JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 12/83

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. CLAUDETTE MILLER

Miss Janet Nosworthy for Applicant

Mr. Norman Davis for Crown

January 13, 14 &
February 10, 1986

ROWE, P:

Dr. Carlton Jones conducted a post-mortem examination on the decomposing body of Caseta Green in a canefield in Westmoreland on October 27, 1982. He found a comminuted fracture of the right parietal area of the skull and in his opinion it required great force to produce that fracture from which death resulted. The malodorous odour emanating from the body in an advanced stage of decomposition did not permit of very close examination, but the doctor was able to observe that there was a small perforation of the abdomen, that the mouth was gagged with a bit of cloth, and there was a length of rope around the neck, drawn tightly. Death was not due to strangulation as symptoms such as protruding tongue, perforation of the extremeties and mouth and petechiae of the eyes were not observed. Theory of the prosecution that the body was dragged to its resting place was supported by marks on the ground. The deceased was

approximately 22 years old, of medium build, weighed about 130 lbs., and stood about 5'5" tall. At one point in his evidence, the doctor estimated that death could have occurred 72 hours before the post-mortem but on reference to his notes he corrected himself and said it could be as much as 120 hours before.

Nelson Ambersley lived at Cave in Westmoreland and for a period the deceased lived with him as man and wife. For use in their home Mr. Ambersley bought an antique bed, a two-burner oil stove and a coffee table. On a day during the first week of October 1982, the deceased removed the articles of furniture referred to above without the knowledge of Mr. Ambersley to unknown premises. Prior to that time the appellant would visit the deceased at Cave and remain as long as one week on some visits. Mr. Ambersley knew the appellant as a friend of the deceased.

Raymond Peterkin, a farmer, of Grange Hill, Westmoreland, described by the defence as the "star witness" for the prosecution, gave evidence that the appellant was known to him from she was a "small youth" while he first met the deceased when she was "a big-size girl". Admittedly he knew both women for many years. On October 20, 1982, the appellant in the company of the deceased was at Grange Hill and the appellant asked Peterkin if he knew of the availability of a room which they could rent. He suggested his mother's place and later that evening he saw the appellant and the deceased move some furniture and personal effects in a van to the room. The two women went away and returned next morning, and spent the day in the yard, apparently in the company of each other.

In the evening while Peterkin was in his bed, the appellant, he said, came to him with a most unusual request. She asked Peterkin to kill Caseta (the deceased) for her. Peterkin said he refused saying he had never

killed someone yet, "a never kill even a fowl much less someone". According to Peterkin, the appellant replied, "Kill him rass man" and when Peterkin again refused, adding that he was going to tell Basil meaning Basil Thompson, the appellant retorted that he should not so proceed "as Basil mouth is too chat-chat". Why did the appellant want to kill the deceased, enquired Peterkin, to which the appellant answered that the girl had some money that she the appellant would like to get. Peterkin said he retorted that it would be better to steal the money than to consider killing as that would place the appellant in more trouble. "Kill her, kill her" was the appellant's refrain. He parted from the appellant upon her request for him to meet her at the Grange Hill All-Age School. Peterkin further said that he spoke to Basil Thompson and on that night both of them went up to the All-Age School. Basil went into hiding while he went forward and saw both the appellant and the deceased. They began to walk together when Basil came out of hiding and called to them. Then the appellant enquired if he had told Basil about the killing and this he denied, whereupon the appellant said it was best that they should return and don't worry with it again.

Examined as to why he had gone to the School that evening, Peterkin said that he was curious to see who in fact the appellant was planning to kill and he suspected that he could have been her intended victim. Consequently he alerted Thompson to accompany him. Peterkin said that from the close association and friendship which he observed between the appellant and the deceased he did not believe that the appellant indeed intended harm against her. Peterkin's evidence included the following narrative.

All 3 persons returned home at about 9 p.m. Early on October 22, the deceased went to the home of an adjoining tenant. Peterkin was asked by the appellant to call the deceased so that the appellant could borrow her hat to wear to Savanna-la-Mar, a message which he did not deliver. Nothing remarkable transpired during the day up to 5 p.m. and Peterkin kept to his room as he was feeling unwell. About 5 p.m. Peterkin from his bed, saw the appellant and the deceased talking and passing by on the Grange Hill main road, walking in the general direction of the All-Age School. Later at about 9 p.m. Peterkin heard the appellant speaking to someone in his yard saying that the deceased had gone to Montego Bay with a boy named Starkey. During that same night at about 1 a.m. Peterkin, Basil Thompson and some two others assisted the appellant to remove furniture from the room which she had occupied to another room estimated by the police to be about 1½ miles away, but much less by the civilian witnesses. Nelson Ambersley identified the articles of furniture to be those which the deceased had removed from his premises at Cave during the first week of October.

