NA/LS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 69/2002

BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH J.A.

LORETTA BRISSETT v R

Deborah Martin for the Applicant
Paula Llewellyn, Senior Deputy Director of Public Prosecutions for the Crown

May 17, 18 and December 20, 2004

SMITH JA:

On the 21st March 2002, Loretta Brissett, the applicant, was convicted in the Home Circuit Court before Cooke J and a jury for the murder of Franklyn Johnson. She was sentenced to life imprisonment; the learned judge specified that she should serve 25 years before becoming eligible for parole.

On November 3, 2003 her application for leave to appeal was refused by a single judge. She has now renewed this application before the court. The prosecution's case was based on circumstantial evidence.

The applicant shared a visiting relationship with Franklyn Johnson the deceased. The applicant lived in Mount Horeb with her children . The deceased lived in Moy Hall, St. James with his then 14 year old

daughter Tonia, who at the time of the trial was a student at the St. James High School.

In July, 1999 Tonia attended the Corinaldi Avenue Primary School. She knew the applicant as 'Netty' who she said, stayed with her father but would go home on weekends. She testified that on July 25, 1999 she went home from school and saw the applicant and the deceased. The applicant, she said, asked her father (the deceased) to allow her, Tonia, to spend the weekend with the applicant. The deceased agreed. That same evening, a Friday, Tonia and the applicant journeyed to the house of the applicant in Mount Horeb.

During the night the applicant left the house without saying to Tonia where she was going. She did not return until the afternoon of the following Monday. She told Tonia that she and the deceased were going to the country on the following Sunday to "look some mangoes". Tonia further testified that the applicant told her that the deceased had packed his bag and had left but she did not know where he had gone. Tonia who was the deceased's only child, told the court that the deceased had never left home without telling her. According to Tonia, the applicant informed her that the deceased had told her (the applicant) that she should take the furniture at his house, but, if she did not want them she should not give them to anyone. About 2:00 p.m. that Monday at the behest of the applicant, Tonia and Rosemarie (the

applicant's daughter) along with the applicant set out for the deceased's house in Moy Hall.

On the way they stopped in Montego Bay for the applicant to make arrangement for a truck to transport the furniture. The applicant told the owner of the truck to be at the deceased's house about 6:00 p.m. From there the three of them proceeded to the deceased's house. The applicant had taken two buckets from Mount Horeb. She told Tonia and Rosemarie that she needed the buckets to carry "dirt" to throw into the pit toilet (latrine). She said that the deceased had told her to throw his clothes in the latrine and throw dirt on them.

The applicant took possession of the shovel which was on a table behind the deceased's house. She took Tonia and Rosemarie into an unfinished house beside the deceased's house. There with the shovel the applicant dug the earth and filled the buckets. Tonia and Rosemarie made six trips to the latrine to empty the buckets into the pit. While the applicant was digging she told them to look out for anyone passing the gate and "looking up in the yard". Tonia said while they were throwing dirt into the pit Rosemarie lit a piece of paper and threw it into the pit. Tonia looked into the pit and saw some of the deceased's clothes. After the exercise the applicant told the girls to wash the buckets at a nearby standpipe.

As arranged, the truck arrived at about 6:00 p.m. The applicant and the two girls moved furniture from the deceased's house and had them placed on the back of the truck. Tonia said she saw the deceased's travelling bag and slippers in the house. According to Tonia the deceased had given the applicant one of the two keys he had for the house. The other one the deceased kept with a bunch of keys. On this occasion the applicant had used the deceased's key to get into the house.

When they had almost finished packing the furniture onto the truck, Mr. Fletcher, a neighbour came over to the deceased's premises. He spoke with the applicant. After the packing was done, the truck drove off. The applicant was in the cab of the truck with the driver. The two girls were in the back. The truck was driven to the house of the applicant in Mount Horeb. There the furniture was unloaded. A television and a radio were placed in the house of the applicant and the other things under the cellar of her house. Tonia spoke of a second trip to Moy Hall by the applicant, Rosemarie and herself. On this occasion the applicant dug earth beside the unfinished house and Tonia and Rosemarie threw it into the latrine.

