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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 28/78

BEFORE: The Hon. Mr. Justice Kerr, J.A.  
The Hon. Mr. Justice Carey, J.A. (Ag.)  
The Hon. Mr. Justice Marsh, J.A. (Ag.)

R. v. DELBERT HOLT  
& WILBERT JACKSON

Mr. Sylvester Morris for Holt

Miss N. Hamilton & Mr. Arthur Williams for Jackson

Mr. M. Dukharan for Crown

October 16, 17 1980 & January 21, 1981

CAREY J.A. (AG.)

On 17th October last, when these appeals were dismissed, we promised to reduce our reasons in writing and to hand them down at a later date. This is in fulfilment of that undertaking.

These appellants were convicted before White J. and a jury in the Westmoreland Circuit Court as long ago as 10th February, 1978, for the murder of a young woman, one Gretel Barrett.

Not only was the murder particularly gruesome but a motive was not discovered. The medical evidence which was read at the trial, showed that skin and subcutaneous tissue were removed from the following areas of the dead girl's face and head:-

(a) right side of head including removal of right ear.

The right temporalis muscle, the right sternomastoid muscle, part of the right trapezius muscle, tissue around the right eye, the great vessel at the right side of the neck, along with skin, superficial muscles and sternomastoid muscles were all removed. In effect, what had taken place was a half facial and neck scalping with the muscle having been pared down to the bone and skull.

There were some other injuries but these did not appear to be of any particular significance. The cause of death was stated to be haemorrhage from removal of tissue from the right side of the neck. The pathologist suggested that the 'operation' was performed probably when life was just extinct and further, either a wound had been inflicted to the right side of the neck and evidence of its nature had been removed, alternatively, whilst unconscious, a cutting away of the neck tissues was started, which resulted in rapid death from loss of blood, when the great vessels of the neck were divided. There was also evidence that a sharp knife had been employed in this terrible operation which would have occupied about 15 - 20 minutes, assuming the hand was inexpert.

The evidence which led to the conviction of these appellants came from a solitary witness, Audley Bowen, who was not an eye witness to the actual murder. According to Mr. Bowen on 10th May, 1977 he had attended a member's meeting at his church, the Riverside Home Bible Church. On his way home at about 11.15 p.m. he overtook both appellants in the company of the victim of the murder, Gretel Barrett. As he did so, the girl directed a curious question to him, enquiring whether he was afraid. His rejoinder was 'no'. The appellant Delbert Holt then remarked how, 'they' had killed Miss Williams and thrown her daughter in the bush. Bowen thereafter went on home. During the time he stood waiting at the door for someone to answer his knock, he observed from a distance of 6 chains, the appellants and the eventual victim of th

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Although he saw no one in the common, he did however, hear a scream, which seemed to come from the common. It lasted a matter of some 10 seconds by his reckoning.

He then moved to the side of his aunt's house where he stood for a short time. The appellants emerged from the same common, supporting the body of a woman, whom he was not at all able to identify. Twenty minutes had elapsed from the time he heard the scream. They placed the body through the barbed wire fence of premises belonging to Elsaída Beckford, the mother of the dead girl. He lost sight of them. From the back of the house to which he had moved, he again saw the appellants but without their burden. He was one and a half chains away. At this point, the appellant Wilbert Jackson intimated that if he heard his name mentioned, he would come looking for him. This sinister threat filled him with fear. His reaction was to flee to Irwin where his mother lived, 1½ chains away. On the next morning he left for Kingston, from where he moved on to Thompson Town in Clarendon. While at this last address he received some information which led him to Detective Ladreth Martin of the Montego Bay C.I.D.

As was to be expected, the witness was very searchingly cross-examined by two very able counsel, one of whom is an eminent silk and the other an attorney of not inconsiderable experience. It was established in the course of the cross-examination, that at some time in the past a ratbat had momentarily pitched on his head. It was, he said, an ill-omen because he went down sick with the 'dengue fever'. During the time of this illness, he had a vision of Jesus coming to heal him. Jesus was to him a reality for he had touched him as in the words of the hymn "let me touch Jesus". He had never, however, seen

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a Miss Williams' daughter, and that he had not seen the appellants bearing the body of a woman which was left at Miss Beckford's home.

It also emerged during cross-examination of this witness that it was not until 21st May, 1977 that he learnt of the death of Gretel Barrett which, in point of time, would be subsequent to his return to Irwin from Thompson Town. He had not divulged the events of the night of 10th May to anyone until his interview with the police on 24th June. He had a particular reason for his precipitate departure on 11th May, viz. the threat expressed by the appellant Jackson. He did not accept that the reason for his silence was that he had not witnessed the events about which he had testified.

Another witness of some importance as respects the prosecution case, was Elsaida Beckford, the mother of the dead girl. She testified that her daughter aged 19 years was the mother of two children, and had had an emergency operation, (presumably as a result of an ectopic pregnancy). On 10th May, her daughter had left home but had not returned up to the time she retired to bed at about 10.00 p.m. At this time she recalled hearing footsteps and the sound of some sort of struggle in her yard, but, she had seen nothing to alarm her. Next morning she discovered the dead body of her daughter with her face mutilated. It was the same area in which she had heard the nocturnal sounds described by her in evidence.