About 7 a.m. on October 23, Peterkin said he saw the appellant and Basil Thompson together on the road at Grange Hill. Thompson spoke to him and he asked the appellant of the whereabouts of the deceased. The appellant began to cry and said she had already told them that the deceased had gone to Montego Bay.

Peterkin was vigorously cross-examined to suggest that his evidence as to the conversation between the appellant and himself on the morning of October 21 was completely untrue, that the appellant had never made any request of him to kill the deceased on her behalf, that Peterkin did not see the appellant and the deceased together on the night of the

21st October at the Grange Hill All-Age School, and indeed that Peterkin had not gone to that school at the request of the appellant. Peterkin did not acknowledge the truthfulness of any of these suggestions.

Peterkin said he went to the Morgan's Bridge Police Station of his own free will and was detained by the police for questioning. He said he knew one Roland Beckford, alias "Crowder King" as the boy-friend of the appellant and he had not seen him since October 22, 1982.

Basil Thompson said he knew the appellant from boyhood as both grew up in the same district and the deceased he knew for many years. Peterkin whom he also knew told him something on the afternoon of October 21 and they both walked to the Grange Hill All-Age School. Peterkin left him and walked away in the dark, he called out, Peterkin answered and then he left for home. At that time he did not see either the appellant or the deceased. At about 1 a.m. on the night of October 22 he was at Peterkin's home cooking and he saw the appellant packing up clothes in her room. Later at the request of Peterkin he and 3 others assisted the appellant and Peterkin to carry a bed, a two-burner stove and a coffee-table from the appellant's room to Race Course about 20 chains away. Thompson said he had a premonition that all was not well hence his initial unwillingness to assist in the removal.

Thompson said that on the morning of the 23rd October the appellant came to his home and at her request he gave her uncooked food. He walked with her and enquired where was the deceased and according to Thompson, the appellant said he should not ask her any more questions. He complied. However, on the Saturday night, having regard to the information which he had got from Peterkin and not seeing the deceased walking with the appellant as before, Thompson said he went to the Morgan's Bridge Police Station and made a report. Monday

October 26, was the day on which the body of the deceased was found and Thompson said he was requested to return to the police station. He was detained. Evidence came from Thompson that when he went to the police station on the Monday he saw the appellant and there followed these questions:

"Q. Did you speak with her?

A. No, Sir, she was only trying to sink me.

Q. She what?

A. After the police them call me to the station she was trying to sink me.

Q. How you mean?

A. After I make the report and she find out I make the report she was trying to sink ..... "

Neither side explored this accusation further.

The only suggestion which came from the defence attacking the veracity of Thompson was that the appellant never removed any furniture on the night of October 22, to which Thompson did not agree.

Patrick Malcolm, a welder, of Grange Hill who plied his trade about 10 chains from the Grange Hill All-Age School, testified that he knew the appellant for a long time before October 22, 1982 and apparently he knew the deceased before then also. On that afternoon at about 3.30 p.m. he said he saw both the appellant and the deceased walking together passing his shop. The deceased stopped and spoke to him while the appellant waited about a chain away. The talk being over the deceased joined the accused and they walked in the direction of the Primary School. Malcolm further testified that at about 8 p.m. while he was still at his shop he saw the appellant alone walking from the direction he had seen her go earlier in the day and she passed his shop. Neither of them spoke to the other. Defence Counsel suggested to this witness that he was

not speaking the truth when he said he saw the appellant pass his shop at 8 p.m. on the night of the 22nd October, a suggestion which the witness rejected.

Another civilian witness called by the prosecution was Anthony Bartley. When he was called to the witness box this dialogue ensued:

"MR. GREEN: Before he is sworn, M'Lord, I don't know if your Lordship wishes to do anything.

MR. ANDRADE: I see from the deposition he was sworn.

HIS LORDSHIP: Yes.

MR. GREEN: Very well.

