant the portion of the statement notifying him of his right to an attorney. The appellant signed that portion as well.

[15] According to Inspector Ward, the appellant then began to dictate the purported written statement in the presence of himself and Sgt. Bynoe. However, while the inspector was writing the third page of the statement, the appellant violently snatched the first two pages from the inspector's hand, tore them,

put the pieces in his mouth and began chewing them. He was subdued by Inspector Ward and Sgt. Bynoe, and the pieces of the statement were forcibly recovered from his mouth.

[16] The inspector reassembled the statement by sticking the pieces back together, and both he and Sgt. Bynoe signed the statement. He then read it over to the appellant, and asked the appellant if it was true and correct. The appellant did not reply, did not place his initials on some corrections to mistakes which the statement contained and refused to sign the statement. The inspector added: "No threats were made, no force or violence used, no promises or inducements were held out to the accused in respect of this statement. This statement was voluntarily given by him."

[17] Before the statement was read into the record, the appellant's attorney again objected that it was not the appellant's statement but indicated that she had no difficulty with the statement being read. Inspector Ward then read into the record the body of the dictated statement as follows:

> "Last night I get home about six o'clock. When I get home Patricia; she daughter from St. Philip and she son Renaco; Sakina and she two children did home. I was moving around talking with the kids in the house and then I watched TV 'till late. Patricia, she daughter and Renaco left the house near midnight. Patricia say she gine by a friend because it was she birthday and she daughter went to catch the bus. Sakina and the children then went in Patricia bedroom to watch TV and I went in my room. I light my candle and read my Bible and drop to sleep. I get up this morning when the cocks were crowing and

> my Creator tell me make a sacrifice and I went out in the yard under the shed and tek up a hammer and went in the front bedroom and see Sakina and she baby lying down in the bed sleeping. I hit she in the head with the hammer. I hit the baby in the head with the hammer. I pulled them down on the floor. She went down on she face with she hands cross under she chest. I aint see the little boy in the room. I went back in my bedroom and took up the candle that was still burning and light my sheet and then went and light she sheet. I jump through my bedroom window with my Bible and run down through the bushes. I get some scratches."

[18] That is where the statement ended before the appellant snatched it, tore it, and began to eat it. Inspector Ward then wrote the certificate which he and Sgt. Bynoe signed. On completion of the written statement, Inspector Ward asked the appellant if he was prepared to point out to him the areas of the house where he had hit Sakina with the hammer and had lit the sheet. The appellant made no reply. When he asked the appellant what had become of the hammer, the appellant again made no reply.

[19] Inspector Ward stated that, at about 5:30 that same afternoon, he went to the scene accompanied by the appellant, Sgt. Bynoe and other officers. He saw Sgt. Woodroffe searching among the rubble of what remained of Ms. Walrond's dwelling house when the sergeant found the head of a hammer. Inspector Ward asked the appellant what he could say about the hammer but the appellant made no reply. On 1 April 2005, the inspector was informed that the appellant's family had been able to contact an attorney who had seen

him privately at the station and fed him. Later that same evening, the inspector told the appellant that he was continuing his investigations into the deaths of the three victims and that he had a right to speak with an attorney-at-law if he wished. The appellant replied: "I ain't want to hear you or no lawyer."

[20] When the inspector told the appellant that the post mortem examination had revealed that Sakina and her young daughter had received injuries to their heads before the fire, that Shaqkem was burnt in the fire that the inspector believed that he was the person responsible, the appellant shook his head in the negative but made no reply. On that same day, Inspector Ward charged the appellant with the three murders.

The Appellant's Testimony in Defence

[21] The appellant testified at trial in his own defence. He stated that on the 31 March 2005, he was at the home of his mother's friend "Itricia", his nickname for Patricia Walrond. He had been there for two days. He had awakened, watched television and done some chores. He recalled that Sakina, Sha-Mya and Shaqkem came to the house later, and Sakina asked for her grandmother, Patricia. He told her that Patricia had gone to Bridgetown and would soon be back. Sakina told him that she would stay at the house until Patricia returned.

[22] The appellant stated that at about midnight, Patricia returned home and said that it was her birthday and they had some champagne, after which he went to

sleep. He testified that he was awakened by fire and smoke. He got up, "hollering for 'Itricia' several times but got no response. The fire was coming up and "the smoke had me good," he stated, and "I wrapped something around my hand and cuff out a bedroom window", jumped through it, and escaped.

[23] The appellant recalled that he had been interviewed at the police station and was asked about a house fire and three murders. He responded that he knew about the fire but knew nothing about any murders. When the officer accused him of killing the three people, he replied "I ain't kill nobody." He had given a statement to Sgt. Ward but, he testified, when he realized that "nothing I tell he, he ain't write…he write wha he feel like writing," the appellant stated that he tried to destroy the statement. He said that the officer "bound on 'pon'" him. As he pushed the statement in his mouth, he recalled, the officers had beaten him, causing him to spit out a tooth and some blood.

[24] When asked about Sakina and the children, the appellant stated that he had nieces and nephews whom he loved and that he would "never kill those children and that young girl." He had been given an injectable psychiatric medication, the dosage of which had been decreased. He recalled that Sakina and the children had not been at the house during the day in question.

