JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 146/78

BEFORE: The Hon. Mr. Justice Robinson - President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

THE QUEEN v. OLASSIO BAILEY

Mr. Eric Frater and Miss A. Tapper for the Applicant

Mr. Glen Andrade, Dep. Director of Public Prosecution for the Crown

January 28, March 24, 1981

ROWE, J.A.:

Velma a 17 year old girl and her sister Pamela aged 15 years of age testified before Carey J. and a jury in the Port Maria Circuit Court during the trial of the applicant, their father, for murder that on the night of March 1, 1975, they saw the applicant thump their mother, Ermenia Bailey with his fists, hold on to her, wrestle with her so that she fell to the ground at the foot of the stairs, then he stepped on her, sat across her as she lay on the floor and used the stick of a pick-axe to beat her in the process delivering several blows to her head; he beat her all over the body in so much so that Velma Bailey said, "Her face mash up and her hand did batter bruise and her nose dig out." The girls said that after the beating Ermenia Bailey was not able to talk, or to move. They shook her and called her name but got no response. Her clothes were saturated with blood. It was the applicant, said these witnesses, who lifted Ermenia Bailey and placed her on a bed in a downstairs bedroom and then ordered the children to change her clothes as he was taking her to the hospital. The girls were unable to turn the injured woman

as she lay helpless on the bed but they managed to place upon her a duster, albeit somewhat imperfectly. The applicant ordered these two witnesses to go to their beds in an upstairs bedroom along with their younger brother. They went, leaving Ermenia Bailey senseless and speechless and helpless on the downstairs bed and that was the very last view which these children had of their mother.

The further evidence from these two witnesses was that on the following morning Sunday March 2, 1975 when they came downstairs at 8 a.m. they saw the applicant who spoke to them saying, in the language of Velma:

> "He say we mother gone and we not going to see her again and if anyone ask we where we mother is, was to come and ask him or tell him that she gone to 'Merica'."

The girls said they looked on the bed on which they had left their mother but now say only two bloody sheets. On the applicant's instructions, Velma washed them clean. The girls did not believe that their mother could have got up and left that house during the night and so they searched the house, even to the extent of looking in the wardrobe, to try to locate her. Next, they searched the surrounding bushes. Mrs. Bailey was not found. The girls said that they dared not speak of the night's events as the applicant threatened them that he would kill them if they revealed anything of the night's happenings and consequently they became afraid of him.

When Mrs. Bailey visited Harmony Hill on the night of March 1, 1975 she was wearing a pair of slippers and a watch. Some months later the applicant gave the pair of slippers to Pamela Bailey and still later in time he gave the watch to Velma Bailey. The daughters said that on the night of the beating the applicant after sending them to their beds, plugged in the light for his cabinet-making workshop, turned up the radio and entered the workshop. They heard sounds, as if someone was washing, coming from the workshop.

Mrs. Bailey has not been seen since that night. Her sister who lives in Kingston and with whom she would visit on her days off from work has neither seen nor heard of Mrs. Bailey since March 1, 1975. A former co-worker and with whom Mrs. Bailey maintained frequent telephone contact, testified that since March 1, 1975, she has not heard from Mrs. Bailey and her efforts to contact her by telephone have been fruitless. An officer from the Immigration Department told of his search of the Department's Records to discover if Mrs. Bailey had been issued a Passport in her own name, as the Passport which she held jointly with her husband had expired, and he found that none had been so issued to her. No relative or friend who would normally be expected to be in contact with Mrs. Bailey has seen or heard of her since March 1, 1975.

There was evidence from one Joshua Watson that in July 1975 while he worked in a property about six chains from the house of the applicant, he was attracted by an odour most foul, - "the flies and the horrible stench." On investigation he saw 'something in a trench like dog dig it up." That something turned out to be a plastic bag containing some cut-up bones, a frilly front blouse, striped skirt and a long sleeve striped shirt. Nearby was a skull. It was from the bones and the skull that the abominable stench emanated. Watson purported to identify the long sleeve striped shirt as the property of the applicant he having seen the applicant working in that shirt. At the time he drew the inference that the skull was that of a dog and so he made no alarm. At trial he identified the plastic bag, 7 pieces of bone and the frilly front blouse which he said he saw in this trench in July 1975. These articles were recovered from the trench in October 1977 when the witness re-visited those premises in the company of the police.

