JAMAICA

595

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 32/83

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

GEORGE EDWARDS V. REGINA

Mr. B. Macaulay, Q.C. and Mr. B. S. Samuels for the Appellant.

Mr. C. Lawrence for the Crown.

December 16, 1983

KERR, J.A.:

The hearing of this application for leave to appeal from a conviction for murder in the St. Elizabeth Circuit Court is being treated as the hearing of the appeal as the grounds of appeal involve questions of law.

The appellant was charged that between the 24th and 25th days of March, 1982 he murdered Seion Edwards. The deceased was the niece of the appellant being his brother's daughter.

On the morning of the 25th of March, 1982 the body of the deceased was found underneath a heap of stones on a track about three chains from the public road which leads from Duff House to Bull Savannah in the parish of St. Elizabeth. The deceased, as far as the evidence goes, was last seen alive by one Vivian Linton who said that on the 24th of March, that is the day before, at about 1:30 to 2 o'clock in the afternoon he saw the deceased going down the road towards her home at Duff House. She had with her an umbrella, an oil jug, and two paper parcels. On that same day at about 5 o'clock in the afternoon Cecil Simpson, returning from his farm to Duff House on the track on which the body was found, saw a

pile of stones. Attention was drawn to it because his donkey which he was riding shied away from the stones. Further on, on a second track, he saw the black umbrella which the deceased had had earlier that day.

The post-mortem examination was performed by Dr. Ramu, who found (1) an abrasion to the front and outer side of the left foot, (2) a contusion to the front and inner side of each thigh at its lower third, (3) a contusion to the front and outer side of each thigh at its upper third, (4) an incised wound to the back of the left wrist joint, measuring two inches in length and one inch in width, (5) an incised wound to the back of the neck at its middle, with surrounding area being contused. This wound measured five inches in length and three inches in width. It was seen to cut through the third and fourth cervical vertebrae, the spinal cord and the artery on each side, (6) an incised wound to the back of the right forearm at its lower third, measuring 1½ inches in length and half an inch in width, (7) contusion to the back of each shoulder on its outer side.

The doctor was of the opinion that the injury to the back of the neck could have been caused by a weapon like a machete. He also found that there was contusion of the labia fold of the vagina. He said that death was due to the injury to the neck, from resulting shock and haemorrhage. He said that the other injuries which he saw to the thighs and labia of the vagina suggested that there had been sexual intercourse with some degree of force.

The evidence with which the prosecution sought to connect the appellant to the crime was purely circumstantial. At about 2:30 p.m. that same day he was seen by District Constable Oscar Simpson on the road leading from Duff House to Bull Savannah. Simpson's evidence was that the appellant was coming from the Duff House direction. He came to the station and made a report that he was being molested by some young men, and thereupon the Special

Sergeant of Police went with him to investigate, and returned with him about 2:45 p.m. At the time he came to the station he had with him a wooden mortar which he left there when going with the Sergeant. When he returned he took up the mortar and went on his way, in the direction of Duff House. There is further evidence that this mortar was made by the appellant for a resident of the Duff House area, a Mr. Nugent Sinclair, and Sinclair said that at about 4:45 p.m. the appellant attended there with the mortar, he paid him and he left. On the following morning after the body was found the appellant was taken into custody.

The other aspect of the evidence is the scientific evidence. The investigating police who went to the scene, according to their evidence, testified that in the hand of the deceased girl were some hairs. She had on no panties. They took possession of her clothing and other exhibits from the body; they took possession of the clothes of the appellant, and in the course of their investigation with his consent hairs were taken from the head of the appellant and were submitted to Dr. Cruickshank and hair from the girl was also submitted to the doctor. As the learned trial judge said in the course of his summing-up, the evidence of Dr. Cruickshank is the platform of the crown's case. Dr. Cruickshank found that of the hairs that were found in his underpants one was similar to the hair on the head of the girl and one was similar to his hair. She also found semen on the girl's clothes and it was of the "B" group which accords with the blood grouping of the appellant. The evidence of the analyst is that eighteen percent of the people of Jamaica have group "B" blood.

The appellant, after submissions of no case were made by his counsel, gave a short unsworn statement from the dock in which he said that on the day of the 24th of March, 1982 he was making a mortar, that he knew nothing about the death of Seion Edwards because when he finished making the mortar and was going to deliver it to the

person for whom he made it, when going on some boys were fooling around him and he helped down the mortar at the police station gate, made a report to the police, asking them to go and warn them, and after the police went he went back, took up his mortar and carried it to the person for whom he made it, and returned home.

Now the first set of grounds of appeal argued concerned questions of law. The first of these was that the trial judge in his directions on circumstantial evidence was in direct conflict with the directions established in the case of Sidney Campbell, Supreme Court Criminal Appeal 112/76, the judgment of November 3, 1977. Mr. Macaulay submitted that the directions were inadequate because the trial judge failed to tell them that circumstantial evidence must be capable of supporting a verdict of guilty and that the circumstances must be inconsistent with any other rational conclusion than the guilt of the prisoner.