Subsequently the applicant made arrangements for Tonia to change schools. She started to attend the Mount Horeb All Age School where the applicant's children attended. Tonia recalled that one day

when she was at school, her mother, her aunt and two policemen visited her. She accompanied them to the applicant's house. The applicant was at home then. The police told the applicant that Tonia's mother had come for her. The applicant replied that Tonia's father had told her that she must not give her to anyone. The police insisted that Tonia's mother must have custody of her. Tonia was taken from the applicant and went to live with her aunt in Norwood, St. James. Tonia testified that since the 25th July, 1999 she had not seen or spoken to her father. Her father she said had not told her that he was going anywhere.

In cross-examination she said that she used to live with her father's friend in Hanover before going to live with her father in Moy Hall. She had told her father that one Romaine had sexually molested her.

Mr. Huntley Fletcher, the neighbour of the deceased told the Court that he knew the deceased as "Orange man" and "Peter". He used to see and speak with the deceased every day. He knows the applicant ; she used to visit the deceased. He recalled seeing the applicant at the house of the deceased late July, 1999. It was a Sunday. The deceased was there planting coco. The following morning- Monday morning, he did not see the deceased.

The witness returned from work about 7:30 p.m. that day. He did not see the deceased. He saw a truck in the deceased's yard. He also saw the applicant, Tonia (the deceased's daughter) and another girl and

two men in the deceased's yard. They were moving the deceased's furniture from his house and packing them on the truck. Mr. Fletcher went to the gate of the deceased's premises and said "Wha happen man, how I see you yesterday and you moving and you nuh say anything at all to me?" According to him, he thought the deceased was there. The applicant, he said, "hushed him," took him aside and told him that "two men ran after Orangeman during the night and she nuh see him so she a move out him things because she don't want dem can't catch him and do her anything". He said he asked her where she was moving to and she said "up the line, up soh". Since that day he had not seen Orangeman (the deceased).

Detective Constable Cleveland Fray, a police photographer attached to the Area One Crime Scene office went to the deceased's house on the 24th November, 1999. There he saw Detective Inspector Keith Brown and one Mr. Hugh Sloley. He observed men "digging at the front section of a pit latrine." He saw the diggers take building blocks, sand and dirt, male clothing, sheets, a pix axe, a pair of black shoes, cassettes and last of all- a skull and bones. The skull, he said, appeared to be that of a human being. He took charge of the bones the skull and some of the clothes . Some of the things were tagged and sent to the forensic lab and subsequently retrieved. Some of these things such as sheets, shirt, pillowcases, a pick axe were exhibited. According to this

witness some of the bones were placed in a box and buried at the Pye River Cemetery on the 1st December, 1999.

On the 14th September, 2001, Detective Fray went with other police officers, Dr. Sarangi and persons from the Public Health Department to the spot in Pye River where the bones were buried. He witnessed the exhumation of the bones. Dr. Murari Prasad Sarangi, a Consultant Forensic Pathologist, testified that on the 14th September 2001, he was present at the exhumation of the skeletal remains of a body.

Subsequent to the exhumation, he examined the skeletal remains at the Cornwall Regional Hospital Morgue in the presence of Detective C. Brown. The skeletal remains were comprised of fifty five pieces of bones viz an intact skull, an intact mandible bone, intact humeri, two intact clavicles, 21 ribs some intact and some broken, 15 pieces of vertebrae, a single piece of sternum with the first rib attached to it. His evidence was to the effect that the bones were of human origin and from one person only. The bones were those of a male between the ages of 35 and 45. In his opinion the person had died about two years of the date of his examination of the bones. He gave, in detail, the scientific bases for these conclusions.

