CA - Crim. Law - Murder - Trial - Evidence - Summing-up - Whether evidence of pathologist as to how deceased received injuries inconclusive and insufficient to sustain conviction - whether judge failed to direct jury adequately or at all on weaknesses in evidence or on aspects of evidence - whether judge misdirected jury in contravention. Application for leave to appeal refused. JAMAICA

CMR

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 90/88

EVIDENCE
CRIMINAL PRACTICE

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A.

R. v. CHARLES ROSE

D. V. Daly for Applicant

Brian Sykes for Crown

May 5 & June 5, 1989

CAMPBELL, J.A.

The applicant was found guilty of murder in the St. James Circuit Court on April 20, 1988 before Orr, J. and a jury and sentenced to death. On May 5, 1989 his application for leave to appeal was heard and after hearing submissions on his behalf by Mr. Daly we refused the application and undertook to put our reason in writing. This we now do.

On the evidence, the deceased who was a strong, healthy, hardworking farmer aged about 79 years was last seen alive by his daughter Mrs. Avis McGhie at about 2.00 p.m. on Friday May 9, 1986. He was then on a parochial road connecting Carlton District where he had a farm and a farm house and the district of Little Ease where he also had a farm on which he reared cattle. From the point where he was last seen alive to his farm at Little Ease was about 30 chains and his decomposing body was found within this farm about half a chain from the road. The body was found on Tuesday May 13, 1986 "in a little ditch" as described by one witness while another witness described it as "a little descent," the depth

of which was demonstrated to the jury. Both Mrs. McGhie and the police officer who visited the scene and gave evidence said the deceased was lying on his back on the earth in an area characterised as bush and grass. The deceased's wife said in her evidence that the deceased's face was "scorched up" and that she saw a long circle around his neck which looked like a cut with blood dried up around it. The deceased's daughter Mrs. McGhie said that the body had burns over the face and chest and the throat appeared as if it was cut. The deposition of the pathologist who performed the post mortem at the scene on Wednesday May 14, 1986 so far as is relevant reads as follows:

> "On examination, I found a very large fracture to the skull. The bone, it was bare of skin and flesh. It was a large irregular fracture of the dome of the skull. The pieces had fallen away from the rest of the skull. The head was separated from the rest of the body when I first saw it. In my opinion the skull fracture was the cause of death. It is my opinion that a mere fall would not have fractured the skull in the way I saw it."

The pathologist was not cross-examined on her deposition at the preliminary enquiry even though counsel for the defence was present.

Returning to the events of May 9, 1986, Mrs. McGhie said that when she saw her father, he and the applicant were engaged in a quarrel. They were about three yards from each other. The deceased and the mother and brother of the applicant were not on good terms since 1984 when the deceased had successfully laid criminal charges against them. In the course of the quarrel, the applicant threatened the deceased saying "you see, you boy Duck Green, you head belong to me, and when mi done wid you not even John Crow find you." The deceased who is known as Duck Green replied that he would report the applicant to the police so soon as he the deceased had looked after his cow. Mrs. McGhie described the shirt which the applicant was wearing at the time as "a fine stripe shirt with thick brown and black." She identified a shirt shown to her in court as similar to the one which she saw the applicant wearing on May 9, 1986. This shirt which was admitted as an exhibit had been taken from the applicant when he

was taken into custody on May 18, 1986 and was submitted to the Government Analyst who in her evidence stated that a drop of human blood was discovered on it which was however insufficient to admit of further analysis into any blood grouping. She further stated in evidence that it was possible for the shirt to have contained more blood and to have been washed leaving the drop of blood which she saw. This evidence was admitted as being relevant to the evidence of Pamela Sterling a neice of the applicant. She stated that she was then living with her maternal grandmother who is the mother of the applicant. The applicant and two other brothers were also residing with her. On the evening of May 9, 1986 before it got dark, she observed the applicant come home in the rain. He was accompanied by Ashley, another brother, who was jointly charged for the offence. They each had their clothes "blood up."

