J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 142/75

BEFORE:
THE HON. MR..JUSTICE ZACCA P. (Ag.)
THE HON. MR. JUSTICE ROBOTHAM J.A.
THE HON. MR. JUSTICE ROWE J.A. (Ag.)

REGINA

v

ALPHONSO KENYON

Mr. Dennis Daley and Mr. D. Morrison for the Applicant

Mr. Derrick Hugh for the Crown

March 1, 2, 3, 8, 17, 1978

ROBOTHAM J.A.

This applicant was convicted in the Clarendon Circuit Court on December 11, 1975 for murder. From this conviction he appealed and on March 8, 1978 having concluded the arguments we allowed the appeal on grounds 1, 2 (1) and 4 as filed on his behalf, and in the interest of justice ordered that a new trial should take place at the next session of the Clarendon Circuit Court. As promised, we now proceed to put our reasons in writing. However, it is not intended to deal exhaustively with the matter in view of the order for a new trial which has been made, and the possible prejudicial effect which an in depth examination of the issues might have on the subsequent trial.

The case for the Crown depended in its entirety on circumstantial evidence as related by two witnesses for the Crown namely Edgar Elliott and Noel Williams.

A brief outline of the Crown's case shows that the applicant and the deceased Arthur Chambers, who was known as Daddy were partners at cane-cutting at Haynes Land in Clarendon. The two witnesses Elliott and Williams, partnered each other and all four of them usually operated in the same cane field. The deceased and Edgar Elliott were also tenants of the applicant

each occupying a separate room.

On March 7, 1974 all four were engaged in cutting canes, from around 7.00 a.m. The rows being cut by Elliott and Williams were shorter than those being cut by hthe deceased and the applicant, with the result that they finished cutting at about 10.30. a.m. Elliott then said that he heard that some more cane was burnt over the gully, so he and his partner Williams were going over there to cut it. The applicant, who that morning had assumed the responsibility for giving out the work told them that it was not true that canes were burnt over there, and they should both go home. They nonetheless left the deceased and the applicant in the field and went and cut the burnt cane some distance away, out of sight and hearing of the deceased and the applicant.

The finding of the burnt canes showed that the applicant was either mistaken or lying when he told Elliott and Williams that they should go home as no burnt canes were at the spot indicated by them, and was put forward by the Crown as showing an initial desire on the part of the applicant to be left alone in the area with the deceased.

Elliott and Williams ceased cutting canes about noon, and it being a Thursday, and pay day, they set out for the pay bill at Robinson's pay bill yard. On their way, and while proceeding along an interval between two cane fields the applicant suddenly appeared ahead of them in the interval. They did not see from whence he came, but they called to him to wait for them. He moved from the left hand side of the interval over to the right, and was seen to be perspiring profusely and wiping perspiration from his brow with his fingers. When asked how he was so wet, his reply was that he still had on his morning clothes and the sun was hot. Elliott's and Williams' evidence on this was that although it is customary for them to get wet whilst cutting canes, they had never seen the applicant wet like that when they were going home, and in any event this was

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some one and a half miles from the spot where the applicant and the deceased had been left cutting canes.

On March 18, 1974 the remains of a body which the Crown alleged was that of Daddy, was found in a shallow grave, mutilated beyond recognition by dogs, and in an advanced stage of decomposition. The only attempt at identification of it as being the body of the deceased was by means of a jaw bone found nearby, which Lorenzo Chambers the son of the deceased purported to say was that of his father. The trial judge quite rightly told the jury that they could not rely on this evidence as being proper identification, or any identification at all of the deceased. Doctor Marsh was unable to discern any injuries due to the decomposed state of the body, neither could he determine the cause of death. The jury were therefore left in a state where they had to determine that Arthur Chambers was dead, soly on the basis of the circumstantial evidence in the case.

This shallow grave with the body was located within the cane field adjacent to the left hand side of the interval where on March 7, the applicant was seen suddenly to appear by Elliott and Williams. It was eight cane rows away from the edge of the interval, and the Crown not unnaturally relied on the sudden appearance of the applicantat the spot, perspiring profusely (as one would expect a person who had just completed digging a grave single handedly to be) as another link in their chain of circumstantial evidence.

The evidence disclosed that when Elliott and Williams saw the applicant appear in the interval, that was the first time they were seeing him since they left the deceased and himself cutting canes at Haynes Land. The last known person to have seen the deceased alive was the field head-man Jacob Thomas. He had partaken of water coconuts in the same field with the applicant and the deceased about noon, and left them at that spot.

