JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 138 of 1975

BEFORE: The Hon. Mr. Justice Swaby, J.A.(Presiding).
The Hon. Mr. Justice Watkins, J.A.(Ag.).
The Hon. Mr. Justice Henry, J.A.(Ag.).

REGINA vs. FERNANDO MARKS

Mr. G. James with Mrs. S. Lewis for the Crown.

Mr. H. Hamilton for the applicant.

June 30; July 1, 2, 30, 1976

WATKINS, J.A.(Ag.):

On July 2, 1976 we refused the application for leave to appeal against a conviction and sentence for murder recorded on December 4, 1975 against the applicant in the Home Circuit Court before Rowe, J. and intimated that we would put our reasons in writing. This we now do.

The indictment charged that the applicant either on February 2 or 3, 1975 in the parish of St. Andrew murdered Alex Parker. The scene of the fatality was No.2 Stony Hill Road. There the deceased had lived in a detached bungalow. His married daughter Mrs. Paula Espeut occupied a separate residence on the same premises. A mile away situated along Harbour View Road the deceased had had his own home called Bella Vista, a portion only of which was then occupied by a Miss Hart. Parker had advertised the rest of Bella Vista for rental and his presence there on the morning of Sunday February 2, 1975 was in order to receive prospective callers. When at about 10.15 a.m. Mrs. Espeut also arrived at Bella Vista the applicant was already there, not in response to the advertisement, but rather allegedly to see Miss Hart. Mrs. Espeut later departed to the residence adjoining Bella Vista where her husband lived and at about 1 p.m. her father Alex Parker driving his white Avenger car arrived to inform her that he was returning to No.2 Stony Hill Road for lunch. That was the last occasion on which she saw her father alive.

At about 3 p.m. that same Sunday Lanceford Hibbert, a factory worker, living off the Washington Boulevard, St. Andrew received a visit from the applicant whom he had met on two or three occasions before.

The applicant drove a white Avenger car. It was in a noticeably defective condition, Hibbert said. The fan belt was brushing against the radiator which would not hold water, and the left head lamp and left front fender were damaged. Much fruitless effort was spent by Hibbert together with the applicant either to get the engine of the car to start, or if started, to maintain it in running condition, and so the applicant's offer to take Hibbert to the National Stadium to view a football match remained unfulfilled up to 5 p.m. when they parted. Hibbert was unable to tell what registration letter and number, if any, the car bore. At 10 p.m. that same Sunday night Devon Davidson, another prosecution witness, said that he saw the applicant. He was standing on Pembroke Avenue off the Washington Boulevard outside the gate of premises at which a relation Desmond Hanchard kept a motor car garage. Whilst there the applicant drove up in a white Avenger car. The car, registered licence NB 92 was giving trouble. The engine intermittently started and shut off. This car's radiator also leaked and would not hold water. It too had dents. "It was damaged all over" he said "for it got a lick in the front". Specifically the left headlamp and left front fender of this car were also damaged. At the invitation of Davidson the applicant left the car that night for repairs to be undertaken, but the work thereon which was begun on the following morning was discontinued when in the afternoon newspaper the Star, of that day, Davidson read an article which aroused his suspicion and led him to contact the Police at the Constant Spring Police Station who brought a wrecker and took away the car. The applicant had promised to return on Monday February 3 in connection with his car but did not do so. That Monday evening, however, Davidson saw the applicant at the Constant Spring Police Station and, pointing to him, said "This is the man who brought the Avenger car to be repaired".

At about 7 a.m. on Monday February 3 Mrs. Espeut left Harbour View Road for No.2 Stony Hill Road. Her father's white Avenger car was not there. Flower pots along the drive-way were noticeably crushed and the iron gate was damaged. In the dining/sitting room of her father's bungalow lay his body, prostrate on its back, a steak knife plunged into the chest. The side pockets of the trousers with which the body was clad were pulled out, and covered with blood, Alex Parker appeared to be dead.