Ashley's girlfriend enquired of him how his clothes were so "blood up." His response was that it was none of her business. They took off these clothes namely trousers and shirts and placed them in a yellow bath pan. They were on the verandah of the house and she was about four yards away looking out from a glass window on to the verandah. Later that evening when it grew dark, she saw her grandmother light a piece of tyre and with the girlfriend of Ashley and the girlfriend of another brother, and aided by the light from the tyre, they took the yellow bath pan with the "blood up" clothes together with soap and proceeded in the direction of a river. Under cross-examination it was elicited from her specifically that she saw blood on the applicant's shirt.

On May 18, 1986 the applicant together with three brothers were taken into custody and placed in the Spring Mount lock-up. The applicant's shirt which he was then wearing, was taken from him and submitted to the Government Analyst for examination. The result of her examination has already been mentioned.

The applicant and two of his brothers were still in the Springmount lock-up when on June 11, 1986 one William Gordon a farmer was placed in the cell with them for an unpaid debt. He enquired of these men the reason for their being in custody. The applicant disclosed to him that he the applicant was in custody because they were said to have killed a man. Gordon enquired of him the name of the man and he replied that the man's name was "Duck Green". The applicant further volunteered that the man was a bad man who had killed many persons already so "dem make certain that him no kill them." Gordon asked him what clue the police had and the applicant replied "the woman never wash out the shirt good."

In cross-examination of the deceased's daughter it was suggested to her that she never saw the applicant engaged in any quarrel with the deceased or at all. It was suggested to Pamela Sterling that she never saw the applicant shed any "blood up" clothing nor had she seen any "blood up" clothes.

It was suggested to the police officer who took the applicant into custody and took the shirt from him that, that shirt had no blood on it at all. It was suggested to Gordon that the applicant had no conversation with him as to why he was in custody and never made the statements attributed to him. All the suggestions put to the witnesses were repudiated.

The applicant made an unsworn statement in which he said he was sick at home on May 9, 1986. He thus neither saw the deceased nor the latter's daughter. He had killed nobody. No blood was on the shirt taken from him and he never discussed with any one in the cell the reason for his being there.

On the evidence summarized above, the jury found the applicant guilty of murder.

Mr. Daly sought leave to appeal on many grounds. Firstly, he complained that the evidence of the pathologist as to the means by which the deceased received his injuries was inconclusive and insufficient to sustain a conviction for murder. The learned trial judge was therefore in error in failing to address the issue on whether the evidence pointed incontrovertibly to murder, he further erred in inviting the jury to find that there was reliable evidence from which to conclude that the deceased's throat had been cut because the pathologist's deposition does not support that.

We did not consider that these complaints were sustainable. The pathologist's deposition disclosed a fracture of the dome of the skull which must have been caused by a blow of such force as to cause the fractured bones to be completely separated from the rest of the skull. Mr. Daly's submission that the deceased could have sustained the fracture from a fall did not address the fact that the deceased was not found in any rocky terrain such that a fall could have caused the kind of fracture seen by the pathologist.

Rather the body was found in bushes and it was resting on earth. Therefore the pathologist's opinion that the nature of the fracture ruled out the possibility that it could have arisen from a fall, inevitably led to the conclusion that someone struck the deceased a blow on the head and with such force as to cause the fractured bones to break away completely from the rest of the skull. This was clearly murder and it would have been wrong for the learned trial judge to have confused the jury by directing them on matters of speculation not supported by evidence.

In relation to the complaint that the learned trial judge invited the jury to find that the deceased's throat had been cut, this also is without merit. He directed their attention to the evidence of the deceased's wife and that of Mrs. McGhie that the deceased throat appeared to have been cut. Their evidence was, contrary to the contention of Mr. Daly actually supported by the pathologist, who said in her deposition

that when she first saw the body, the head was separated from the rest of the body. The learned trial judge was right in drawing the jury's attention to this evidence since it could explain why the applicant's clothes could have become "blood up" as stated by Pamela Sterling.

Mr. Daly next complained that the learned trial judge failed to direct the jury adequately or at all on the weaknesses inherent in the evidence concerning the blood allegedly found on the appellant's shirt and unfairly invited the jury to find that the presence of the said blood was an important link in the chain of circumstances from which the applicant's guilt could be concluded.

