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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 103/83

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

FREDERICK McINTOSH

Mr. W.B. Frankson, Q.C. and Mr. S. Stephenson for Appellant

Mr. K. Pantry and Miss J. Joyner for the Crown

November 17 and 18; and December 18, 1986

KERR, P. (AG.):

The appellant was jointly charged and convicted with his mother Yvonne Johns for the murder of his step-father Altimont Johns in the Westmoreland Circuit Court before Morgan J. and a jury on the 20th October, 1983 when both accused were sentenced to suffer death.

On June 8, 1984, their appeals against their convictions were dismissed by this Court and they were similarly unsuccessful in their petitions for special leave to appeal to Her Majesty in Council. The petitions were refused on October 19, 1984.

This further appeal came before us pursuant to the Governor-General's reference under Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act. The Governor-General was moved to make the reference in the light of a written confession by Yvonne Johns alleging therein that she was solely

responsible for the death of the deceased and that the appellant was not in any way involved.

We dismissed this further appeal. Herein are our reasons for so doing.

The facts of the case as presented at the trial were carefully summarised in the judgment of the earlier appeal by Carey, J.A. thus:

> "These appellants, who are mother and son, were both convicted in the Circuit Court for the parish of Westmoreland held at Savanna-la-mar before Morgan J., and a jury on 20th December last, and sentenced to death on an indictment which charged them jointly with the murder of Altimont Johns on 23rd February, 1982. The deceased was the husband of the first appellant and the step father of the other.
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> The case for the prosecution was based wholly on circumstantial evidence, the quality of which was severely criticised by Mr. Small. The circumstances surrounding the charge, are of the sketchiest. The victim lived with his wife (the first appellant) and her two children, Vivienne or Carol McIntosh and Frederick McIntosh (the second appellant) at Pipers Corner a district in the parish of Westmoreland. On 22nd February, 1982 at about 9:00 p.m., one Iveta Wright, a neighbour of the Johns family, was on her way home when she heard the raised voice of Mr. Johns coming from the bedroom occupied by his step-daughter Carol. What he said was never however vouchsafed to the jury as the learned trial judge did not allow the content of the statement to be admitted. Counsel who appeared for the Crown did not demur although as it later emerged, the first appellant was certainly present in the house when the statement would have been made.
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> In the early hours of the following morning, about 1:30 a.m., Ivan Wheatly who had stayed overnight in the neighbourhood, was awakened by shouts of murder originating from premises which adjoins the Johns. On Investigation, he found Carol McIntosh kneeling by the steps of the house on those premises. When the lights were switched there, he noticed both appellants standing together by a sand heap in their own premises. The first appellant told him that - 'they kill Mr. Johns.' He next went accross to the Johns' house where he observed the body of Mr. Johns lying by the verandah steps. There was a large wound under the neck. He returned to Mrs. Johns

"who volunteered the information that while she was asleep she heard a stumbling outside and when she looked saw 3 men running off. Wheatly said he went to the gate but saw nobody. Finally he touched the body which he found cold and commented as much. A police officer, Det. Sergeant Gayle arrived on the scene at 8:15 a.m. Both appellants were present. He saw the dead body of Mr. Johns which showed injuries to the forehead and neck. In response to his enquiry as to what had occurred, the first appellant said that after her husband arrived home, he had put on his pyjamas and repaired to the verandah where he sat on a chair drinking a beer. Subsequently she retired to bed but awoke at 2:00 a.m., to find her husband not in bed and on going outside, found him lying in the same position that Gayle had himself seen.

The officer pointed out what appeared to be blood-stains on the big toe of her right foot and asked her how it got there. She replied that she was unable to say but supposed it might have got there - 'when me find him dead and a fool around the body.' She agreed that some blood-stains on her right knee looked like blood-stains. She produced the night-dress which she said she was wearing that night. The officer also found another night-dress which belonged to this appellant. Both garments bore signs of blood-stains. During this interview, the other appellant who was present, said nothing.

In the room occupied by the other appellant, the police retrieved what appeared to be the murder weapon from under the mattress of a bed in that room. The knife was claimed by the male appellant as his, but he said he did not know how it got there and the last place he had set eyes on it, was in the kitchen. Near the body, was seen a large concrete flower pot. It also had blood-stains. It had obviously been used to hit the deceased in the back of his head for in that area the police officer saw what he described as a 'bash.'