Mrs. Espeut recognised the white-handled steak knife as one from a set which her father had had.

At about 10 o'clock on that Monday morning also Mernel Bartley, domestic helper to Miss Hart, saw the applicant looking out from a window of the unoccupied portion of the Bella Vista house. He explained his presence there in these words "I move in last night and I sure I come in with the key and I don't know what happen, it seems like the key disappear and I cannot get to come outside". Bartley said she noticed that the applicant then had her employer's towel over his shoulder and her chain around his neck. The applicant told Mernel Bartley that he had telephoned Mr. Parker who had said that he would come and open the door later. Of course Mr. Parker had already died many hours earlier. Mernel Bartley by a ruse succeeded in calling the Police on the telephone and upon their arrival she pointed out the applicant to them. It was Police Constable Patrick Wedderburn who had responded to Mernel Bartley's telephone call. Upon his arrival at Bella Vista he recognised the applicant who was hanging wet clothes on a line as someone whom he had known before. The applicant made an attempt to run away but was quickly apprehended by the constable. Searched, a brown leather wallet was taken from the applicant's right hand back pocket, and in one of the rooms which the applicant appeared to have occupied a bunch of keys was also found. At the Stony Hill Police Station Mrs. Espeut identified the applicant as the person she had seen at Bella Vista on the previous day and she also identified the wallet as the property of her deceased father and the bunch of keys as belonging to the Bella Vista house. The medical evidence affirmed that the death of the deceased was due to shock as a result of haemorrhage occasioned by stab wounds to the left ventricle. Death was almost instantaneous and having regard to the condition of rigor mortis observed at 9.30 on Monday morning the effect of the medical opinion was that the death of the deceased had taken place between one and two o'clock of Sunday February 2. Upon arrest the applicant was supposed to have said "No Rasta never kill him, a fi him knife me use stab him and dig off with the car" but in view of the fact that the arresting Police officer had made only a mental note of what was said, and in view of the assertion by the applicant that what he had said was

"nuh Rasta did deh deh and stab him with the knife and mig off with the car" the learned trial judge virtually directed the jury not to take into their consideration the statement attributed to the applicant by the arresting police officer.

From the preceding narrative it will be apparent that there was no eye-witness to the killing and that the case for the prosecution rested mainly, if not entirely, upon circumstantial evidence. The applicant on his part, whilst admitting his presence on the occasion of the killing, denied any participation in it, and in an unsworn statement from the dock he attributed it to three rasta men who thereafter fled the scene in the deceased's white Avenger car. In a written statement made voluntarily by him just prior to his arrest the applicant again attributed the killing to three rasta men. An attempt to put this statement in evidence was however refused by the court.

By leave of the Court Counsel for the applicant argued the following supplementary grounds of appeal: "(1) That the learned trial judge by the wrongful admission of evidence and palpable misdirections gave the jury no assistance whatever on the issue of circumstantial evidence in that:-

(a) Circumstances were indicated which were in fact not circumstances e.g. pages 276-280 of the summation

(b) The method of identification employed by the witness Davidson was wholly improper

(c) There was never any identification by the witness Hibbert of "the" white Avenger Car.

(2) That the learned trial judge erred in excluding the applicant's cautioned statement."

It will be convenient, having regard to the interlocking nature and interdependence of the events upon which the case for the prosecution rests, to consider the first ground as a whole. In the concatenation of events adduced by the Crown four incidents were principally relied upon, that is, the time of the deceased's death, the possession by the applicant shortly thereafter of the car and wallet belonging to him, and the evidence of Miss Mernel Bartley, domestic helper to Miss Hart, as to the applicant's conversation with her and including the matter