As recently as September of this year, in the case of Beverley Champagnie et al, Supreme Court Criminal Appeals Nos. 22 - 24 of 1980, this Court reiterated the oft expressed that it is the effect of the summing-up as a whole that is important; the trial judge is not obliged to follow any formula or pronounce any shibboleth, and went on to quote with approval a passage from R. v. O'Reilly, [1967] (51) C.A.R. page 349. Where however directions on a particular aspect of the law have been authoritatively approved and advocated by an Appellate Court, the prudent and appropriate use of such directions is recommended. In the instant case the complaint was that in his directions the trial judge failed to follow the rule in Hodges and other cases. The passage in the summing-up against which this complaint is made is at page 125 of the record, in which the learned trial judge said:

> "You have to go back and look at the crown's case - circumstantial evidence that the crown has put before you. Is this circumstantial evidence of such a nature that if you believe the expertise of Mrs. Cruickshank, this undesigned set of circumstances, did it point anywhere other than guilt, or is it broken that it points in this case to the innocence of the accused, because that is a matter for you. You have to look at that evidence to see if everything satisfies you so that you feel sure."

But this is not the whole story. Earlier in his summing-up the learned trial judge had said:

> "Circumstantial evidence, Mr. Foreman and Members of the jury, is this: if you look at all the surrounding circumstances and you find such a series of undesigned coincidences or unexpected coincidences, that as reasonable common-sense people up there, the twelve of you up there, you can only find your judgment being propelled in one direction, then circumstantial evidence would have been made out. All the circumstances though, Mr. Foreman and Members of the jury, in circumstantial evidence must point to one direction alone - must point in the direction of guilt. If it does not do so then it does not satisfy that test. If it leaves gaps in it then it is of no avail, you cannot convict on that, because the over-riding theme or thought that ought to influence your minds is that you must be satisfied so that you feel sure as to the guilt of the accused."

This Court had but recently to deal with a similar complaint in the case of R. v. Lloyd Barrett, unreported Supreme Court Criminal Appeal No. 151 of 1982. In delivering the judgment of the Court, Carey, J.A. identified the essential elements that must co-exist to render circumstantial evidence capable of supporting a verdict of guilty, in the following passage:

> "On a fair reading of these directions relating to the directions in that case it is plain that the learned trial judge directed the jury on circumstantial evidence, highlighting two factors which if a verdict adverse to the prisoner was to be returned should co-exist: (1) An array of circumstances which point to one conclusion, and to all reasonable minds that conclusion is guilt. (2) Those circumstances must not have gaps or be equally consistent with innocence."

The learned Judge of Appeal then went on to consider the cases of R. v. Cecil Bailey, [1975] (13) J.L.R. p. 46, and the English case of McGreevy v. D.P.P. [1973] (1) A.E.R. p. 503, and

The jury were told by the learned trial judge in his directions at page 100:

> "In that statement he raises something that can be termed an alibi, because what he is saying in that statement is that he was not there at all, he knows nothing about the killing of Seion Edwards. That is what he said."

Then he went on to say:

> "Mr. Foreman and Members of the jury, take the warning that you cannot convict where an alibi is raised unless you reject the alibi completely; you have to reject that statement. And remember, even if you reject it, in the nature of things, you have to go back and look at the prosecution's case. So you cannot say you are going to do any conviction without rejection of the alibi."

Mr. Macaulay makes the point that the learned trial judge should tell them that if the alibi raises a reasonable doubt they ought to acquit; that the omission of that in the directions rendered the directions on alibi inadequate.

Later on in the summing-up, after that passage, the learned judge referred to the statement of the accused, and went on to say:

> "That statement can satisfy you as to the truth, in which case there is no alternative but to acquit the accused because the prosecution would not have discharged the burden to satisfy you so that you feel sure of the guilt of the accused. If the accused testimony raises a reasonable doubt in your minds as to its truth, equally you must acquit the accused because the crown would not have made out its case to the required standard. Thirdly, it may have the tendency to strengthen the case for the prosecution."

Those directions were unduly favourable to the appellant in that the judge virtually elevated the statement from the dock and equated it to testimony on oath. Notwithstanding, we gave careful consideration to this ground of appeal and we are of the view that, taking the summing-up as a whole, the jury could be in no doubt that (1) they could not convict unless the alibi was rejected, and (2) that the rejection of the alibi was not per se sufficient for the finding of guilt, but it was incumbent on them nevertheless

put it that way, more helpful opinion, and as a result she had this to say - "If there is a comparison we always put in 'it could have come from the same source', to guard against the remotest possibility that there is someone else who has these characteristics." She calls it the "remotest possibility."

Now in cross-examination she admits of course that given a strand of hair she would be unable to say whether that hair was the hair of an adult or child, or whether it is from a male person or a female person. She admitted that of the control sample that she got there could be someone walking around with characteristics similar to the control sample hair. She was asked, "leaving out the accused for the moment", whether there could be someone walking around whose hair characteristics are similar to the control sample, and she said yes. To the question whether that person could be in Duff House or Bull Savannah, or Santa Cruz, she made no answer.

