JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 155, 156 & 157/81

BEFORE: The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

R. v. FRANCES DOVE, WINSTON DIXON &
STANFORD FLOWERS

Carl Rattary Q.C. & K.D. Knight for the Applicant

Lennox Campbell for the Crown

September 28, November 10, 1982

ROWE J.A.

The evening of October 29, 1980 was an evening of terror in the district of York in the parish of Westmoreland. Busta Salmon died on November 8, 1980 allegedly as a result of injuries which he received in the course of that evening, and the three applicants herein were convicted in the Westmoreland Circuit Court on October 26, 1981 for murdering him. We heard their applications for leave to appeal on September 28, 1982 which applications we treated as the hearing of the appeals and in the end we allowed the appeal of Frances Dove quashed the conviction and entered a verdict of acquittal, while the appeals of Dixon and Flowers were dismissed. These are the reasons which we then promised to put into writing.

Jonathan Davis and his wife Annel, two elderly people, gave evidence for the prosecution that after 4 p.m. on October 29, 1980, the day before the last General Elections, they were at their home at York having their evening meal when Busta Salmon (the deceased) ran unceremoniously from the road into their house and locked himself in. This unusual action became understandable when Mr. and Mrs. Davis saw that the applicant Flowers with a big cook knife in his hand and the applicant Dixon who had two stones in his hands were both chasing the deceased. The couple did not obey the commands of the male applicants to eject the deceased from their house, so in reprisal they began to

stone the house. Mrs. Davis went to the Police Station at Bethel Town and made a report but she got no police assistance. On her return at about 8.30 p.m. she saw the applicant Dixon hiding beside her kitchen. She ordered him to leave but he replied, "it is easier for you to leave than me for I have a duty to perform here". Shortly after, the deceased opened the door of his sanctuary to admit his mother and this was the signal for both male applicants to rush in. Both were armed - Flowers with a cutlass and a piece of stick; Dixon had a piece of stick. The prosecution witnesses said they heard "wrestling and licking" inside the house and the deceased bawling for murder. Then the deceased ran out chased by the male applicants. An alarm was raised that Salmon was knocked down. The mother of the deceased spoke of seeing the deceased lying in the road. She drew him back into Mr. Davis' house. Mr. and Mrs. Davis gave evidence that they saw the male applicants renew their attack upon the deceased on the verandah and the hall of their house, as again they started to "lick" him with sticks.

Frances Dove the mother of the male applicants, throughout the earlier part of the evening's proceedings, was seen standing at Mr. Davis' gate. She had refused to do anything to restrain her sons and later went into Davis' house after the deceased was drawn in there by his mother. Neither Jonathan nor Annel Davis saw Frances Dove do any violence to the deceased, although Mr. Davis described her attitude as the "most cruel of them all." During this final assault upon the deceased and while Frances Dove was in the room, the deceased's mother was heard to scream to Frances Dove asking her not to chop her son again. Frances Dove was seen to leave the room carrying a cutlass. The male applicants escaped through a side door.

The deceased was left in a pool of blood. In the picturesque language of that agricultural community, his mother described his behaviour during the rest of that night as one who "was battering like hog and bawling like cow."

Vida Salmon sought medical attention for her injured son. On Election Day, October 30, she could get no transportation to take him to a doctor or to the hospital. On the Friday she had to go from York in Westmoreland to Cambridge in St. James to get a car to take him to the Doctor. She did not go in the car but the deceased returned home and at trial she was unable to say if he was given any medical treatment on the Friday. It was not until the Monday, the fifth day after the injury, that she was able to have him taken to the Cornwall Regional Hospital. He did not survive and he died on November 8, in the hospital.

Dr. Levy Hibbert performed a postmortem examination on the dead body of Busta Salmon on November 13. He found a number of abrasions on the body. There were small superficial abrasions to the left leg and to the right leg, over the right hip, and to the lower back. There was an abrasion to the left wrist which was in plaster of paris. There were superficial abrasions to the left side of the abdomen. There was a sutured laceration on the flank of the scalp behind which there was another laceration which was surgically done for the purpose of drainage of the other wound. The body was dissected. Internal examination of the chest revealed that the left lung consolidated and showed evidence of wound in it. There was pnuemonia in the lung. There was a clot in the artery going to the right lung and there was a blood-stained collection of fluid inside the right chest cavity. There was bruising of the upper part of the left kidney. Apart from the fracture of the left forearm, some of the ribs were broken.