Mr. Hugh Slowly the pastor of the Mount Zion Apostolic Church gave evidence to the following effect. The deceased was his nephew. He did not know the age of the deceased, but the deceased was

younger than he and he was 43. Sometime in August, 1999 he went to the deceased's house in Moy Hall. In November, 1999 he went back to the deceased's house. The police went with him. Arrangements were made to have a pit toilet "dug up". He was there when the men under the supervision of the police dug into the pit toilet and retrieved certain articles. Some of these were identified by him in court.

Detective Corporal Nielson Allen testified that on the 6th December, 1999 he received from Constable Fray six sealed envelopes which he took to the Police Forensic Lab in Kingston. Some time after he retrieved five of these envelopes and handed them to Detective Inspector Clive Brown. The witness identified the envelopes in Court.

Miss Sherron Brydson, a government analyst attached to the Forensic Laboratory gave the following evidence. On the 30th November, 1999 she went with the police including Inspector K. Brown to certain premises in Moy Hall district St. James. On these premises were two unfinished buildings, a dwelling house and a latrine. She examined the dwelling house and the latrine.

In the dwelling house she found blood in the form of brown drops and droplets on a partition wall in the bedroom. She also found blood stains in the form of serosanguineous stains on the said partition wall and on the floor in the bedroom.

In the latrine which was at the rear of the dwelling house she found blood in the form of serosanguineous stains under the surface of the seat and on the floor. She observed a large hole in the ground in front of and below the latrine. The wooden seat on which she found blood was broken and detached from the concrete base. She collected samples from the blood stained areas and took them to the lab for further analysis. The test revealed that the blood was human in origin. She concluded that efforts were made to remove the blood stains from the bedroom and the latrine.

On the 6th December, 1999, she received six sealed envelopes and one sealed parcel from the police. These envelopes contained sheets, pillowcases, shirt and a wooden handle axe. She found human blood on the axe, sheet, shirt and pillowcases. On the sheets, pillowcases and shirt she found earth, faecal matter, human tissue i.e skin, flesh and hair. The blood found on the axe was in brown stains. The blood found on the other articles was in the form of clots, brown and serosanguineous stains diffused almost throughout the entire articles. The sealed parcel contained three little pieces of bones. These bones, she said were allegedly taken from the toilet. She tried DNA analysis on them but this was to no avail because of degradation.

Detective Inspector Clive Brown took over the investigation of the case in December, 1999 from Inspector Keith Brown. On the 4th June, 2000 he saw and spoke to the applicant at the Montego Bay Police

Station. On the 19th June, 2000 he charged the applicant with the murder of Franklyn Johnson. He cautioned her and she said, "the only thing mi worry bout is mi little children dem."

On the 14th September 2001, he was present at the Pye River cemetery when the skeletal remains were exhumed. He handed over the bones to Dr. Sarangi. On the 19th September, he was present when the doctor examined the bones at the Cornwall Regional Hospital.

The Defence

This applicant gave an unsworn statement from the dock. She told the Court that she used to work at Holiday Inn Gift Shop. In April, 1999 she met the deceased's daughter Tonia. She noticed a foul odour coming from her. She brought this to the attention of the deceased. She eventually took Tonia to the doctor on a number of occasions. She understood from the doctor that Tonia was being sexually molested. At the request of the deceased she took Tonia to live with her in Mount Horeb. She said she took Tonia to the deceased's home only on weekends to get things from him for her. When the deceased disappeared she did not take her back to Moy Hall. She said that Tonia told her that all the while her father "left and go bout him business and come back when he want to that is why him no want mi live with him".

She said that when she heard a rumour that Tonia's father and his child were killed, she took Tonia to the police. The police she stated told

her to keep the child. She spoke of sending Tonia to the school which her children attended. She also spoke of a visit to her house on a Friday in November, 1999 by three police officers and a lady who said she was Tonia's mother. She was later taken to the Family Court and had to give up custody of Tonia. She said that a policeman told her that Orangeman (the deceased) was alive and was selling oranges in Mandeville. She asked her sister to accompany her to Mandeville but she could not. She was subsequently arrested and taken to the Montego Bay Police Station lock-up. There she was informed that the deceased was found in a toilet. She told the Court "I was so shock I could not come to my senses".