HIS LORDSHIP: Why you think I should want to do something?

MR. GREEN: No, M'Lord, I just wanted to bring the fact to your attention.

HIS LORDSHIP: Yes. How old are you Bartley?

WITNESS: Thirteen, Sir.

HIS LORDSHIP: Thirteen years of age. Yes."

The witness was then sworn and his evidence was that just after 5 p.m. on October 22 while he was on his way from school he saw the appellant and the deceased standing in the road talking together and they were then about three chains from the All-Age School. He knew both women for many years. Later that evening about 7 p.m. he was on his way to the shop and he saw two persons going down in the direction where the deceased was found but he was unable to recognize the sex of those persons or their identity.

Acting Corporal Norman Townsend of the Morgan's Bridge Police Station received a report on October 23 apparently in connection with the disappearance of the deceased. He took no action. At 3.30 p.m. on the 24th he got a further report from Basil Thompson and he went to Crowder District in the Grange Hill area

in search of the appellant. She came to him at the police station later that day and the Corporal cautioned her and enquired of her when was the last time she had seen Caseta Green. The appellant replied that she and Caseta Green and Caseta's boyfriend Starkey were at Grange Hill and that Starkey took Caseta in a red car to Ramble. The appellant was detained.

On October 26 at about 7:30 a.m. the police received a further report which took Acting Corporal Townsend to Mt. Eagle Farm, about 10 chains west of Grange Hill All-Age School. There he observed the body of the deceased dressed in blue clothing, a piece of rope was tied around the neck and there was a piece of cloth around the mouth. There was a large wound to the abdomen and the forehead seemed to be bashed in. He could see signs as if there had been a struggle in the area and as if something had been pulled along the track into the canefield. Acting Corporal Townsend said he went to Savanna-la-Mar Police Station and there cautioned the appellant and asked if she and the deceased had gone in the vicinity of Grange Hill School on October 22. She replied in the affirmative adding that that was the place from which the deceased was taken by her boyfriend.

Police investigations did not lead to the discovery of a red car as described by the appellant or of anyone known as Starkey. The police officer said in cross-examination that he detained Peterkin and Thompson and a third man whom he felt could assist him in his investigations and that he had issued a warrant for Roland Peterkin in connection with this murder. The three detainees gave statements and were released. The appellant refused to give a statement and to answer questions.

At the end of the Crown's case, defence counsel made a no-case submission on the grounds that in its totality the evidence was unworthy of belief and in any event did not amount to more than mere suspicion. The submission was over-ruled and in her unsworn statement the appellant said, "I don't kill Caseta Green." She called no witnesses. A lengthy summing-up followed and the jury retired for 23 minutes before returning a verdict of guilty of murder.

Miss Nosworthy argued five separate grounds of appeal. She complained in ground 3 that the trial judge misdirected the jury that certain pieces of evidence were capable of amounting to circumstantial evidence. These she identified as:

(a) the evidence of Bartley that he saw the appellant and the deceased talking together on 22/10/82 three chains from the All-Age School and that he saw 2 unknown persons in the vicinity of the same school at about 7 p.m.;

(b) that the appellant removed furniture belonging to the deceased on the night of October 22 to another location;

(c) that the appellant told Peterkin that the deceased had gone to Montego Bay with Starkey; and

(d) that the appellant on being questioned by Peterkin and Thompson as to the whereabouts of the deceased cried and told them not to ask her any further questions.

That the trial judge gave an impeccable definition of circumstantial evidence following the decisions of this Court in R. v. Clarice Elliott [1952] 6 J.L.R. 173 and R. v. Cecil Bailey [1975] 13 J.L.R. 46 was not an issue on appeal. Neither did the trial judge expressly indicate that the matters complained of formed the totality of the circumstantial evidence in the case. Undoubtedly the structure of the Crown's case did not rest entirely upon the impugned pieces of evidence. They were led as the superstructure built upon the bedrock of Peterkin's evidence, to show opportunity in the appellant to commit the crime and conduct on her part by the removal of the

furniture in the absence of the deceased to indicate that the appellant had knowledge that the deceased would not have further use for those articles. Her behaviour on the morning of the 23rd October must be contrasted with her conduct over the previous three days when the deceased and herself were wholly inseparable, and this was a matter for the jury's consideration. The fallacy in counsel's argument is that it was sought to separate the matters complained of in ground III from the evidence of Peterkin and this ground fails.

