JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 32/96

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A

R. V. CHRISTOPHER BROWN

Paul Ashley for the Appellant

Dwight Reece for the Crown

19th November & 16th December, 1996

FORTE, J.A.

On the 23rd February, 1996 the appellant was convicted in the Home Circuit Court before K. Harrison J. (Ag.) and a jury for the capital murder of Alvin Smith. He was accordingly sentenced to death. He now appeals that conviction and sentence. Having heard arguments of counsel on the 19th November, 1996, we reserved our decision, which we now record.

On the 16th October, 1991 Alvin Smith was found dead lying in a pool of blood at his Portview Avenue home in St. Andrew. When the body was subsequently examined by Dr. Ademola Odunfa, Consultant Pathologist there were two stab wounds and eight incised wounds to his body. There was an half-an-inch by quarter inch stab wound in the right side of the neck about 12 inches below the top of the head. The tract of that wound travelled through the skin

and underlying tissues with a depth of about 3 inches causing massive subcutaneous and intra-muscular haemorrhage. The other stab wound, three quarter by half an inch, was seen at the left side of the neck. The other injuries were described as follows:

> (i) two superficial incised wounds measuring two inches by one and a half inches in length below the top of the head,
>
> (ii) three incised wounds measuring half-inch, one inch, and one and a half inches in length respectively to the right forehead;
>
> (iii) two incised wounds each measuring three-quarters of an inch in length located on the left forehead, and
>
> (iv) a half-inch superficial incised wound located laterally to the left line.

In his opinion death was due to mildly sharp force injuries to the neck and head.

In proof of its case the Crown relied in part on the evidence of Sonia Walters who in the company of Peter Williams who lived at the home of the deceased, discovered the body. Earlier, at about 2.00 p.m. while at her home, next door to that of the deceased's, Miss Walters heard an old lady who lived in the home of the deceased "bawl out for murder." As she could not see what was happening from her home because of a zinc fence which divides both premises, she, along with her tenant, went through her back gate and knocked on the zinc gate of the deceased's premises. When she knocked, the appellant whom she had known for three months before, came to the "gully side" from where she had been calling. Having asked him what happened, he responded

"Granny B drop off the bed". After answering her, he went across the gully, which runs across the back of the premises went into a kitchen and came back out "with his hand held stiff like he was holding something" and went back into the house. It was because of this incident; why later that same day, when she saw Peter Williams arriving home, she went inside with him and made the discovery.

This identification of the appellant on the scene, was only a part of the evidence upon which the Crown relied. In support a caution statement taken from the appellant was admitted into evidence. The following extract from that statement describes vividly how the deceased came to his death. The appellant lived on those premises, but only a few days before, having had a quarrel with the deceased, he was asked to leave the house, and seek residence elsewhere. In the statement he related a plan made with two of his friends to go to the home to rob the deceased. Then he continues:

> "... all three a we go round a Uncle house and we press the gate buzzer and Uncle come and open the gate. Me tell him say me friend them come back fe the read up and him left we in the front gate. All a we and Uncle was there talking until the nurse who come look after Granny cut foot left and we was still there talking for a good while. We talk and talk until Rohan ask Uncle for some ice water and me drink some too. We still a talk to him until we see it a get late. It (sic) was going up to about 3 o'clock. Then Rohan tell Uncle say him want to talk to him privately. So Uncle and him walk go up in the wash tub area and then Gary get up and say him want fe use the bathroom. After him use the bathroom and come out back Uncle back was

turned to him and Gary look on me and tell him say is time now, and Gary grabbed Uncle by him neck and Rohan grabbed him too and them throw him pon the ground and Uncle start fe cry out fe murder. Rohan hold him neck and Gary sit down over him. Gary asked me fe something fe lick him and me teck up a hammer which was in the sink near to me and give Gary and him use it and lick Uncle in him head. Sametime me hear some people next door calling Uncle and asking what happen. Me go at the fence and me see a lady and a man next door over them yard and me tell them say nothing dont happen a one a the old lady drop off her chair and them walk away. Same time a there so me go a help hold down Uncle a so me clothes get blood up. Me teck up a knife and give Gary and him stab Uncle with it. Me give gary (sic) a machete and him chop Uncle a him neck. At this time the two old lady was a meck a whole heap a noise and me go to them and tell them fe shut up. Me see Uncle a get up run come towards me and me push him back so that him don't reach the door. Gary lick him in him head with the hammer again and him drop. Gary then hold him two feet and draw him go back up a the wash tub. So after that Rohan left a go in a the house and me and Gary go behind him and start fe search up the house. Me look fee the bunch of keys and start fe pull the grill but me could not get the verandah grill fe open. Me left them in the house and come back out and Granny May start fe cry out again and me push her down and her head lick up on the wall and she get a cut in her head. Me then took off two rings off Uncle finger. Me go back in the house and Rohan cut the phone cord. Same time Gary teck up the video a put in a plastic bag. We come out a the house and we walk go round a the front where Uncle car park. Me was trying to start the