Grounds of Appeal

Before us Ms. Martin argued the following grounds of appeal:

1. The learned judge erred in law in not upholding the no case submission made by counsel for the defence.
2. The learned trial judge failed to properly direct the jury on circumstantial evidence.
3. The learned trial judge's comment on the applicant's election to give an unsworn statement was unfair.

Ground 1 – The no case submission

Learned counsel for the applicant submitted that the evidence adduced by the prosecution was insufficient to establish the fact of the death of Franklyn Johnson. The evidence, she contended did not show

that the bones found in the toilet were those of the deceased, or that the blood observed in the dwelling house or in the latrine was that of the deceased. Further she submitted that there was no evidence of any act of violence done to the deceased by the applicant and there was no evidence of the cause of death. Miss Llewellyn for the Crown submitted that there is cogent circumstantial evidence to establish the death of Franklyn Johnson at the hand of the applicant.

It is trite law that an accused may be convicted solely on circumstantial evidence. In a case of murder the fact of death may be proved by circumstantial evidence notwithstanding that neither the body nor any trace of the body has been found: ***R v Onufrejezyk*** [1955] 2 QB 388. However, before a defendant can be convicted the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt. The circumstantial evidence should be so cogent and compelling as to convince a jury that on no rational hypothesis other than murder can the facts be accounted for. See ***Onufrejezyk*** (supra).

In ***Attorney General's Reference*** (No. 4 of 1980) 73 Cr. App R. 40 the English Court of Appeal held that it was not necessary to prove the cause of death in order to found a conviction. As the learned trial judge in the instant case correctly and succinctly observed: "If the body can't be found how are you going to prove the cause of death?"

The real issue raised in this ground is whether the evidence adduced by the prosecution, if accepted, was sufficient evidence upon which a reasonable jury, properly directed, could properly convict the applicant of the offence charged. When a submission of no case is made the case is to be stopped if:

(i) there is no evidence that the crime has been committed by the defendant; or

(ii) where the prosecution's evidence is of a tenuous character, for example, because of inherent weaknesses or vagueness and the judge concludes that such evidence taken at its highest is such that a properly directed jury could not properly convict on it: See ***R v Galbraith*** [1981] 73Cr. App R. 124 .

To determine this issue we must examine the state of the evidence at the end of the prosecution's case. The Crown relied on the following:

1. The applicant shared a visiting relationship with the deceased who lived with his 14 year old daughter Tonia at Moy Hall.
2. On Friday, July 25, 1999 the applicant was at the home of the deceased. The applicant sought and obtained the deceased's permission for Tonia to spend the week-end with her.
3. On July 25, 1999 the applicant took Tonia to her house in Mount Horeb.
4. During the night of Friday, July 25, 1999 the applicant left her home without saying where she was going.

5. On Sunday the applicant was seen with the deceased at the deceased's home by the latter's neighbour - Mr. Fletcher. Since then Mr. Fletcher has not seen the deceased.
6. The applicant returned home on Monday and told Tonia that she and her father (the deceased) were going to the country on Sunday to look for mangoes. She further told her that the deceased had packed his things and left and that she did not know whereto.
7. On the same day (Monday) the applicant with her daughter Rosemarie and Tonia journeyed to the deceased's house.
8. On the way she made arrangement for a truck to be at the premises of the deceased to remove furniture from the deceased's house.
9. At the deceased's home the applicant told Tonia and Rosemarie that the deceased had told her to throw his clothes in the latrine.
10. The applicant dug earth which she had Tonia and Rosemarie throw into the latrine's pit.
11. While she was digging she asked Tonia and Rosemarie to be on the look out for anyone approaching.
12. Tonia saw the deceased's clothes in the pit of the latrine.
13. Under the supervision of the applicant items of furniture were removed from the deceased's house and packed onto a truck.
14. The deceased's slippers and travelling bag were seen in his house. He had no other travelling bag.
15. A key which the deceased had for himself was used by the applicant to access his house. The only other key to the house was given to the applicant by the deceased.
16. Mr. Fletcher the deceased's neighbour observed the removal of the deceased's furniture and went over to the deceased's premises.