A young boy testified that as he played in Mr. Amritt's property, in the vicinity of the Watson discovery, he too saw a skull, "some long bones like hand and knees and some jointee-jointee things like

finger bones". He saw too a shine ring. As he did not think that a human being could have been involved he said nothing of his find. This child's mother also spoke of seeing the skull but although others with her thought it was that of a dog, she observed "a gap" in the head which led her to believe it might not be the skull of a dog and so she ran away and did not return to that spot.

Dr. Ramu, a pathologist, examined the seven bones found in the plastic bag and he formed the view that they were all of human origin. One of those bones he identified as a leg bone and he found on it bony reaction, the result of a long-standing, chronic ulcer of the leg. The Bailey daughters said their mother had a "bump" on her leg which as children they would playfully squeeze but which would cause the mother to let out a small gasp of pain. The bones did not assist Dr. Ramu to determine the age of the person to whom they once belonged but he did advance the opinion that the bones were those of a person of small stature whose bone structure was quite small. Mrs. Bailey, on the evidence of her sister, was a dimunitive woman.

Prior to March 1, 1975 the applicant and his wife did not live in peace and harmony together. The daughters spoke of frequent quarrels and fights between husband and wife and on occasions consequent upon these fights Mrs. Bailey would leave home for a time. After such an incident in 1974 she left home and had been away for about 1 year up to March 1, 1975. During this time she had lived and worked in Kingston. Florence McLean and Lena Palmer testified that on an afternoon in March 1974 they, together with Ermenia Bailey were at premises 20-30 Oxford Street in Kingston when the applicant suddenly entered the premises, "grabed Ermenia by the hand, pulled her to her legs and say, "come we going back to country now. Get dressed." He pulled her despite her protests, down Oxford Street. Her friends intervened and the applicant released Ermenia and left.

Between March 1975 and October 1977 the Bailey daughters bided their time. Then in October 1977 Velma Bailey ran away from home and made a complaint to her aunt in Spanish Town. The police were contacted and they interviewed the applicant about the whereabouts of his wife. The evidence was that at that time the applicant said "yes, she came from Kingston to visit the children and she remained at the house until about 10 o'clock the Monday morning when she left for Kingston." At trial the applicant denied making that statement to the police and after admitting his wife's visit on the night of March 1, 1975 said they did have an argument as to why she had stayed away for such a long time especially as she had promised him a month ago to return but that there was no violence. He retired to bed leaving her with the children. During the night he discovered that she was in bed with him. They slept together until about 4 a.m. when she got up, dressed and left for Kingston. She wished him to accompany her but he declined. He specifically denied the allegations of his two daughters and indeed it was suggested to them in cross-examination that they were "tutored" by others to give the damaging evidence against the applicant.

These were the main features of the evidence on which the jury convicted of murder. In the first ground of appeal the applicant complained that the verdict was unreasonable and could not be supported having regard to the evidence as there was no reliable evidence from which the jury could find death of the applicant's wife. The third ground complained that there was no proof that the alleged beating of the wife by the applicant caused her death and that her death might well have been by accident.

At the outset of the hearing of the appeal Mr. Frater abandoned these grounds of appeal. It is common place in Jamaica for the body of the murdered person to be available for the most detailed post-mortem examination and for the murderer to be at