> car but it could not start and me was in it and Rohan and Gary start fe push it and me a try fe juck start it but me could not get it fe start and me left it down the road. We go back in the house and me and Gary change off the blood up clothes. Me put on one of Uncle new shorts and new pair a my shoes which I had there. Gary put on one of Uncle shorts too. Gary teck up the video and left before me and Rohan. Then Rohan teck up some bath soap and put them in a plastic bag and then me and him leave. When we reach at this bus stop me see Gary up there so same time we get a bus and we go down. The video did put down a Gary house for about two days then him teck it and carry it down a one big yard at South Avenue. Me and Gary sell it to the one youth who live in front of the police lab in Kingston Gardens. We get two thousand dollars for it but we don't get all of it one time."

In addition the prosecution called a witness John Wiles who testified that in October 1991 the appellant along with another sold him a video recorder for $2000.00. This evidence gave credence to the account given by the appellant in his statement that the video was taken from his uncle's home, at the time of the incident and was later sold by "me and Gary" to "one youth who live in front of the police lab, in Kingston Gardens". Mr. Wiles in fact testified that he lived in front of the police lab in Kingston Gardens.

The video recorder was subsequently identified by Peter Williams as one missing from the home of the deceased after the incident. The statement of the appellant, if accepted and acted upon by the jury, remembering that it also substantiates the allegation of an encounter with the appellant by Sonia Walters,

would disclose a very strong case of capital murder against the appellant. Worthy of note, is the appellant's participation in handing the weapon to the other assailant, and specifically that he too exhibited violence on the deceased when, as he related, on seeing 'Uncle' (a name by which the deceased was known) get up and run towards him, he "push him back so that him don't reach the door." In addition bloody clothes were later found in the room which was in keeping with the following account given by the appellant:

> "Same time so me one go and help hold down Uncle a so me clothes get blood up."

and then later:

> "We go back in the house and me and Gary change off the blood up clothes. Me put on one of Uncle new shorts and new pair a my shoes which I had there. Gary put on one of Uncle's shorts too."

The prosecution also tendered the depositions of Peter Williams by virtue of Section 31 D(d) of the Evidence (Amendment) Act 1995 which states:

> "Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the Court that such person -
>
> (a) ...
> (b) ...
> (c) ...
> (d) cannot be found after all reasonable steps have been taken to find him; or
> ...".

These depositions were admitted correctly in our view by the learned trial judge after he had received in evidence, testimony to his satisfaction that "all reasonable steps had been taken" unsuccessfully to find the witness.

This evidence of Peter Williams also gave credence to the appellant's statement in the following regard:

> (i) that there was a quarrel between the appellant and the deceased prior to the incident;
>
> (ii) when he returned home on that fateful day the car had been removed from where it had been. It could not be driven because he had removed the rotor brush at the request of the deceased;
>
> (iii) there were bloody foot prints leading from the body;
>
> (iv) several items - grocery, a video cassette and gold chains which the deceased had been wearing were missing;
>
> (v) shoes and grey pants that the appellant had been wearing when he had previously left the house were found in the deceased's wardrobe covered with blood;
>
> (vi) there was also another pants covered with blood in the wardrobe;
>
> (vii) he found a knife, a kitchen knife, a machete and a hammer, all of which except for the machete had blood on them.

Also supportive of the Crown's case is the testimony of the arresting officer, that when the appellant was arrested on a warrant, and cautioned he said "Yes a

true but is Gary and Rohan make me do it. Me sorry sah, because him did good to me. I want fi give you a statement how the whole thing go."