The applicant took Mr. Fletcher aside and told him that two men had chased the deceased and she had not seen him since.

17. The applicant took the deceased's furniture to her home.

18. In November, 1999 a human skull, human bones, male clothes (including a shirt), sheets, pillowcases, a pickaxe, a pair of shoes among other things were removed from a pit toilet on the deceased's premises.

19. In September, 2001 the bones were examined by a pathologist who opined that they were from one person and that person was a male between the ages of 35 and 45 and that death had occurred about two years of the date of examination.

These roughly coincide with the age of the deceased and the time when he went missing.

20. Human blood was found on the pickaxe, sheets, shirt and pillow cases. On the sheets and pillow cases and shirt were found earth, faecal matter and human tissue- skin, flesh and hair. Apart from the pickaxe, the blood found on the other articles was in the form of brown and serosanguineous stains. The fact that some of the blood stains were serosanguineous indicates an attempt to wash out the blood from the fabric.

21. Human blood stains were found on a partition wall in the bedroom in the form of brown drops and serosanguineous stains and on the floor of the bedroom in the form of serosanguineous stains.

Counsel for the applicant submitted that there is no evidence to show that the Forensic expert went to the premises of the deceased. Accordingly, she urged, the judge erred in leaving the evidence of blood as a factor for the jury to consider. We do not agree with this submission.

The evidence of Mrs. Brydson, the Forensic expert, is that she went to a dwelling house in Moy Hall District, St. James; she was accompanied by Inspector K. Brown and others. Inspector Clive Brown said that he took over the investigation of this case from Inspector Keith Brown. Detective Constable Fray said when he went to the house in Moy Hall where the digging was taking place he saw Inspector Keith Brown there. Ms. Brydson gave a detailed description of the premises. This description is consistent with the evidence of Tonio. She said there were two unfinished buildings, a dwelling house and one latrine on the premises. She observed a large hole in the ground in front of and below the latrine. This is consistent with the evidence of Detective Fray who said that the 'digging' to retrieve the items took place in front of the pit latrine. The clear inference is that Miss Brydson was at the premises of the deceased.

The above summary indicates that the deceased was last seen alive with the applicant. She wanted Tonia out of the way. Having taken Tonia to her home she returned to the deceased's house. She gave two explanations for the disappearance of the deceased. She did not expect the deceased to return to his house – hence the taking of his furniture. She apparently knew what was in the latrine: thus her efforts to conceal. There was human blood in the deceased's house. The only two keys to this house were in the possession of the applicant at the time of the disappearance of the deceased. The blood on the sheets and pillow

cases and the partition wall in the bedroom indicates that someone was injured in the deceased's bedroom. Was it the deceased? This was clearly a matter for the jury. Blood was found on a shirt taken from the pit of the latrine. Tonia's evidence is that the applicant said the deceased told her (the applicant) to throw his clothes in the latrine. Did the applicant throw the blood smeared shirt of the deceased in the latrine? If so, why? The presence of the blood on the floor and base of the latrine and the finding of the skeletal remains of a male person about the same age of the deceased in the pit latrine are also important pieces of circumstantial evidence.The learned trial judge did not agree with counsel that there was no case to go to the jury. He was correct. In our judgment there can be no doubt that the circumstantial evidence adduced by the prosecution established prima facie the death of Franklyn Johnson at the hand of the applicant. This ground fails.

Ground 2 –Circumstantial Evidence

Counsel for the applicant submitted that the learned trial judge's direction to the jury on circumstantial evidence was inadequate in that he failed to direct the jury that:

(i) the facts they found proven had to be inconsistent with any other rational conclusion than that the accused was guilty; and

(ii) that circumstantial evidence consisted of a series of undesigned and unexpected coincidences that compel one to one conclusion only.