The most significant injury was a fracture to the front of the skull. An area of bone about 3 c.m. by 4 c.m. over the middle was removed and in the opinion of the doctor this was done surgically for drainage purposes. The cause of death was attributed to septic meningitis consequent upon the compound fracture of the skull and a consolidation of the left side of the lung, a condition that results when a patient lies in bed for a prolonged period. In the opinion of the doctor the injuries, other than the one to the head, would not have caused the deceased to be confined to bed, and were therefore not a contributory factor to his death.

During cross-examination the doctor said that it was possible for one injured as the deceased was, to have developed infection, if he did not receive immediate medical attention. Some patients, he said, who did not seek medical attention recover on their own, while in others, the consequence of lack of medical care would be death. It is of some significance in this case that all the injuries found on the deceased could have been caused by blunt force and that there were no sings of incised wounds.

The first ground of appeal argued by Mr. Rattary was that the medical evidence was insufficient to establish causation and the totality of the evidence including the neglect to obtain medical treatment for the deceased within a reasonable time was sufficient to break the link of causation between the acts of the accused and the death of the deceased. It was his proposition that in the context of the development of civilization which makes medical treatment available to those in need of it, a person in the Jamaican Society today, who receives an injury and through no fault of the accused the injured person does not receive medical treatment for five days, if death results, there is a duty on the prosecution to prove that death was caused by the original injury and was not due to the intervening supine inaction.

In R. v. Jordon (1956) 40 Cr. App. R. 152, the Court of Criminal Appeal held that where the medical evidence showed that death was not caused by a stab wound but by the intravenous introduction of abnormal quantity of terramycin after the deceased had shown that he was intolerant to it, the chain of causation was broken. The Court said at page 157:

> "We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by felonious injury."

The actual decision in R. v. Jordon is explicable on its special facts. This was the view of Lord Parker in R. v. Smith (1959) 2 All E.R. 193, at page 198. That was a case in which after the deceased was feloniously stabbed, he twice fell to the ground, whilst being carried in search of

medical attention, in circumstances which exacerbated the injury. The court held that:

> "If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating."

Both the cases of R. v. Jordon and R. v. Smith supra were considered by the Court of Appeal in R. v. Blaue (1975) 1 W.L.R. 1411. The defendant had stabbed a young woman with a knife which penetrated her lung. A blood transfusion was recommended but due to her religious belief as a Jehovah's witness she refused the transfusion and died the following day. The cause of death was bleeding into the pleural cavity which would not have been fatal had she accepted the recommended medical treatment.

In the course of his judgment Lawton L.J. said:

> "It has been long the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this coming about did not break the chain of causation between the act and death."

Two cases decided in 1981, R. v. Malcherek and R. v. Steel (1981) 1 W.L.R. 690 reviewed the decisions in R. v. Jordon and R. v. Smith. Again the Court stressed the exceptional nature of the facts in R. v. Jordon Lord Lane C.J. saying at page 696,

> "Lord Parker who gave the judgment of the Court stressed the fact - if it needed stressing - that R. v. Jordon was a very particular case depending on its own exact facts, as indeed Hallet J. himself in that case had said."

After reviewing the case of R. v. Smith supra, Lord Lane C.J. said:

> "In the view of the court, if a choice has to be made between the decision in R. v. Jordon (1956) 40 Cr. App. R. 152 and that in R. v. Smith (1959) 2 Q.B. 35, which we do not believe it does (R. v. Jordon being a very exceptional case) then the decision in R. v. Smith is to be preferred."

The facts in R. v. Malcherek, R. v. Steel were that victims of assaults which necessitated medical treatment were given normal and conventional medical treatment involving connection with life support systems. In each case after a time the doctors decided that the victims were "brain dead" so that the treatment was otiose. The life support system was disconnected and all bodily functions ceased".

On these facts the court held at page 696:

> "There is no evidence in the present case that at the time of the conventional death, after the life support machinery was disconnected, the original wound or injury was other than a continuing, operating or indeed substantial cause of the death of the victim, although it need hardly be added that it need not be substantial to render the assailant guilty."

The fact that the victim has died, despite, or because, of medical treatment for the initial injury given by careful and skilled medical practitioner will not exonerate the original assailant from responsibility for the death.