In his defence the appellant made an unsworn statement in which he maintained that he had left his home from the 13th October, 1991 to visit his aunt in St. Thomas, and did not return until in November of that year, when he was told by his "baby mother" that the deceased had died. He was on his way to visit the house, when he was accosted and arrested by the police. He denied knowing anything about the killing. Sometime after, while he was in custody, he was beaten and forced to sign a statement which had already been written.

Against this background the appellant filed and argued five grounds of appeal which are as follows:

> "1. That the learned trial judge erred in law by failing to make explicit the possible verdicts open to the jury and directed their attention exclusively to the issue of capital murder."

This ground is easily answered by the following passage from the summing-up of the learned trial judge, which indicates that he did leave the possibility of a conviction for murder as well as capital murder. It reads as follows:

> "Madam Foreman and members of the jury, if you feel sure that this accused man attacked the deceased man Alvin Smith, intended to kill him or to inflict on him really serious bodily harm and with the combined effect means what himself and the other two did, was to kill him by their joint act by using, as the prosecution, has adduced

> evidence in this case, a knife, a machete and a hammer to hit, stab and cut this deceased, then in those circumstances the accused man would be one of the actual killers and it would be open to you to say that he is guilty of murder. If at the same time you are satisfied and feel sure about it that he killed the deceased in the course or in furtherance of a robbery and that he used violence on Alvin Smith in the or furtherance of an attack on him, then it would be open to you to say that he is guilty of Capital Murder. The prosecution say that Alvin Smith was killed during the course of a robbery and you must say whether this was a killing of Alvin Smith in the course of this robbery."

In this passage the learned trial judge made it quite clear that the jury could consider first the question of murder, and thereafter determine whether the murder was committed in the furtherance of a robbery, and that the appellant used violence upon the deceased, in coming to a conclusion as to whether the murder was capital . This ground is therefore without merit.

> "2. That the learned trial judge erred in law by failing to indicate that he had taken into consideration the burden and standard of proof in arriving at his ruling during the voir dire."

We are not aware of any rule of practice or law which requires, a Judge presiding over the voir dire to state expressly that he knows that the burden of proof in such circumstances rests on the prosecution. This is not a principle of law which falls within the specific categories, e.g. where the learned judge has to demonstrate that he had cautioned himself before acting on evidence such as that of a complainant in a rape case, or a witness who purports to identify his

assailant. The learned judge must be presumed to know the fundamental elements of the law, and cannot be required every time he gives a decision to itemize every requirement of law necessary for his determination of issues before him. Nevertheless in the instant case the learned trial judge expressed in his findings, the evidence which he believed, and made his finding on that basis.

In coming to his conclusion this is what he said at page 248:

> "I have heard the witnesses, I have seen the witnesses. Det. Sergt. Davis I find to be a credible witness, a witness who I believe as to the circumstances surrounding the taking of this statement."

Of the witness Thompson, the Justice of the Peace who witnessed the taking of the statement he said:

> "... so I do not think he would have come to this court to lie as it was being suggested to him, that he was never present during the taking of this statement. I find him to be there present witnessing this statement and I believe his evidence is credible that he was present."

In the end, there can really be no valid complaint that the learned trial judge did not apply the proper principles as they relate to the burden and standard of proof in coming to his conclusion.

Counsel also argued two other grounds, one relating to the learned trial judge's directions on circumstantial evidence, and the other, his treatment of the jury's functions in analysing whether the statement was voluntary or not and how they should treat with it in the event that they found that it was not voluntary. In both these grounds, on being shown passages of the summing

up to which he had not referred, counsel refrained from maintaining his arguments on these points. In our view both grounds were without merit, the learned trial judge having adequately and fairly dealt with the principles involved in relation to both issues.

Counsel, however argued very strongly his last ground which reads as follows:

> "That the learned trial judge erred in law by failing to instruct the Crown to provide the defence with a copy of the finger print report of the locus. This amounted to a material irregularity of non-disclosure of documents by the Crown."

The basis on which counsel mounted this argument arose out of an application by the attorney for the appellant at trial, for the case to be postponed. The purpose of the application, related to the fact that requests made of the prosecution for photographs of the scene, and, the results of the examination of the dusting for finger prints done at the scene had not been complied with up until the time of the application for the adjournment. In response counsel for the Crown, stated:

> "In relation to the photographs, my learned friend spoke to me. Again, I would have to say they were not submitted with the file to my department, neither is there any finger-print reports, m'Lord. We cannot give what we do not have."