of the wet clothes. Now as already indicated the hour of the death of the deceased, having regard to the state of rigor mortis which had supervened when the doctor had examined the body at about 9.30 a.m. on Monday February 3, was placed at somewhere between the hours of one and two o'clock in the afternoon of February 2. On the evidence of Mrs. Espeut and on his own admission the applicant was at No.2 Stony Hill Road at this critical period. He too said in his unsworn statement from the dock that the deceased had taken him to his bungalow in order, among other things, to look at a defective lawn mower. This indubitably was evidence of opportunity. Next, within two hours of the death of the deceased the applicant, described as being in a highly nervous state, was seen by Lanceford Hibbert who said he had known him before and he remained for nearly two hours in the company of this witness with an Avenger motor car, white in colour and whose defects, namely a leaking radiator, a fan belt touching the radiator, inability to start, and damaged left front fender and left headlamp, bore an irresistible likeness to the white Avenger car which some five hours later was positively identified by its registration plate NB 92 as being the very one driven by the self-same applicant and left at the garage of the witness Devon Davidson for repair and later identified by Mrs. Espeut as her deceased father's car. The contention therefore of the applicant in his ground of appeal that "there was never any identification by the witness Hibbert of "the" white Avenger car" must be restricted to the absence of identification by reference to the registration plate of the car, but there was an abundance of other evidence, already referred to, on the strength of which it was open to the jury, taking into consideration as well the evidence of the other witness Devon Davidson, to come to the conclusion that "the" white Avenger car seen in the possession of the applicant so shortly after the death of the deceased was indeed the very car owned by the deceased. The applicant on his part had given in his unsworn statement from the dock an account of the disappearance of the car from No.2 Stony Hill Road. It was that the rasta men after killing the deceased had driven away in the car. He had seen them leave the premises in the car. He offered however no information as to how either the flower pots in the drive-way or the iron gate had been damaged although he said that he had noticed

that the left side door and left front head lamp of the car had been damaged. Davidson had described the damage on the white Avenger car as "fresh" and Hibbert described the applicant as "highly nervous" in appearance when two hours after the death of the deceased the applicant appeared at his Hibbert's home driving a white Avenger car. It seems to us that on a consideration of all the evidence relative to the possession of the white Avenger car in the hours immediately following upon the death of the deceased a jury would have no hesitation whatever in arriving at the conclusion that it was the applicant and none other who had taken possession of the vehicle in the circumstances already described and that that possession was not an innocent one by any means. It was contended further by Counsel for the applicant that there was no proper identification by Davidson of the applicant whom he had never known before the night of February 2. By "no proper identification" is meant of course that no identification parade had been held whereby the ability of the witness Davidson to identify the applicant could more properly have been tested. The merit of this contention cannot and ought not to be disputed, but in the circumstances of this case, it can only affect the weight as distinct from the admissibility of the evidence of identity otherwise afforded in the testimony of Davidson. Although it was night when the applicant brought the car to Davidson's garage there was a fair amount of light available from a street lamp and the applicant had remained in conversation with the witness sufficiently long to afford full and thorough observation and recognition of him. These matters were all adequately left with the jury by the learned trial judge and it was open to them on the evidence to be satisfied so that they felt sure that it was the applicant and none other who had left the car of the deceased on the night of February 2 with the witness Davidson for repair.

The third link in the chain of circumstantial evidence was the possession by the applicant of the wallet belonging to the deceased. Constable Wedderburn had retrieved it from the pocket of the applicant when on Monday February 3 somewhat after 10 a.m. he had taken him into custody at the Bella Vista residence. Mrs. Espeut identified the wallet as the property of her father. In short within twenty-four hours of the death of the deceased the applicant was found in possession of his wallet.

this passage unobjectionable. As a whole, therefore, the arguments advanced under this first ground of appeal are unsustainable and therefore fail.