Ground IV was to the effect that identification was a vital issue in the case on which the trial judge gave no directions. The contact between Peterkin and the appellant was such that no question could arise as to whether both persons knew each other over several years, that they talked together, and according to the prosecution in the most confidential terms, that she was known to Thompson and to Malcolm over many years and when they saw her between the 20th and 22nd October there was no impediment to their recognition of her. Throughout the cross-examination the question of identification did not once arise. We are of the view that the true issue was between truth and deliberate prevarication and this was the issue properly left by the trial judge for the jury's consideration.

In ground II counsel contended that the evidence of Bartley was improperly admitted in that he being of the age of thirteen years, the trial judge ought to have held a voire dire to determine his ability to appreciate the nature of an oath before permitting him to be sworn. Section 54 of the Juveniles Act provides that if a child of tender years called to give evidence for the prosecution does not in the opinion of the court understand the nature of an oath, his evidence may be received unsworn provided he has sufficient intelligence to

justify the reception of the evidence and understand the duty of speaking the truth. An accused person may not be convicted on such unsworn evidence unless it is corroborated.

"Tender years" as used in section 54 supra is not defined by the statute but child is defined as a person under the age of fourteen years. Robotham, J.A. giving the judgment of the Court in R.v. Whitely [1978] 27 W.I.R. 247 at 248 (c-e):

> "There would have been no room for argument about the soundness of the conviction if the only witness had been an adult, or a person of the age of fourteen years and over. The only ground of appeal argued, however, was that the learned trial judge, having heard that the boy was only twelve years of age, failed to examine him on the voire dire to decide on his competency to be sworn. The question of the competence of the witness to be sworn is a matter for the judge. If upon inquiry by him it was decided that he should not be sworn because of his lack of understanding of the impiety of falsehood, then his unsworn testimony would have to be corroborated as a matter of law, or if there was no corroboration as was the position in this case, the applicant would have been entitled to an acquittal.
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> "Age is not necessarily the only test of the competency of a witness to be sworn. It has generally been accepted in these courts that a child of the age of fourteen is capable of being sworn as a witness. Idiots, lunatics, deaf and dumb persons to name but a few, although adults, may however still have to be examined on the voire dire. The real test is 'does the witness or potential witness appear sufficiently to understand the nature and moral obligation of an oath'."

He offered valuable advice at p. 249 (h) of the same judgment when he said:

> "It has always been the practice here for the Court to examine on the voire dire all children under the age of fourteen when they are presented as witnesses. This practice should continue especially when such child is the only witness of fact."

In Whitely's case the witness was twelve years of age and had retracted his sworn evidence of identification by an affidavit filed since the date of conviction. The Court declined to order a new trial to cover the irregularity. Defence counsel had alerted the trial judge to the necessity for holding a voire dire in the instant case. The trial judge, however, observing that the boy had been sworn at the preliminary examination and learning that he was 13 years old declined to examine him upon the voire dire. We are of the view that this was an irregularity. Robotham J.A. was clearly saying that although the question of competency to be sworn is a matter for the judge it is to be decided by him upon his enquiry and we endorse his exhortation that the practice to be followed in Jamaica where the child is under 14 years of age is that the trial judge should first examine him on the voire dire to determine his fitness or otherwise to give sworn evidence or any evidence at all.

Bartley's evidence of seeing the appellant and the deceased together at 5 p.m. three chains away from the Grange Hill All-Age School could not in our view have tilted the scales against the appellant. The trial judge had directed the jury that as Bartley was wholly unable to identify the persons whom he saw at 7 p.m., not even as to their sex, that evidence was of no probative value. Accordingly we decided that if the irregularity in the admission of the evidence of Bartley was the only point in favour of the appellant we would apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act and dismiss the appeal as there was no miscarriage of justice.

The most substantive ground argued by the appellant's counsel was that the learned trial judge misdirected himself and the jury on the issue of corroboration in that the witnesses Raymond Peterkin and/or Basil Thompson were either accomplices or persons with an interest or purpose to serve and the trial judge failed to rule as to whether those witnesses fell into either category and failed to direct the jury as to the jury's function to decide the issue of accomplice vel-non as also as to the necessity for corroboration in either of those circumstances.