On 28th April, 1982 the appellants were both arrested for the murder of Altimont Johns. Neither appeared to have said anything after caution. The police officer was less than helpful in stating in evidence that he did not remember if either said anything, as it is inconceivable that the officer could have made this response if anything of significance had been said by either of them.

In their defence, both the appellants made statements to the same effect. After stating his or her name, each said:

" 'I did not kill (the deceased).
I know nothing about his death.
That is all I wish to say.'"

The pertinent particulars of the confession describing the incident in which the deceased was killed were set out in the affidavit of Yvonne Johns sworn to on the 10th November, 1988 and the following paragraphs merit reproduction here:

.....

"6. That following the death of my husband, my son, my daughter and I were detained by the Police, who released my daughter, Carol after two days but arrested my son and I and charged us with murder.

7. That at the Preliminary Examination which was conducted by the Resident Magistrate for the parish of Westmoreland no order was made and we were discharged.

8. That I admit that I made statements to one, Ivan Wheatly and Detective Sergeant Gayle which were not consistent, and both of which were untrue, and having been released after the hearing at the Preliminary Enquiry I formed the mistaken belief that I could avoid the consequences of my act by indulging in falsehoods, I saw no need to tell the truth nor did I believe that I was exposing my son to any danger or any risk and I accordingly neither said nor did anything to clear him of suspicion.

9. That following our discharge at the Preliminary Enquiry a Coroner's Inquest was held to enquire into the death of my husband by the Coroner and a Jury which returned a verdict arising out of which my son and I were to face the Court again and stand our trial for murder.

.....

12. That having enjoyed limited success from the lies which I had told, about how my husband came to his death, I persisted in those lies because they had so far served me very well, and I did not know how important it was to speak the truth nor did I realise that I was exposing my son to the danger of being found guilty of the charge of murdering his Step-Father.

13. That the statement made by my son in Court at his trial is the truth and now that he is facing a death sentence, I am having to live with the terrible knowledge and burden of guilt and remorse for having caused the death of my husband but of being responsible for the terrible fate which has befallen my son.

"14. That my son is innocent of the charge of murdering his Step-father as he did not in any way participate in the incident which resulted in the death of my husband.

.....

16. That this fight between the deceased and me was but one of many which had taken place before and in which the deceased had battered, kicked and boxed me when he had come in late at nights and had been drinking and despite the fact that I had on several occasions pleaded with and begged him to stop drinking and live a loving life so that the children can respect him.

17. That on the night of the 23rd day of February, 1982, the deceased came home late as he was accustomed to do, he had been drinking and was apparently drunk. We had the usual argument which developed into a fight. The Deceased attacked me and I feared that I was again about to be beaten, boxed and kicked by him, and as I was quite unable to resist him as I was unable to manager him physically and I had no other choice but to lay hold of a knife and in defence of myself I stabbed the deceased who fell face and head forward where he was seen lying by the Police.

18. That I got frightened and I ran to the room shared by my son and my daughter and hid the knife under the mattress upon which both of them were sleeping.

19. That about 20 minutes after I awakened my son and told him that the Deceased and I had a fight and he fell and hit his head.

20. That the death of the Deceased came about in the manner and the circumstances I have described herein and in no other way and neither my son or my daughter was in any way involved in the incident which lead to his death."

On the request of the prosecution she gave evidence on oath and was cross-examined. Hers was a most unconvincing performance in the witness box. She admitted telling the witness Keith Wheatly that she had seen three men running away from the scene; of giving an entirely different account to the police but offered no reasonable explanation for these lies. She was aware of the defence of self-defence yet she told no one of the attack

made by the deceased on her. She said she made up these stories to prevent her children from being displeased with her - "having her up." She never told her lawyers about the attack on her and of her killing the deceased in self-defence - not even after her appeals were dismissed. It was only when the appellant was about to be executed she realized the seriousness of not admitting that she killed the deceased. She did not know her sentence was commuted to life imprisonment when she confessed to Reddie, the Prison Officer. She did tell her sister Margaret Lewis some time after losing her appeals but can't remember when and she never told the appellant before her confession to Reddie that she killed the deceased.