I turn now to the second ground of appeal, namely that "the learned trial judge erred in excluding the appellant's cautioned statement". It is not necessary to refer to the text of that written statement further than to repeat that in it the applicant whilst admitting his presence at the scene of the killing, attributed that killing to "three rasta men who come and kill him then stab him up and drive way the car say them a carry it go a garage go charge it up." The defence had sought to put the statement in evidence but an objection thereto by the Crown on the ground that it was merely self-serving evidence and as such irrelevant and inadmissible was sustained by the learned trial judge who in the course of his ruling on the issue made reference to a number of cases including R. v. Roberts (1943) 28 Cr. App. R. 102, R. v. Sparrow (1973) 57 Cr. App. R. 352 and R. v. Thompson (1975) C.L.R.34. The law is well settled that a party is not permitted to make evidence for himself and so a statement by an accused party which is merely exculpatory is, without more, inadmissible. Such a statement may however be admissible in evidence (i) if it forms part of the res gestae or is tendered to rebut a suggestion that a defence was a concoction (e.g. Roberts' case at p.106) or (ii) as showing the reaction of the accused when first taxed with incriminating facts (R. v. Storey (1968) 52 Cr. App. R. 334 at 337). As the circumstances at (i) above clearly did not apply to the instant case, the Court invited Counsel for the applicant to consider whether the principle of Storey's Case would apply. A call girl, Storey had responded affirmatively to a telephone caller named Anwar, who said that he wished to do "business" with her. Shortly thereafter he arrived with luggage containing three bags of cannabis and asked Storey whether she would object to his doing some business in relation to the cannabis with a friend who would attend on him at the flat. Storey was still arguing with Anwar about the matter when the Police arrived and discovered the cannabis laid out on her bed in the flat. Asked to

account for her possession of the prohibited drug she silently pointed at Anwar. Later at the Police Station Storey dictated a voluntary statement to the same effect. At the end of the case for the prosecution which included this statement, a no-case submission on behalf of Storey was made but was rejected by the trial judge. Storey was convicted and on the hearing of the appeal Widgery L.J. had this to say:

> "We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of short hand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial."

In the light of this dictum it arises for consideration whether the applicant could be said to have been taxed with the incriminating facts at the time when he offered to make his voluntary statement at the Constant Spring Police Station. In his presence at the Stony Hill Police Station Mrs. Espeut had earlier identified the wallet and bunch of keys as the property of her father. At Bella Vista whither the Police, the applicant and Mrs. Espeut had gone prior to going to the Constant Spring Police Station Mrs. Espeut had identified the applicant as "the man I saw with my father yesterday". At the Constant Spring Police Station Mrs. Espeut also identified in the presence of the applicant the white Avenger car brought from Davidson's garage as the property of her deceased father. Davidson too identified this car in the presence of the applicant. The narrative of the examination of Detective Inspector Smythe to whom the voluntary statement of the applicant was dictated may now be looked at:

"Q. ... What did Davidson say first?

A. This is the man that bring the Dodge Avenger car.

Q. Pointing to the accused, "This is the man" that what?

A. Brought the Dodge Avenger car to my garage to be repaired.

Q. You don't remember hearing Davidson mention anything about a key?

A. I don't remember.

Q. Only about the car. When Davidson said that in the presence and hearing of the accused, do you recall the accused saying anything to that?

A. Yes, Sir.

Q. What do you recall him saying?

A. The accused said "Since this happen, sir I will tell you everything."

Q. "Since this happen, Sir"

A. "let me tell you how everything go"

Q. "Everything go"?

A. Yes.

Q. Did you then caution the accused?

A. Yes, Sir".

It is apparent from the above narrative of the events which preceded the taking of this statement that the applicant had been taxed with the incriminating facts and that the statement was in the nature of a reaction thereto and that on the authority of Storey's case it ought to have been admitted so that it might form part of the general picture to have been considered by the jury at the trial. In his unsworn statement from the dock, however the applicant had said all that was material in this voluntary statement, save for an account in the latter that he had come into possession of the wallet by opening a drawer of the deceased after he had been slain. The exclusion therefore of the voluntary statement did not in our opinion operate to deprive the jury of the opportunity of forming an adequate general picture of the case, nor did the applicant thereby suffer any injustice in fact. This is not a case in which consideration of the use of the proviso arises, but if it did we would not hesitate to invoke it having regard to the weight of the evidence as a whole.

For the reasons above we refused the application and affirmed the conviction and sentence of the court below.