large unknown to and unidentifiable by the police. It is rare for a murder trial to commence without positive evidence of the identification of the body and of post-mortem evidence of the cause of death. In the instant case the scientific evidence, such as it was, could go no further than to establish that a human frame was chopped up and some of the bones placed in a plastic bag. The bones were not visible when the police visited the property in 1977 but were unearthed after some digging. The witness who showed them where to dig was the same one who said that he came upon the evil smelling bag and skull. From this evidence it could be inferred that in 1975 flesh was rotting from those bones. The finding of part of a blouse and part of a brassiere in that same plastic bag along with the bones leads to the further inference that the bones belonged to a woman. If the two daughters were to be believed in the material aspects of their evidence, then although Mrs. Bailey could not be found on March 2, 1975, her slippers which she had worn to the house on the previous night and her watch which she had carried there did not leave the house. They were found to be in the possession of the applicant. Once the jury were convinced that Velma and Pamela Bailey were credible witnesses and that their narrative of the events of March 1 and 2, 1975 were indeed true, then there was abundant evidence that the applicant having battered his wife into unconsciousness took the further steps in the course of that night to dispose of her body. His positive statement to the girls on the Sunday morning that they would not be seeing their mother again and his threat to kill them if they revealed what had transpired on the Saturday night were cogent pieces of evidence in the chain of circumstances leading inexorably to the conclusion that the applicant killed and secreted the body of his wife. From the testimony of the girls it was impossible for Mrs. Bailey to have left that house unaided during the Saturday night, yet such was the testimony of

the applicant at trial, which testimony must be compared with his earlier statement to the Police that his wife had remained in the home until 10 a.m. on Monday March 3. There was ample evidence that Mrs. Bailey had been killed by the deliberate acts of the applicant. Accordingly we are of the view that there was no merit whatever in grounds 1 and 3 of the grounds of appeal and that Mr. Frater acted quite properly when he abandoned them.

Ground 5 complained that:

(a) "The conduct of one or two members of the jury during the trial manifested that a fair trial was not likely to result" and

(b) "the learned trial judge wrongly exercised his discretion not to discharge the jury"

The source of that complaint arose in this way. Pamela Bailey was being cross-examined by Mr. Frater, counsel for the applicant, on Wednesday July 19, 1978. At page 152 of the Record there appears this question and answer sequence:-

"Q. I am suggesting to you that those are things that the person who write down your statement did.

A. No sir

Q. Tell you to do - Tell you to say

A. No, sir."

There was an objection by the prosecuting attorney to that line of cross-examination which the learned trial judge over-ruled. The cross-examination continued.

"Mr. Frater: Now isn't it true that you were told some of these things to say?"

The Judge intervened and Mr. Frater continued.

"Q. Yes, isn't it ture that............?

A. I didn't hear what you say, Please repeat.

Q. What?

A. I didn't hear what you say, Please repeat.

Q. You didn't. I said to you, isn't it true that ---------wern't you coached on what to say?

A. Yes sir.

Q. Yes

His Lordship: What are you answering?

A. He said if I did tell the police.

His Lordship: What?

A. What I see.

There followed some questions from Mr. Frater to discover if the witness understood the meaning of the word "coach" and from her answers she demonstrated that she did. Then the learned trial judge asked:

> "What counsel is putting to you is that somebody teach you to say what you say."

A. No sir, nobody teach me what to say."

The records disclose that at that stage Mr. Frater said,

> "There is clapping from the jury."

His Lordship: "I did hear something was it a clap?

Foreman: No sir, it was just accidentally done by one os us, you see............

Mr. Frater: M'Lord, I have been watching them very carefully. M'Lord, and I am a little concerned. You see we are trying to have a fair trial.

There were some exchanges between Bench and Bar and Mr. Frater was advised to make a note of that with which he was concerned. The case for the Crown was closed late on the afternoon of Thursday July 20, and there followed a no case submission by Mr. Frater, which was not upheld. At the resumption on Friday July 21, Mr. Frater made an application to the learned trial judge for the dismissal of the jury on the ground that (a) "one member of the jury clapped, literally raised up" when the particular answer was given by the witness Pamela Bailey and referred to above, and (b) "in addition, juror No. 8, in particular, has constantly been having an expression on her face of anger at anything that is said during the trial that seems to cast sufficient, well, doubt on the veracity ofthe Crown's witnesses."