Mr. Daly in making his submission isolates the evidence of the Government Analyst who said she saw only one spot of blood on the shirt. We did not see any inherent weakness in this evidence albeit limited to one spot of blood. Rather it was highly significant in the context of the other pieces of evidence, including the applicant's emphatic denial that the shirt subjected to the analyst was the one in which he was taken into custody, or that any blood was on the shirt which was taken from him by the police. He says that his sisters bought and took new clothes to him while he was in custody. He put these on but not before they were inspected by the police. He gave his sisters the dirty clothes which he then had on. It was the newly bought shirt which he had on, which the police ordered him to take off and which was despatched to the Government Analyst. He was thus by one sweep denying that the shirt could possibly have had any spot of blood thereon at the time when it was taken from him, and further if any spot of blood was on the shirt prior to his putting it on, the police inspection would certainly have discovered this. Equally, it was a denial that Mrs. McGhie could have seen him in the shirt exhibited in court, even if she had seen him, which he denies, because the shirt was on May 9, 1986 not owned or possessed by him. Further, and for similar reason, there could be no possible nexus between

the "blood up" shirt which on the evidence of Pamela Sterling the applicant took off in the evening of May 9, 1986 which was washed by his mother, and the shirt exhibited in court. In our view the evidence of the blood spot found on the applicant's shirt was an important link in the circumstantial evidence derived from Mrs. McGhie, Miss Sterling, Mr. Gordon and the applicant's own denial that there was any such blood on his shirt.

Mr. Daly complained that the learned trial judge did not direct the jury adequately or at all on aspects of Mr. Gordon's evidence which adversely affected his credit. We carefully reviewed the evidence of Mr. Gordon and were unable to find anything which detracted from his credit. The police officer who took Mr. Gordon into custody, presumably at the instance of the creditor, relying perhaps on his experience that persons thrown together in a cell often exchange information as to why they are each in custody, enquired of Mr. Gordon whether the applicant had made any disclosure. He said he enquired thus of Mr. Gordon as a result of information passed to him by a District Constable. Nothing in the evidence of Mr. Gordon reflected ill-will against the applicant whom he did not know before.

A further complaint was that the learned trial judge erred in law and in fact in directing the jury that the evidence of the Government Analyst that she found blood on the shirt was capable of corroborating the evidence of Pamela Sterling, a girl of eleven years, further that the summing up of the evidence of this latter witness was biased in favour of the crown and the learned trial judge's comments thereon were overwhelmingly designed to persuade the jury of its truth and accuracy.

On the first aspect of the complaint we have been unable to find where the learned trial judge directed the jury that the evidence of the Government Analyst that she found blood on the shirt was capable of corroborating the evidence of Pamela Sterling. Rather the learned trial

judge having questioned whether this, like the evidence of Mr. Gordon supported Pamela's evidence, concluded his summation by directing that Gordon's evidence did provide support for Pamela's evidence. He did not so direct, with respect to the evidence of the analyst. The learned trial judge after giving directions on corroboration said thus:

> "So we have to look at the rest of the evidence, to see what can we find to support her story. Therefore, now, you look at Mr. Gordon's evidence. Remember what Mr. Gordon said that the accused man said to him 'The woman never wash it out good.' So you ask yourself, does that support Pamela's evidence that she saw her grandmother and Theresa going down to the river with the blood up clothes. That would be some evidence. You look at the evidence of Pamela. She does'nt know what clothes she can't remember what clothes the accused man was wearing. But remember that Mrs. Cruickshank says she found blood on the shirt. Detective said he saw blood on the shirt, does that support her story? Does that make her story more believable to you? Because remember I told you that children this age can be influenced. But, even if you don't believe - don't find the support, you can still convict, you can still accept her evidence, if you believe she is speaking the truth. Matter entirely for you. Bear that in mind. You have to look at her evidence very carefully but as I said, if you believe Mr. Gordon you can find some support of her evidence.

On the other aspect of the complaint we could find no justifiable cause for saying that the learned trial judge's comments on Pamela's evidence were overwhelmingly designed to persuade the jury of its truth and accuracy. It is true that Pamela's evidence was analysed in great detail with comments by the learned trial judge but this in our view was proper and necessary because not only was she subjected to prolonged and intensive cross-examination to elicit from her that her evidence as to what she said she saw was untrue, that she was telling a lie, that she was not then living with her grandmother but further that her evidence was a rehearsal of what her father had told her to say because the latter was no longer on good terms with the witness' mother and maternal relations.

It was for the above reasons that we on May 5, 1989 refused the application for leave to appeal.