Attorney for the appellant would not accept that - he said:

> "The police who investigated this case took photographs of the scene and they must be made available to the accused. If he does not submit it to the Director of Public

> Prosecutions the State invests in the Director of Public Prosecutions, under his powers to take it from the office ...".

Counsel also indicated that he had earlier written to the Director of Public Prosecutions requesting 'relevant documents and received a reply on the 16th February, 1995 by way of letter from Mr. Fraser of the Director of Public Prosecution's office enclosing "relevant documents" i.e. a statement he had asked for, but there was no mention of the photographs he had requested.

This sparked the following dialogue between the learned trial judge and counsel:

> HIS LORDSHIP: I was asking what was your response to the absence of the report and mention was made in Mr. Fraser's report to you. Since you have requested some things and others did not come, what was your response in the absence of those things mentioned?
>
> MR. CHARLES: In relation to my correspondence, there is no letter that I have that I wrote subsequent to Mr. Fraser saying what happened to the photograph report that I asked for.
>
> HIS LORDSHIP: You did not seek to make any further inquiry?
>
> MR. CHARLES: Not in writing.
>
> HIS LORDSHIP: You spoke orally to whom?
>
> MR. CHARLES: I am not prepared to say now.
>
> HIS LORDSHIP: What?
>
> MR. CHARLES: I made an oral request now in court of crown counsel."

And then:

> "HIS LORDSHIP: You are saying all this but you cannot give me anything official that you wrote in the absence of comments on that or you did not ask anyone in particular what had happened to the reports that you asked for?
>
> MR. CHARLES: The Photographs?
>
> HIS LORDSHIP: You had not followed up on that at all.
>
> MR. CHARLES: No, I did not write to him again about the photographs because having visited the man I formed a certain view of him. I wrote to them pertaining to that view and asked that the date coming up be postponed because I would make the application concerning someone to see the accused man. They consented. I made the application, that report was not received by the Court until November of 1995."

In the end the learned trial judge refused the application for the adjournment and commenced the trial.

During the trial the matter was raised once again in the cross-examination of Det. Sgt. Blandford Davis by Counsel for the accused as follows:

> "Q: Did you do anything to this car?
>
> A: Yes, sir.
>
> Q: What was that?
>
> A: I caused it to be photographed and dusted for fingerprint impression.
>
> Q: Your purpose for dusting it for finger-print impression would have been what, Mr. Davis?

A: Well, there are more than one purpose, but mainly to identify the possible suspect if the car was removed from the premises."

And then:

"Q: Having done that, you caused the premises to be dusted also.

A: Yes.

Q: And in particular the exhibits that can be dusted to discover prints?

A: The entire scene.

Q: Entire scene?

A: Yes, what could be dusted. I am not the expert. The expert considers what should be dusted, and what should not."

And again:

Q: Now, having caused this premises to be dusted for prints, did you get a report concerning those prints?

A: No, sir.

Q: You didn't?

A: No.

Q: And up until today you are not in a position to say what were the results of those prints?

A: To some extent, no, sir.

Q: To some extent, no. Who did you cause to dust the premises for prints?

A: Detective Corporal Smith.

Q: From?

A: C.I.B. Headquarters."

And on page 271:

"Q: ... let me ask you this sir, the photograph you took of the premises, the photograpah - you a photograph, or you caused it to be taken?

A: I caused the photographs to be taken.

...

Q: Where are they?

A: To the best of my knowledge, they are at the Photographic Branch at the C.I.B. Headquarters."

A thorough examination of the transcript discloses that no further application was apparently made by Counsel for the defence for the provision of the results of the fingerprint examination nor the copies of the photographs. What the above extracts reveal is that in the course of the cross-examination of the police officer it was disclosed to the defence that the result of the fingerprint examination could be had from Det. Cpl. Smith at C.I.B. Headquarters, and the photographs at the Photographic Branch of that said office. Despite this, no application was made by counsel to have Det. Cpl. Smith, subpoenaed to bring with him the results of his examination, nor apparently was any further effort made to secure the photographs.