Further, counsel complained that, the learned trial judge did not assist the jury in their analysis of the evidence. The learned trial judge gave the jury the following directions:

> "...On a charge of murder the fact of death is provable by circumstantial evidence, despite the fact that no body has been found. Immediately the question that springs into your minds, what is circumstantial evidence?
>
> Well, Madam Foreman and members of the jury circumstantial evidence is where from the circumstances that are being put forward, you are asked to draw an inference. So in this case, the crown is asking you to draw an inference, one that Franklyn Johnson is dead. Two, that it is Miss Brissett who killed him.
>
> Now, listen carefully to me please, these are the two critical questions. Is Franklyn Johnson dead? Did the accused kill him? If the answer to the first question is no or you are not sure about it then you must acquit the accused. It is only if you are satisfied that you feel sure that Johnson is dead that you are entitled to go on to consider the second question. Did the accused kill him?
>
> Now, the inference you are being asked to draw the inference both that Johnson is dead and that it is the accused who killed him. Before you can draw any such inference all the evidence all the circumstances put forward, must lead in one direction and one direction only. So before you can say that Johnson is dead, you must be satisfied so that you feel sure that the circumstances point in one direction and one direction only, that he is dead.

Equally, if you find and you are satisfied so that you feel sure, that he is dead, the evidence or the circumstances must point in one direction and one direction only, that is that Miss Brissett killed him, before you can arrive at a guilty verdict. Because this is so critical to the case. You may say, the Judge think we do not have any sense why he is repeating this so much. Any how because it is so critical, I am going to continue. So therefore, Madam, Foreman and members of the jury, the Crown is relying on circumstantial evidence to satisfy you so that you feel sure that the person named in the indictment is dead, and that it was the accused who killed him.

Remember , there is no burden on the accused, this must be your approach. In respect of the two cases put to you, look at the circumstances which have been put before you in respect of each question. Is Franklyn Johnson dead? Did the accused kill him? So you look at the circumstances put before you in respect of each of those questions. That is the evidence adduced by the Crown. Then in respect of all the evidence produced by the Crown you determine what if any what part or parts of that evidence you accept as factual then, from what you accept as factual you then determine whether your conclusions compelled you –notice I used the word compelled you to the conclusion which the Crown seeks. It is only if your conclusions compelled you, it is then and only then that you will be entitled to return a verdict adverse to the accused.

So your conclusion must be compelled to say, yes, I am satisfied so that I feel sure that Franklyn is dead. And two I am satisfied so that I feel sure, that Miss Brissett killed him. It is then and only then that you can return a verdict of guilty. To put it simply you must be satisfied, beyond all reasonable doubt."

Thereafter, the learned judge reviewed and analysed the evidence adduced by the prosecution. At the end of his analysis he told the jury:

> "What the prosecution is asking you to say when you put all the circumstances together – the age of the bones, that it is a male, the presence of blood stains the presence of blood on the pick axe, and there was a pickaxe that he used to have. When you put all of these circumstances together the Crown is saying that you are compelled to one view and one view only. That is what the prosecution is saying, and I have given you directions already which I will repeat is only if the evidence points in one direction and one direction only that is to the guilt of the accused that you can return a verdict of guilty. The evidence must be consistent with her guilt and inconsistent with any other rational conclusions."

The learned judge in his usually careful directions made it abundantly clear to the jury that they must not convict unless they were satisfied that guilt has been proved and has been proved beyond all reasonable doubt. The jury were made to understand that they could only be sure of the applicant's guilt if the evidence was not only consistent with her guilt but also inconsistent with any other reasonable conclusion. As was submitted by the learned Snr. Deputy Director of Public Prosecutions the learned trial judge's direction to the jury on circumstantial evidence was in line with the guidelines set out by Carey JA in ***R v Everton Morrison*** 30JLR 54 at 56B. In that case this Court stated that in this jurisdiction the direction in ***Hodge's*** case [1838] 2 Lew CC 227 at 228 is still applicable.