The police investigation revealed that the clothing of the deceased showed no saturation of blood as would have been expected nor was any significant quantity of blood observed where the body was found and had laid. No murder weapon was found, nor was the spot where

The defence of each of the appellants was an alibi.

Delbert Holt, who gave evidence on oath, said that on the night of 11th May he remained at home. He learned of the incident because of the commotion caused by the comings and goings of several persons. He himself went and viewed the body. With regard to the witness Audley Bowen, he acknowledged that both of them were quite friendly and were members of the same church. Indeed, on some occasions he had assisted Bowen by way of loans. A couple of weeks after the murder, Bowen had been the beneficiary of his bounty to the extent of \$40.00 which had not been repaid despite a request for his money. In cross-examination, the appellant indicated that it was the request for repayment which was made 2 weeks after the incident. He called no witnesses.

Wilbert Jackson also gave evidence on oath. On the night of 11th May, he had left his home at 8.45 p.m. to watch television at his neighbour, Mr. Brown's house. He had taken with him his 17th months old child. He had remained there until 10.55 p.m. when he left for home a matter of 6 feet away. His wife and another relative returned home at 11.15 p.m. He was a past member of the Riverside Home Bible Church, his last visit there being some 7 years previously. He knew the dead girl, her mother and also the other appellant. A witness was called to support his evidence regarding the nature of the films being broadcasted on that night.

Mr. Henry Brown the appellant's neighbour gave evidence on his behalf. He confirmed the arrival of the appellant Jackson at his house and his presence there until 9.15 p.m. when he fell asleep. When he awoke at 11.15 p.m. the appellant had already left.

the grounds urged before us, which was common to both appellants was that the verdict was unreasonable and could not be supported having regard to the evidence. In the end, however, it was conceded, certainly by Mr. Williams for Jackson that if the jury accepted the evidence of Audley Bowen, the ground could not successfully be maintained. We unhesitatingly agree that this view is eminently right and would commend counsel for his refreshing candour. In the circumstances, it becomes wholly unnecessary to consider the matters canvassed in argument by Miss Hamilton who also appeared for the appellant Jackson.

We can now turn to consider the ground which became the basis of the main thrust of the arguments of Mr. Morris who appeared on behalf of the appellant Holt, but which concerned the other appellant as well. It was in the following form:

"the learned trial judge failed to exercise his duty under the law as to whether (Bowen) was a competent witness."

Before dealing with this ground, however we wish to mention that there was another ground criticizing the summing-up on the basis that the trial judge had failed properly to direct the jury how they were to treat the evidence of the witness (Bowen). It was not in the event pressed as the court did indicate passages in the summing-up which dealt with this issue fairly and adequately. It will be necessary, nevertheless, to advert to those at a later stage, in the course of this judgment.

What we understood learned counsel to be advancing was, that at the end of the prosecution case, the learned trial judge should have withdrawn the case from the jury as it had been demonstrated in

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experiences of his. Mr. Bowen had in his evidence said firstly, that a 'ratbat' had at one time pitched against his head and according to folklore it presaged some ill-omen. He had in fact fallen ill with dengue fever and in that state had seen Jesus Christ coming off the cross to heal him. This vision was to the witness a reality. Jesus had touched him, that is, healed him. Mr. Morris therefore argued that anyone who held these beliefs was incompetent and any evidence given by him should be withdrawn from the jury's consideration by a trial judge.

It is well established that an objection to the competence of a witness may be taken whenever his incompetence appears. See the old case of Jacobs v. Layborn 11 M & W 685. So far as the instant case was concerned, no objection whatsoever was raised to the competence of the witness by any of the counsel who appeared, one of whom, as has previously been noted, was an experienced counsel at the criminal Bar. While this would not relieve the judge of his duty to rule on the competence of the witness, <sup>the</sup> nature and conduct of the defence is indicative that credibility rather than competence was the issue specifically raised. Competence is a question for the judge, credibility a matter for the jury.

In the case of R. v. Hill 20 L.J. M.C. 222, on a trial for manslaughter, evidence was given by one Donnelly who was a patient in a lunatic Asylum. Before he was called as a witness, an attendant at the asylum stated that Donnelly "labours under the delusion that he has a number of spirits about him which were continually talking to him!" The medical superintendent at the asylum stated the same, and

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competence will depend on the character and extent of the malady. Even where a person is insane as respects certain matters, if he understands the nature of an oath, he is capable to give evidence unaffected by his derangement.

There was no evidence in this case that Mr. Bowen was suffering any mental disability. The vision of Christ leaving the cross to heal him can fairly be attributed to his fundamentalist religious belief; he was a member of the Riverside Home Bible Church. Learned counsel for the appellant Holt was suggesting that the witness must be regarded as suffering from some mental disability when he said that he saw Jesus Christ coming from the cross to heal him, in the same way that he had seen the events which he had related to the Court. But he was quite unable to identify the nature of the malady.