Now circumstantial evidence of course has certain well-recognised factors or phases. Firstly, one has to consider the opportunity to commit the offence, and here we are of the view that the evidence of opportunity is too nebulous. There was no evidence of how far from where the body was discovered was the police station, how far was Nugent Sinclair's house; there was no evidence that could put him on the road in that particular spot at or around the time the deceased was seen going home; there is no evidence to show whether where the body was found was where the killing took place.

As regards the conduct of the appellant, which is another aspect of the circumstantial evidence, there was nothing suspicious in his conduct. Firstly, throughout the time that he was seen by the witnesses for the prosecution he had no machete, and when he was asked to give samples of his blood and of hair he willingly did so.

Secondly, we are not particularly at ease with the conduct of the investigations. For reasons which do not seem clear other suspects were taken into custody but no samples were ever taken of their hair, and it is of interest to note that the foreman of the jury, when permitted by the Court, asked a very pertinent question, whether if a hair was found in the Court-room it was necessary to take the hairs of all the twenty persons there, in an endeavour to determine whose hair it was, and the answer was that if she did and there was a comparison - meaning a similarity - she would be able to so conclude.

So that, in short, we are of the view that standing by itself, and the crown's case seem to rest on this evidence because without the evidence concerning the comparison of the hair - there clearly would be no case to answer, and having regard to the opinion expressed by Dr. Ramu, to which the jury's attention incidentally was not specifically drawn, it does not satisfy the test, and accordingly no reasonable verdict can be founded on the evidence in this case.

For these reasons, the appeal is allowed, the conviction quashed and judgment and verdict of acquittal entered.

then went on to say:

> "The weight of authority, beginning with R. v. Clarice Elliott, 6 J.L.R. page 173, R. v. Elijah Murray, 6 J.L.R. page 356, R. v. Burns and Holgate, 11 West Indian Reports, page 110, R. v. Cecil Bailey supra, is that where the case for the prosecution depends on circumstantial evidence the Judge should make it clear to the jury there not only must be evidence pointing in one direction and one direction only, that being guilt, it must be inconsistent with any other rational conclusion."

The approach in this country is not the same as in England. Speaking for myself it would seem that if the circumstantial evidence must point indubitably to the guilt of the accused then impliedly if it points to any other reasonable conclusion it would not meet the test; nor do I think that to tell a jury of laymen that it must be "inconsistent with any other rational hypothesis" is clarifying or edifying. Be that as it may, the rule in Hodges' case is so firmly established here that trial judges are well advised to adhere to the formula, thereby obviating the risk of the directions on this question being made grounds of appeal.

In the instant case it is true to say the learned trial judge did not faithfully follow the formula. However, we are of the view that he advised the jury of the essential elements to be identified, and told them that they must co-exist before a verdict of guilty may be founded on such evidence. Accordingly, on this question the jury were adequately and fairly directed.

The next ground of appeal argued was that the directions on alibi were inadequate and wrong, in that the learned trial judge at no time directed the jury that if the alibi raised a doubt in their minds they were to acquit; he impliedly treated the alibi as meaning not present at the scene of the crime. Further, that he failed to make it explicitlyclear to the jury that the defence of alibi meant that the accused was elsewhere and the prosecution must prove that he was not elsewhere; if the jury had any reasonable doubt that he was there they must acquit.

to examine the case for the prosecution and to determine whether the burden of proof had been discharged by the prosecution. Accordingly, we find no merit in this ground.

The next ground, however, concerned whether the judge's directions on circumstantial evidence were fair and adequate and helpful. However, our anxious concern is whether or not the circumstantial evidence met the requirements necessary to support a finding of guilt.

Now in cross-examination of Dr. Ramu, counsel for the appellant directed his attention to a work on forensic medicine and put to him a particular passage, thus: "In spite of the detective story writers, it is a very imprecise means of identification", that is means of identification by hair, and Dr. Ramu agreed with that. He however went on to say that it is possible to identify an individual by examination of hairs, and he elaborated - "If someone was to take a sample of hair from one head and analyse two strange strands of hair microscopically, it is possible, by comparison, to say that they came from the same head." He went on, however, to say in effect that not only do many people have similar hairs but several quite different hairs can come from the same head, especially when it is growing grey.

Now Mrs. Yvonne Cruickshank is a Government Analyst attached to the Forensic Laboratory in Kingston. She is the holder of a Bachelor of Science degree in Chemistry and Bio-chemistry, and a Master of Science degree in Forensic Science, and she holds a diploma in Haematology. In her examination-in-chief, having expressed that she found certain hairs from the head of the appellant with similar characteristics to the hairs found in the head of the deceased, she expressed the opinion thus - "I would state that they are similar and could have come from the same source." Clearly, an opinion like that, in the terms it was expressed, was far from sufficient to satisfy the requirements of the standard of proof. Counsel for the crown then sought from her, if I may