The 'rule' in Hodge

The so-called rule in ***Hodge*** is that where the prosecution's case is made up of circumstances entirely the jury should be directed that before they can find the prisoner guilty they must be satisfied:

> "not only that those circumstances were consistent with his having committed the act but they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person".

In 1952 this Court of Appeal applied the rule in ***Hodge*** in ***R v Clarice Elliott*** [1952]6JLR173. This decision was followed in ***R v Elijah Murray*** [1952] 6 JLR 256 and ***R v Burns and Holgate*** [1967] 11 WIR 110. In 1975 in ***R v Cecil Bailey*** 13 JLR 46 this Court held that the rule in ***Hodge's*** case had become a settled rule of practice in this jurisdiction and that a special direction as to the way in which purely circumstantial evidence is to be viewed should be given. In that case the Court considered ***McGreevy v. DPP*** [1973] 1 All ER 503; [1973]1WLR 276. In ***R v Barrett*** SCCA No. 151 of 1982 (unreported) delivered December 16, 1983; ***R v Morrison*** (supra) and ***R v Audley Cameron et al*** SCCA 123 and 126 of 1997 among others, this Court applied the rule in ***R v Hodge*** (supra) holding that the approach in this jurisdiction is not the same as in England.

Recently this Court revisited the issue of the applicability of the rule. This was in the case of ***Bernal and Moore v R*** [1996] 50 WIR 296. Forte JA (as he then was) in reference to cases cited above said:

> "The above cited cases clearly established that it is settled practice in Jamaica for the directions as given in ***Hodge's*** case to be given to the jury. This is not so in England, as the ***McGreevy*** case shows. But even though there is a difference in the manner in which the jury is directed to approach this type of evidence, there is really no difference in the manner in which a conclusion of guilt may be drawn from circumstantial evidence."

Forte JA was of the view that the rule in ***Hodge*** and the decision of the House of Lords in ***McGreevy*** are aimed at the same considerations and that failure to give the special direction in ***Hodge*** was not fatal.

Downer, JA at p. 335H ibid was of the view that the ratio in ***Lejzor Teper v R*** [1952] A.C.480 at 489 is binding on the judiciary in Jamaica. In ***Teper*** Lord Norman opined:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, "put my cup, the silver cup, in the sack's mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Downer JA referred to ***Ramlochan v R*** [1956] A.C. 475 at 487 where their Lordships' Board approved a summing-up which followed ***Teper***. In his view "there are good reasons for this Court to ignore the so-called ***Hodge/Bailey*** rule – p. 356 (***Bernal and Moore***). At p. 357 ibid Downer JA

expressed the view that the decision of the House of Lords in ***McGreevy v DPP*** (supra) ought to have guided the Court in ***R v Bailey*** (supra). He observed that it was most unusual for an intermediate appellate court to prefer the summing-up of a judge on circuit (Alderson B in ***Hodge***) to the considered reasons of the Privy Council and the House of Lords: p357 D.

In ***McGreevy v DPP*** (supra) the point of law certified for the consideration of the House of Lords was as follows:

> "Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion."

Counsel for ***McGreevy*** relied on ***R v Hodge*** for support of this proposition. The House of Lords which is the final authority on the English common law which applies to this jurisdiction, examined the report of the summing-up of Alderson B in ***R v Hodge***. At p. 282E [1973 1 WLR Lord Morris of Borth –y-Gest said:

> "No one could doubt that the wise words used by the learned judge were helpful and admirable and as such were worthy of being recorded. But there is no indication that the learned judge was newly laying down a

> requirement for a summing up in cases where the evidence is circumstantial.."

Lord Morris observed that in England the home of the common law ***Hodge's*** case has not been given very special prominence and references to it are scant. His Lordship observed that references to it did not suggest that it amounted to a rule of law which if not faithfully followed would render a summing up defective. Lord Morris examined the position in Canada and Australia and made references to **Kenny's Outlines of Criminal Law** (9th ed. 1966) at p. 466 para. 510 and p. 519 para 597, also to **Taylor on Evidence** 12th ed. (1931) and to cases such as ***Teper*** and ***Onufrejczyk***. Then at p. 285 B-D his Lordship concluded:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary commonsense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact

> which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt."