Mr. Frater developed his submissions at some length and there followed the prosecuting counsel's reply in opposition. The learned trial judge at page 357 of the record ruled thus:-

His Lordship: "I think that learned counsel for the defence is suggesting that there is manifest bias on the part of two of the jurors who are sitting in judgment in this case. I think, really, that is the burden of his submission.
Well, if the court were satisfied that there was manifest bias on the part of the entire panel I think justice would demand that that jury be discharged and another jury empanelled to determine the issues in an unbiased manner. But having regard to what counsel has told me, i.e. that one juror clapped at a time in the proceedings and another juror has a face that displays emotions, certainly, as far as that is concerned, that must be dismissed as somewhat far-fetched.
If a juror is reacting in a normal fashion I don't really see how that can be basis for bias. Some people are better able to mask their feelings than others. In so far as the clap is concerned, a statement was given by the foreman as to the true situation. I am not at all satisfied that there is any manifest bias on the part of the entire jury panel and at the appropriate time I will, in my summation to the jury, warn them as to the proper approach that they must take in issues in determining this case. That is all that need be said at this particular point. I may observe that it is imprudent, really to make such allegations in the presence of the jury because the jury consists of ordinary mortals and it is much wiser to make those allegations in chambers before the judge, so that he might hold a proper enquiry, so that no one may be prejudiced or appear to be prejudiced in the matter."

In a trial in the Circuit Court before judge and jury, the judge has an undoubted power to discharge the jury before they have arrived at their verdict. Where the trial judge exercises his discretion not to discharge the jury and a conviction follows, the Court of Appeal has jurisdiction to review the circumstances under which that discretion was exercised. In Winsor v. The Queen (1866) L.R. 1 Q.B. 391, Erle C.J. said:-

> "We assume it to be clear that the discharge of the jury before verdict may be lawful at some time and under some circumstances. Then with reference to the facts on this record, we hold that the judge at the first trial had by law power to discharge the jury before verdict, when a high degree of need for such discharge was made evident to his mind from the facts which he had ascertained. We cannot define the degree of need without some standard for comparison; we cannot approach nearer to precision than by describing the degree as a high degree such as in the wider sense of the word might be denoted by necessity............It was his duty to exercise his discretion both in ascertaining the relevant facts and in determining their effect in making the necessity for the discharge evident to himself."

That statement of the law was approved and followed by the English Court of Appeal in R.v. Hambery (1977) 2 W.L.R. 999. In Hambery's case the trial judge during the course of the trial discharged a female juror who had made plans to go off on her summer holidays and continued the trial with the reduced number of jurors. On the special facts of that case the Court of Appeal did not see fit to interfere with the trial judge's exercise of discretion.

Mr. Frater referred us to four very old cases. In O'Connor v. Malone (1839) E.R. 814, two of the jurors clapped their hands at the close of the Prosecution's Speech. This conduct was made a ground of appeal but was found on appeal to be no foundation for a change of venue. A new trial was ordered on entirely different grounds. Hughes v. Budd (1840) 8 Dowlings Practice Cases Revised Reports 835 and Standwicke v. Hopkins (1844) Dowling and Long's Report Vol. 2 p. 502 and Cornish Dowling Vol. 30 of English and Empire Digest para. 398 do not appear to us to have any relevance to the instant appeal.

It cannot be seriously maintained that a juror's countenance or demeanour his smiles, his frowns, his lifted eye-brows,

his scowls, his putting his hands to his cheeks or resting his head on the panel of the jury box ought to be studiously compiled and catalogued by counsel and if it appears to him that there are unfavourable pointers to his case to recount them in an endeavour to stigmatize them as bias in the juror warranting the discharge of the entire body of jurors or for that matter of the individual juror. In keeping with the decision in Winsor v. The Queen supra, the learned trial judge had a duty to ascertain the facts on which the allegations of bias or unfitness giving rise to the high degree of necessity for discharge of the jury are based. We entirely agree with his determination that the act of clapping on the part of one juror in this case, an amorphous and ambiguous act, was no sufficient ground to impute any improper motive to that juror. The explanation of the Foreman that the act was automatic, unconscious, accidental, call it what you will, correctly reflects the importance and value of this isolated act. We found no merit in this ground of appeal.

It was for these reasons that we treated the application as the he·ring of the appeal and dismissed the appeal.