The sequence of events following on Elliott, Williams and the applicant meeting up, in the interval is as follows:-

(1) Elliott asks the applicant where is Daddy, and the applicant told him Daddy was gone home to bathe and shave to go to St. Thomas.

(2) Elliott observed that the applicant was not carrying his cane bill and his explanation when asked about it was that he had lent it to another cane cutter to cut coconuts.

(3) On reaching near their home, the applicant asked Elliott to give him his (Elliott's) bill to take home for him: Elliott complied.

(4) Applicant asked Elliott when they were parting to collect his (applicant's) pay and Daddy's in case he does not turn up at the pay bill. Elliott told him he would not do that.

(5) Whilst the pay bill is in progress the applicant arrives with a cane bill, which was not Elliott's.

(6) The applicant collects his own pay from the paymaster Mr. Ramhai, and when the deceased Arthur Chambers name was called, the applicant came forward and collected Chamber's pay envelope. When Ramhai asked him what had happened to Chambers he told him he was either sick or was cutting his hair. He cannot recollect what exactly was said.

(7) Elliott goes home the evening, calls to Daddy and gets no reply from his room, but the applicant who is present in the yard again tells him that "Daddy gone take the bus at Race Course to go to St. Thomas". The witness Lorenzo Chambers son of the deceased testified that to his certain knowledge, deceased had no connection with St. Thomas.

(8) Elliott asks Mrs. Kenyon the applicant's wife in his presence and hearing, if Daddy had left a long time

ago and she replies that from the three of them (meaning Daddy, Elliott, and applicant) left that morning Daddy had not come back as yet. The applicant then bawled at his wife and said "Don't you see Daddy walk through the front door and gone long time", and she replied in a low tone "yes".

(9) On the following Monday, Elliott sees the applicant in the cane field and when he asks him for the deceased, he said words to the effect that Daddy had not come back yet.

(10) On either the Tuesday or the Wednesday following, the applicant calls to Elliott and told him he heard a man had got hit down over Haynes Land. When asked by Elliott if it was Daddy, the applicant replied that he did not know, but the Police would soon come to him.

(11) That same day Elliott makes a report at the Station, and he returns again on March 18, 1974. On leaving the station and whilst walking along the same interval at the spot where he had seen the applicant appear on March 7, his attention is attracted to the cane field by sounds of "scrumbling" and the shallow grave with the decomposed and mutilated body is discovered.

It is around this chain of circumstantial evidence irrespective of the lack of proper identification that the Crown was alleging that the body in the grave was that of Arthur Chambers, and that it was the applicant who killed him, or caused his death.

The first ground of appeal reads as follows:-

> "1. The learned trial judge failed to give the jury necessary assistance as to the interpretation and significance of the actions of the accused by reason of which the prosecution had asserted that his guilt could be inferred. Instead, the trial judge, for the most part, simply reflected in his summing-up the subjective and often irrational and unsupportable interpretations placed upon the accused's actions by the prosecution witnesses."

No complaint has been made of the general directions in law given by the learned trial judge on circumstantial evidence. The substance of Mr. Daley's complaint was that they were isolated from the evidence and were such that a jury would have difficulty in appreciating the importance of these directions. He contended that each piece of evidence on which the Crown was relying was not in itself incriminatory, and was perfectly capable of bearing an innocent interpretation. We are in entire agreement with this statement. Tedious as it might have been, it was incumbent on the learned trial judge to deal specifically with each significant bit of evidence pointing out to the jury the possible inferences capable of being drawn therefrom and leaving it to them to determine what inferences they would accept having regard to the rest of the evidence in the case. Although he gave a general direction that where a bit of evidence is open to more than one interpretation, one in favour of and one against the applicant, they should draw the one in favour of the applicant, we do not think that that was sufficient where in a case such as this, the Crown was asking the jury to draw an inference of guilt from a set of circumstances, none of which taken by itself was sufficient to prove guilt.

The next ground which was successfully argued is 2 (1) which reads:-

> "He failed to direct the jury that despite the particulars in the indictment that Arthur Chambers died on a day unknown between the 7th and 18th March, if they did not believe that Arthur Chambers died on the 7th of March, 1974 or they were in doubt as to the day on which he was killed then the accused must be acquitted; and further that it was part of the defence that if the body found was indeed that of Arthur Chambers then he must have died on the 8th of March or thereafter."