After examining aspects of the trial judge's summing up His Lordship continued :

> "To introduce a rule as suggested by learned counsel for the appellant would, in my view, not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I see no advantage in seeking for the purposes of a summing up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the judge becomes under obligation to comply when summing up with a special requirement. The suggested rule is only to apply if the case depends "entirely" on such evidence. If the rule is desirable why should it be so limited? And how is the judge to know what evidence the jury accept? Without knowing this how can he decide whether a case depends entirely on circumstantial evidence? If it were to apply, not only when the prosecution case depends entirely on circumstantial evidence, but also if "any essential ingredient" of the case so depends, there would be a risk of legalistic complications in a sphere where simplicity and clarity are of prime importance."

The decision of the House of Lords in ***McGreevy*** is followed in other common law jurisdictions of the region. The Guyana Court of Appeal applied ***McGreevy*** in the ***State v Sookraj Evan*** [1975]23 WIR 189. The Court of Appeal of Barbados in ***Adams and Tull v R*** [1997]55 WIR 60 did

likewise. The Court of Appeal of Trinidad and Tobago in ***Henry v The State*** [1986] 40 WIR 312 at 328b approved the summation of a judge which was "kept well within the boundaries enunciated in ***McGreevy's*** in relation to...the issue of circumstantial evidence." Also in ***Guerra and Wallen v The State*** (No1) [1993] 45 WIR 370 Bernard CJ said:

> "As a matter of fact it is clear law that even when a case is based on circumstantial evidence no special direction is required –see ***McGreevy v DPP and Henry v The State..***"

Dicta of the Judicial Committee of the Privy Council in ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd.*** [1986] A.C 80 at 108 to which Downer JA referred in ***Bernal & Moore*** (supra) seem to support the view that a decision of the House of Lords in relation to the common law is our law and is binding on us.

Indeed it seems that in ***Clinton Bernard v the Attorney General of Jamaica,*** Privy Council Appeal No. 30 of 2003 delivered 7th October, 2004, their Lordships' Board was indicating that they expect this Court to apply common law principles enunciated by the House of Lords.

I now return to the instant case. The learned trial judge explained to the jury what circumstantial evidence is. He told them in clear terms what the critical issues were. He told them where the burden of proof lay. He emphasized what the standard of proof was. He made it abundantly clear that in order for the prosecution to succeed against the applicant they must prove beyond reasonable doubt that she killed Franklyn

Johnson. He told the jury that before they can find that Franklyn Johnson is dead they must be sure that all the circumstances point in one direction only that is that he is dead. They should approach the question - Did the accused kill him?- in the same manner.

In the course of a careful summing-up the learned judge on at least six occasions warned the jury of the need to be sure. He told them: "to put it simply you must be satisfied beyond all reasonable doubt". His summing-up was fair, reasonable and helpful. As we have already stated the jury were made to understand in no uncertain terms that they must not convict unless they were satisfied that guilt has been proved and has been proved beyond all reasonable doubt. The argument of counsel that the learned judge's direction on circumstantial evidence was inadequate is clearly misplaced.

Counsel also complained that the learned trial judge "did not assist the jury in their analysis of the evidence..." This complaint is in our view baseless. The learned trial judge spent much time analyzing the evidence. Pages 184-187 of the transcript contain a careful analysis of the evidence adduced by the prosecution. This ground fails.

Ground 3 –unfair comment

This ground was not argued with much conviction. The directions given by the learned trial judge at p. 189 of the record were in keeping

with the guidance given by their Lordships' Board in ***DPP v Walker*** [1974] 12 JLR 1369 at 1373.

We have examined the words and phrases used by the learned judge and can find nothing unfair or improper. This ground is certainly without merit.

Conclusion

We have treated the hearing of the application for leave as the hearing of the appeal. For the reasons given the appeal is dismissed; the conviction and sentence are affirmed. We order that the sentence commence as of the 2nd June, 2002.