Mr. Ashley, in pursuing his arguments unfortunately relied mainly if not only on a passage from Archbold (1966) C.A.O.I. Second Cumulative Index to the 1996 Edition paragraph T-14 on page 219, which makes reference to the

case of ***Blackledge Grecian, Mason v. Phillips*** 93/547/51 7/11/95 (unreported), which in turn was decided on the basis of the guidelines of the English Attorney General published in respect, naturally, of cases to be tried on indictment in England and consequently not necessarily applicable to cases in this jurisdiction. The test, however was stated in the case of ***Linton Berry* v. *The Queen*** (1992) 2 A.C. 364 at page 373H - 374A where Lord Lowry in delivering the opinion of the Board of Her Majesty's Privy Council said:

> "In relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused but the practice varies between different jurisdictions in the common law world."

In Jamaica, it has long been settled that if the prosecution has in its possession, material which could assist the defence in its presentation of its case then as a general rule that material ought to be disclosed to the defence. A simple example of this is of course a statement which conflicts with the evidence given in Court by the maker of the statement. See ***R. v. Purvis and Hughes*** (1968) 13 W.I.R. 507 where Waddington P. (Ag.) in delivering the judgment of the Court of Appeal stated at page 512:

> "It is to be noted in the instant case that no suggestion was made by defence counsel that there was any discrepancy or inconsistency between the evidence which the witnesses had given in court and the statements given to the police. If there was in fact any such material discrepancy or inconsistency it would have been the duty of counsel for the Crown to inform the defence of the fact. ..."

Shelly, J.A. in delivering the judgment of the Court in ***R. v. Barrett*** (1970) 12 J.L.R. 179 underlined the basis for the prosecution's duty to disclose "statements" in its possession which conflicts with the evidence of the said witness in the following manner:

> "The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as minister of justice whose prime concern is its fair and impartial administration."

The fundamental concept therefore in determining disclosure is the achievement of fairness to the accused.

In (1) ***John Franklyn*** and (2) ***Ian Vincent*** P.C. Appeals Nos: 20 and 21/92 (unreported) where a challenge was made by virtue of section 20 (6)(b) of the Jamaica Constitution to the non-production of statements in a summary matter, there being no requirement for such statements to be served on the defence, Lord Woolf in stating the opinion of the Board stated:

> "While the language of that sub-section does not require a defendant always to be provided with copies of the statements made by the prosecution witnesses, where the provision of a statement of a witness is reasonably necessary for such purpose, it should be provided as being a facility required for the preparation of his defence. This is in accord with the views of Forte, J.A. expressed in the unreported case in the Court of Appeal of Jamaica in ***R. v. Bidwell*** (26th June 1991) where he indicated that 'facilities' could include a statement of a particular witness and added that 'facilities must relate to anything that will be required by the accused in order to aid him in

> getting his defence ready to answer the charge."

The statement I made in the ***Bidwell*** case would apply with equal force to cases triable on indictment.

The learned Director of Public Prosecutions arising out of the ***Franklyn*** case issued on the 14th June 1996 "Guidelines for Disclosure in Criminal Matters" to "all Crown Counsel and Clerk of Courts" which apparently addressed this area in paragraph 1 which reads:

> "In cases of complexity, the prosecution upon request by the defence, shall subject to any claim for immunity on the grounds of public interest, disclose all such documentation, material or information either by making copies available or allowing inspection."

On the face of the transcript in the instant case, it appears that the request by the defence was one which ought to have been acceded to by the prosecution, there having been no claim based on the exceptions outlined in paragraph 1 of the Director's Guidelines. The effect of the non-compliance becomes therefore the real issue in this appeal.

Foremost in this determination, is the fact that this is not a case where the material was to the peculiar knowledge of the prosecution and not disclosed to the defence. On the contrary the defence was well aware that the dusting for fingerprint had been done and that the photographs had been taken. In spite of the contention on the application for the adjournment of the trial the defence thereafter did not pursue its attempts to secure the material even

though during the course of the trial details of where the material could be obtained was disclosed.

In any event, on an examination of the evidence in the case it is difficult to see in what way this material would have availed the appellant. The locus was the home of the appellant, and consequently it would be reasonable and normal for his fingerprints to be found in and around the house, and even perhaps in the car. If the result of the examination was negative in regard to the appellant, then he would still have had to explain the overwhelming evidence which he himself provided in the statement which he gave describing in such detail what occurred on that fateful day.

In so far as the photographs are concerned, nothing really turned on the state or condition of the premises, and consequently no useful purpose could have been accomplished by their production in Court.

In the event, the application for leave to appeal is granted, the hearing of the application is treated as the hearing of the appeal. The appeal is dismissed and the conviction and sentence affirmed.