Professor Glenville Williams writing in the Criminal Law Review in 1957 in an article captioned, "causation in Homicide," in a sub-heading "Manslaughter by Omission" had this to say:

> "Philosophers are sometimes found to deny the concept of a negative cause, but for legal purposes it is quite possible for the absence of a factor (the presence of which would have been decisive the other way) to be accounted a cause. Supine inaction, in breach of duty, can well be a cause. Thus a parent may be guilty of manslaughter where he causes the death of his child through neglect to provide food or medical attention."

Vida Salmon, the mother of the deceased, was not on trial for the breach of any duty to provide medical attention for her son. It would be preposterous to assert that a woman who had been running around trying to

find transportation to take her injured son to seek medical attention was supinely inactive, merely because due to the unusual circumstances surrounding Election Day 1980 and immediately thereafter, she could not find such transportation. In any event the concept of supine inaction is inappropriate when one is considering causation on a charge of murder. An injured person is under no duty to mitigate his injury and by analogy an interested by-stander has no duty to take steps to ensure that the injured person receives appropriate medical attention. It seems now to be settled law that if the original injury is an operative cause of the death, the law will not measure any intervening and additional cause with the object of apportioning the degree to which the original injury, taken alone, was responsible for the death. In the instant case septic meningitis was the direct result of the head injury. The head injury which produced unconsciousness or semi-consciousness could only be treated with the patient being confined to bed and this confinement led to the congestion in the lung. There was in our view no live issue to be left to the jury on the question of causation and the treatment which the learned trial judge adopted in her summing up was adequate and entirely satisfactory, as it was wholly unnecessary for any directions to be given to alert them that the chain of causation could be broken by the failure of the deceased to receive medical attention for five days.

Ground 2 (c) complained that the learned trial judge had misdirected the jury on the burden of proof in that on the directions given, the jury could be left with the view that the defence had a duty to convince them as to the truth of their stories. When, however, Mr. Rattary compared his suggested form in which the correct directions should be given to what the learned trial judge said at page 194 of the Record, he could not sustain his complaint. This is the passage with which we found no fault.

> "Now, members of the jury, if the accused's statements convince you of their innocence then you must let them go, you have to acquit them. Or, if it raises any reasonable doubt in your minds then you must acquit them. On the other hand it might just strengthen the case for the prosecution. If it does and you are satisfied that the prosecution has made out his case, then it is open to you to convict them. But if in view of all the evidence you are in a state of doubt so that you say that you don't know where the truth lies then you have to acquit the accused and you must remember, each accused stands before you as if he or she were the only person standing in the dock."

In support of Grounds 1 (b) and 2 (b) Mr. Rattary submitted that the evidence did not establish that Frances Dove was part of the common design to inflict the injuries upon the deceased. The evidence disclosed that although Frances Dove was by the roadside when her sons were stoning the house of Mr. and Mrs. Davis, she did not do anything to encourage or discourage them. She did not chase the deceased when he ran from the house. The case was conducted on the basis that although there was a series of incidents, the most likely occasion on which the deceased received the head injury was when he ran from the house into the road. Up to that moment in time, there was no evidence that Frances Dove had done any hostile act towards the deceased. Vida Salmon described how she held her son and drew him back into the house. Clearly at that time he could not move about unassisted. Any finding by the jury that Frances Dove had repeatedly chopped the deceased with a machete in the manner described by Vida Salmon would be manifestly unreasonable as the postmortem report did not reveal any incised wounds on his body. Vida Salmon's eye-sight was demonstrably poor and her evidence as to who were the persons beating the deceased in the house on the second occasion differed from that of the other eye-witnesses.

The Judicial Committee of the Privy Council held in Mohen v.R. (1966) 11 W.I.R. 29, that where two or more persons attack the same person at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm,, then as such persons were present aiding and abetting the other in the commission of the offence, both, or all

would be guilty, even if it was uncertain who delivered the fatal blow.

We think that in relation to Frances Dove this case falls outside the decision in Mohan's case. In all probability the fatal blow was delivered before Frances Dove entered the house and there was no credible evidence as to what actions she took on that occasion. Consequently we held that the verdict of guilty in the case of Frances Dove was unreasonable and not supported by the evidence.

No argument was advanced in favour of the other two applicants other than that on causation, as to which we find that there is no merit.

For the above reasons we allowed the appeal of Frances Dove and entered a verdict and judgment of acquittal and dismissed the appeal of Flowers and Dixon.