The categories of accomplices are closed. Lord Simonds L.C. in the unanimous opinion of the House of Lords in Davies v. D.P.P. [1954] A.C. 378 at 401 said, "I can see no reason for any extension to the term accomplice". The primary category of accomplices are those who participate in the crime as accessories before the fact, as principals, and as accessories after the fact. The categories dealing with receivers and similar fact evidence are exceptions to the general rule.

At common law, an accessory before the fact was one, who, though absent at the time of the felony committed, did yet procure, counsel, command or abet another to commit a felony - see Archbold Criminal Pleading Evidence and Practice 37th Ed. para. 4142. In that same paragraph it is stated that:

> "..... the bare concealment of an offence contemplated by another will not make the party concealing it liable ..... nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute an offence."

In the instant case Peterkin's evidence was that he was propositioned by the appellant to murder the deceased but he refused. The defence suggested to him that there was no such conversation. On what evidential basis then could the

trial judge have left the issue of either accomplice or accomplice vel-non? Lord Simonds asked the relevant question in Davies v. D.P.P. supra, at 401-402 and gave the guiding answers when he said:

> "But, it may reasonably be asked, who is to decide or how is it to be decided, whether a particular witness was a 'particeps criminis' in the case in hand? In many or most cases this question answers itself, or, to be more exact, is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witnesses concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant.' In such a case the issue of "accomplice vel non' is for the jury's decision: and a judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

This Court had occasion in R. v. Champagnie et al [1983] S.C.C.A. Nos. 22-24/1980, (unreported) in which the judgment of the Court was delivered by Kerr J.A. on September 30, 1983 to review exhaustively the decided cases on the issues of accomplices, accomplices vel-non and witnesses with an interest to serve. A prosecution witness, one White had at the request of the appellant Champagnie located a man who could "fire gun" and brought him into contact with Champagnie; he had tried to rent a car for Champagnie's use; he told the man who could "fire gun" where the deceased usually went for drinks; and he, after hearing on the radio that there was a shooting at the place where he had indicated that the deceased was

accustomed to drink, was spoken to by the "gunman" and asked to tell Champagnie that he had seen the man and everything was all right. Applying the principle in R. v. Bainbridge [1959] 3 All E.R. 200, the Court held that White was not an accessory before the fact.

Peterkin said he suspected that the appellant intended to commit some crime against him and was luring him to the scene of the All-Age School as he could not believe that given the friendship with the deceased, the appellant could in truth have planned her murder. These facts are considerably more favourable to Peterkin than was the position of White in R. v. Champagnie supra. Peterkin's conduct in making a report to the police before the discovery of the body of the deceased is inconsistent with his being a participant to her murder. In agreement with the learned trial judge we see no basis on which he could have found that Peterkin and even to a greater extent Thompson, were accomplices.

Although defence counsel addressed the jury to the effect that Peterkin ought not to be believed because his evidence was intended to "save his own skin" which translated into legal language means that he had an interest of his own to serve, the trial judge declined to give any warning to the jury that they should so treat the evidence of Peterkin. At page 165 of the Record the judge directed that:

> "Now the defence is asking you to say the reason why Peterkin is telling all this lie is to save his own skin, but I told you, Mr. Foreman and members of the jury, I don't see where anybody is accusing Peterkin of doing anything at all."

That we think is a fair summary of the evidence. Peterkin's detention by the police was based upon the report made to the police of the proposal made by the appellant to Peterkin in respect of the deceased. In the absence of any

allegation or any suggestion or accusation of any improper conduct on the part of Peterkin we fail to see on what basis the trial judge ought to have treated him as a person with an interest to serve.

If the jury believed Peterkin's evidence in its totality, if they believed that the appellant and the deceased were seen on the Grange Hill road by the witness Malcolm and by Peterkin in the late afternoon of October 22, if they believed that the appellant returned alone to her room sometime after 8 p.m., that on the same night she removed furniture belonging to the deceased from the room they occupied to premises elsewhere, that she gave two accounts of the place to which the deceased is supposed to have been taken and that she appeared tearful and refused to answer further questions as to the whereabouts of the deceased on the morning of the 23rd October, all these were circumstances which could lead the jury to find that the appellant killed the deceased. We found no merit in the original ground of appeal that there was insufficient evidence to warrant a conviction.

It was for these reasons that we treated the application as the hearing of the appeal, applied the proviso in the instance of ground II and dismissed the appeal.