The indictment as laid showed the date of the offence as "on a day unknown between the 7th of March 1974 and 18th day of March 1974." All the evidence led by the Crown, however, related to what transpired on March 7. The evidence of the applicant having been seen perspiring profusely in the interval adjacent to where

the grave was eventually found, could have been led for no other purpose than to ask the jury to draw the inference that the applicant had been disposing of the body of the deceased in that shallow grave, just around that period of time. There was therefore no room for speculation in the Crown's case that the deceased came to his death on any date other than March 7. The applicant in his cautioned statement which was put in evidence by the Crown said:-

> "After I go to the pay bill and wait a little time a go get my pay and Daddy pay and a come to Miss Anna shop to pay me shop debt ..... A leave and went to me yard, I went inside a see Daddy lookimg after porridge in a little pot in the house. A drew out his pay same how I get it ..... and hand it to Daddy. He then give me two pounds sah and say take this for rent ..... The following morning the Friday morning a tell Daddy that I am not going work and him say him know and I tell him that him can work with Rasta (Elliott)."

In his unsworn statement from the dock he said:-

> "Then Friday morning (8th) M'Lord my partner then call to me. I told him I am not going out there today. I have to go out with my wife."

The significance of what the applicant was saying, if believed, viz. that he saw the deceased after the pay bill on the evening of March 7, and again on the morning of March 8, would have completely undermined the whole structure of the Crown's case that the deceased was killed on March 7. Apart from recounting it in his general review of the evidence, the learned trial judge did not point out to the jury specifically this main area of conflict between the Crown's case and the defence. It was most germain to the defence of the applicant and warranted a specific direction on how they should approach it because if indeed the applicant had seen the deceased on the evening of March 7, and again on March 8, all the evidence of the incidents on March 7, would be innocuous.

Ground 4 was the final ground of appeal which was successfully argued and reads:-

> "That the trail judge permitted inadmissible evidence to be given by the witness Edgar Elliott that the accused's wife had stated that she had not seen the deceased since he left home that morning. Further and alternatively,

> that if for any reason such evidence could be regarded as admissible, he failed to direct the jury that it was not evidence of the truth of the facts stated therein, and that they should disregard it entirely."

This centres around the sequence of events recounted at (7) and (8) supra. In his argument counsel for the applicant resiled from the position that the evidence of this conversation was inadmissible and concentrated on the alternative formulation of the ground of appeal. When Mrs. Kenyon said in response to Elliott's question that from the three of them left that morning Daddy had not come back yet, that was not evidence of the truth of the statement, but the reaction of the applicant could be of some importance either to the Crown's case, or the defence, depending on what construction the jury were going to put on it, assuming that they found that the conversation did take place. Her final response to the applicant after he bawled at her and said "you don't see that Daddy walk through the front door and gone" was "yes". Is it therefore that Daddy had in fact left earlier that evening and Mrs. Kenyon had forgotten, and only remembered when the applicant bawled at her, or is it that the applicant was bullying her into supporting a story fabricated by him to account for the absence of Daddy?

The learned trial judge dealt with this part of the evidence thus:-

> "Members of the jury why?
> ..... - you have to make up your minds did this conversation take place. You have to make up your mind whether Elliott is telling the truth on this aspect. If so, if he is, why is this accused man telling these stories? Because, remember he is saying he doesn't know anything about it. Why is he saying all these stories; is it because he knows what was happening - what had happened to Mr. Chambers? You have to ask - you have to answer it."

In effect what the jury was being invited to do was merely to decide whether or not Elliott was speaking the truth when he said this conversation (which was denied by the defence) did take place and if they so found then they had to find that the accused was lying about Daddy's whereabouts and was "telling all these

stories" in the process of so doing.

They were never told that what the applicant's wife is alleged to have said in his presence was not evidence of the truth of such statement and that the wife's statement could only become evidence against the applicant if he by word or conduct admitted the truth thereof. On the assumption that the jury accepted Elliott as a witness of truth on this aspect of his testimony, it was for them to determine whether the applicant's sharp rejoinder was intended merely to remind his wife that Dad'y had shortly before refreshed himself and departed or whether it was a strong suggestion to her to meekly submit to his fabrication. In our view the learned trial judge's treatment of this evidence amounted to a misdirection in law. Without going any further into the merits or otherwise of the case, we considered the arguments advanced in support of these three grounds to have sufficient substance to warrant the quashing of the conviction. We therefore treated the application for leave to appeal as the hearing of the appeal and adopted the course set out at the commencement of the judgment.