No medical evidence was produced, to show that his belief in the reality of a living Christ who could touch him was such a delusion as would preclude him from relating events which he had seen. The cross examination of the witness Bowen by counsel, for the appellant did not disclose that the witness did not understand the binding sanction of an oath. At page 204 of the transcript he said:

"I know what is is to take an oath on the Bible - to tell the truth."

We are mindful that the conduct of Mr. Bowen, after the murder, evoked comment by learned counsel. The witness did undoubtedly leave his home immediately after the events which he had related, and he did not intimate where he was bound. It must not be forgotten however, that at the time he fled, he was quite ignorant of the death of Gretel Barrett. The reason for his departure was stark fear arising



footing that he was incompetent. The learned trial judge plainly did not consider the witness to be incompetent, a view with which we concur. He therefore properly left to the jury to consider what degree of credit should be attached to his testimony.

Thus at page 180, in directing the jury on this approach to Bowen's evidence, the learned trial judge said:-

"And you will have to consider whether this man, this young man, - he has been referred to as a boy - this youth of nineteen years is so mad as the defence would like you to believe and find that you cannot accept him as a witness of truth when he told you that he stood by his grandmother's house and his grandmother's land and saw something and because of what he saw he moved from there and went to his aunt, the side of his aunt's house and saw something else. Mr. Foreman, Members of the Jury, you will have to decide whether all that is just a figment of the imagination of this young boy, this young man who was frank to tell you about ratbat pitching on his head and who went on to tell you that it is a common saying of old-time people that when ratbat pitch on your head you are going to be sick. Was he so sick at the time that he could not see and could not comprehend? When he was giving evidence to you, you saw him there quiet, the only time he raised his voice was when he was challenged as to whether he was speaking the truth and he said I am telling you that so and so is the case; I will remind you of those instances. So Mr. Foreman and Members of the jury, if you say that that young man's mental state is as Mr. Miller would have you believe when he questioned him that he is like ratbat, unstable ratbat, don't have any stable residence, but is that true? They fly around but they go back to their nests and they give manure which is very, very healthy. I made that passing comment as somebody who is interested in gardening, and I know that it is very good manure, but how would you collect the manure if they didn't concentrate somewhere. This sounds flippant and I don't wish to reduce the solemnity of our inquiry into any flippancy just for the sake of being humorous, but I just wanted to make

"You saw Audley Bowen in the witness box, you heard his evidence and continuing with his evidence he said when Gretel Barrett spoke, the two accused whom he said was there, could have heard. They were walking just as one walks with friends and side by side together. Is this the description of a kind flowing from a mind which is sick Mr. Foreman and Members of the Jury? If you say that that is so, by all means you will be well on your way in saying that the crown has not satisfied you so that you feel sure. But if you say that it is not, that it is a clear honest description by somebody in good mind, good mental health Mr. Foreman and Members of the Jury, go on to consider the rest of the evidence.

And again at p. 189:-

"Does this to you Mr. Foreman and Members of the Jury, mark him out as a witness of truth, or is he so smart or because his mind is unstable he tells you that, well, you know although I saw the woman go in there, but then I can't tell you, it is a woman's body but I cannot tell you. Is he lying? If he is lying Mr. Foreman and Members of the Jury, I have to direct you, if you say he is lying, to acquit the accused. If he is speaking the truth on this point, well go on to consider it with the rest of the evidence.

Further, on at p. 196 he said this:-

"The question is, what do you make of his statement of that vision? should he be pilloried and ridiculed because of that: Is he telling something of a personal experience which should be respected or is he telling you something of a personal experience which is not a fact but is just the imagination running riot? He is a baptized member of a church. Is it then, therefore not to be expected that he would have a vision if he has a fervency of zeal and conviction, as he said? But all that - my words - don't mean anything except it crystallises in your own mind and you accept it as such. What this witness was trying to say and when he said that he

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to tell you, and if you say you can conscientiously say that this vision of Jesus on the cross is the vision of a demented soul because he was asked about if he had ever seen the Devil and he said no. May be, you would think that he, like the Gadarene demoniac. I don't know if you think that he can be so stigmatised, then, you know, the conclusion would be that the vision which he spoke about was that flowing from the mind of somebody whose word is unreliable and, therefore should not be accepted and that what he saw that night was just a vision of a figment of the imagination which had been painted for you by some man you would think is unstable in mind."

In the light of these passages in which the learned trial judge brought clearly to the jury's attention the question of the reliability or otherwise of the witness and alerted them to the suggestion of the defence that the witness was mentally unstable, we are clearly of the view that there was no failure on his part to direct the jury on the proper approach to Bowen's evidence. Counsel's contention that the trial judge's directions in this regard, were weighted in favour of the prosecution case is therefore without merit.

In the result, we hold that there was no evidence to rebut the presumption of sanity as respects the witness. His credit was a matter for the jury and by their verdict, the jury plainly accepted him as a stable and truthful witness. We are therefore quite unable to find any ground on which we could set aside the verdict of the jury.

It was for these reasons that these appeals were dismissed and the convictions and sentences affirmed.