[25] On cross-examination, he said that he had done some landscaping work but had no history of psychiatric illness. His mother, who lived in the USA and

was a good friend of Patricia Walrond, had arranged to help him out and he had stayed at the Walrond house for two days. While the family was drinking champagne, he had gone to his bedroom leaving about seven family members in the living room. He could not remember if he had heard the cocks crowing before he smelt the smoke or whether he had remained in bed for a little while longer. He agreed that, shortly after he had heard cocks in the neighbourhood crowing, he felt the heat and smelt the smoke. He agreed that he was a good and trusted family friend. Asked why he had not checked "for the children to see if the baby and the young girl Sakina and them were all right", he said "I wasn't in position to check for no one, ma'am." He claimed that "I shout 'Patricia Waldron'. . .several times and I ain't hear nah response, so I flee for my safely."

[26] After leaving the house, he first went by his mother's friend, Marjorie Forde, where he had a coke, and asked her to call his sister to bring some clothes for him. He recalled that he got a cut on his foot when he went through the bedroom window. He had seen Patricia Walrond that morning and she had asked him what happened to the children. He told her that he did not know that any children were in the house. One of Patricia's relatives, Alvin, also came to him and asked why he had killed his family. The appellant replied "I tell he I ain't kill nobody."

[27] He testified that the police had not beaten him or forced him to give a statement, and he agreed that he had told them to "write the thing." He had signed the statement in two places. However, it was when Sgt. Ward read back the statement to him that he pulled it away. He denied that he pulled the statement away before the Sgt. Ward was finished and also denied striking Sakina and Sha-mya with a hammer, and denied lighting afire his bed with a candle.

[28] Apart from the appellant's unsigned oral statements to the police, there was no other evidence which connected the appellant to the murders.

[29] Before us, counsel for the appellant rightly withdrew the fourth ground of appeal which would have raised the issue of the reliability ('voluntariness') of the oral and "written" statements made by the appellant. We say 'rightly' because the trial record clearly shows that the appellant's trial counsel never questioned the reliability of the statements nor the circumstances under which they were made. She had simply argued that the appellant never made them. The settled and binding Privy Council authority of *Ajodha v The State* [1982] AC 204, [1981] 2 All ER 193, has established that where the reliability of an admission statement (the "voluntariness") is not raised by an accused, the question whether the accused made the statement is one of fact for the jury,

and a hearing by the trial judge on *voir dire* is not required. The judge's ruling on this was unexceptionable.

[30] However, what is beyond dispute is that the appellant neither initialled the statement in the police notebook nor signed the so-called "written statement" which he disavowed and attempted to destroy by chewing it. Hence, it is clear to us that *both* statements were oral since neither statement was ever acknowledged by the appellant's signature or initial. As *Haynes C* stated emphatically in *The State v Gobin and Griffith (1976) 23 WIR 256*, at *278*:

> "[W]hen the prosecution puts in a signed statement, what they seek to rely on is not the words of oral confession spoken to the recording policeman; it is what is adopted as true and correct 'in black and white' by the signature".

[31] Further, as *Lord Bridge of Harwich*, writing for the Board observed in similar vein in *Adjodha v The State*, *supra*, [1982] AC at 220; [1981] 2 All ER at 200, citing the dicta of *Haynes C*, above, "it seems to their Lordships clear beyond argument that, if the prosecution tender in evidence a statement in writing signed in one or more places by the accused, they are relying on the signature as the acknowledgment and authentication by the accused of the statement as his own. . ." We turn now to examine the issue relating to the statements.

[32] **Section 73 (1)** of the **Evidence Act Cap. 121** provides as follows:

> "Where an oral admission was made by a defendant to an investigating official in response to a question put or a

> representation made by the official, a document prepared by or on behalf of the official is *not admissible* in criminal proceedings to prove the contents of the question, representation or response unless the defendant has, by signing, initialling or otherwise marking the document, acknowledged that the document is a true record of the question, representation or response."
> [Emphasis added]

[33] At the time, **section 72** of the **Evidence Act** had not yet been promulgated. (It has since been promulgated.) **Section 72(1)** provides that in criminal proceedings, a confession or admission made in the course of official questioning in circumstances where it was reasonably practicable to make sound recordings of the confession or admission, is not admissible into evidence unless recorded. **Subsection (2)** defines "official questioning" as "questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence."

[34] In the absence of any eyewitness, fingerprint or other trace evidence, or DNA or other forensic evidence or any other evidence to corroborate the appellant's oral statements, we hold, and do so with the greatest reluctance, that this case ought not to have gone to the jury at all, however credible the oral statements may appear to have been. Accordingly, there is merit in the appellant's contention that the verdict is unsafe and unsatisfactory insofar as the case ought not to have gone to the jury. There was accordingly, a lurking doubt about the verdict. The appeal must therefore be allowed.

Disposal

[35] The appeal is allowed, the conviction is quashed and the sentence set aside.

Chief Justice

Justice of Appeal

Justice of Appeal