There were also glaring and unexplained inconsistencies between the evidence in the affidavit and her oral testimony.

In her oral testimony she said when she awakened the appellant and sister and told them of their step-father's death and when they asked who killed him she said she did not know. While in her affidavit she said she told them that the deceased and herself fought and he fell and hit his head.

In evidence at trial, she said that there were two beds and she hid knife under mattress of appellant's bed - while in the affidavit she said there was but one bed on which both were sleeping. That the knife was not Frederick's, while the hitherto uncontradicted evidence was that the appellant in her presence and hearing had admitted ownership of the knife; nor did she offer any explanation for hiding the knife under the mattress of the appellant's bed.

Grover Reddie, the Chaplain in the Department of Correctional Services called by the Court said that on or about the 9th July, 1986 he learnt of and told the witness Johns that the imminent execution of her son, the appellant, was fixed for the following Tuesday (15th July, 1986). She gave him the written

confession the Saturday after he spoke with her. He exhibited this confession in an affidavit which he sent to the Governor-General. He did not know that Johns' sentence was commuted when he spoke with her. At the signing of her affidavit appellant complained that her silence caused him to spend so much time in prison.

In his submissions Mr. Frankson described her pathetic performance in the witness box euphemistically thus: "that it may be that the impression one forms of her evidence is not favourable." He conceded that there were inconsistencies in her evidence and her affidavit but said that these inconsistencies did not go to the essential elements of the case; that the Crown's case rested on circumstantial evidence described by this Court as the "sketchiest" but this is so no longer, now that the witness Johns had given direct evidence; that the evidence before this Court should be compared with the circumstantial evidence, and if credible, the appellant is entitled to a judgment of acquittal. In an endeavour to show that her evidence was not inconsistent with the circumstantial evidence, first he astutely endeavoured to show that taking certain important bits of evidence separately they did not point indubitably to the guilt of the appellant: thus (i) although the knife was admitted by the appellant as his, he said he last saw it in the kitchen and therefore it was available to anyone in the house; (ii) that although the evidence indicated that the flower pot was used to strike the deceased in the forehead with great force, Johns' evidence was that the flower pot was in its accustomed place on the verandah and the deceased fell down the verandah steps and, although the witness was unclear as to whether his head came in contact with the flower pot when he fell, the police's evidence rendered the inference more compelling that he fell on it.

Secondly, that there was positive evidence supporting Johns' description of the killing because (a) she had the motive and opportunity and (b) the medical evidence supported her evidence that she stabbed the appellant.

In our view, the circumstantial evidence contradicted rather than confirmed the evidence of the witness Johns. In her description of the incident, she demonstrated how she stabbed the deceased. This was wholly inconsistent with the evidence of Dr. Carlton Jones who performed the post-mortem; he described the injury to the head as a "compound fracture of the bone of the skull" resulting in cerebral laceration to the front of the brain inflicted by "a sharp instrument with great force definitely like the exhibited flower pot." The injury to the neck was described as a laceration two inches wide and two inches deep, cutting the left external jugular vein and inflicted by the knife exhibited with great degree of force.

The deceased was about 37 years old. The doctor was not cross-examined. No suggestion was put to him that the wound to the head could be inflicted by a fall or that the wound to the neck could be inflicted by a stab. Despite the earnest urgings of Mr. Frankson we are of the view that the evidence of the doctor was inconsistent with the appellant being stabbed.

As to Mr. Frankson's approach to the circumstantial evidence, it is enough to say that when the case for the prosecution rests upon circumstantial evidence the probative worth of such evidence must be assessed on its cumulative cogency and not by a fragmented consideration of isolated primary facts. When properly assessed there is ample evidence to establish participation of the appellant in the commission of the crime.

The deceased according to the witness weighed about 180 lbs. He was apparently in good physical condition. She herself weighed 162 lbs. The flower pot weighed 27 lbs. and although hitting him with it may not be beyond her capabilities,

the circumstances point more to the injuries being inflicted by the male accused and the medical evidence, unchallenged as it was, left open to the jury to reasonably infer that the deceased was first disabled by the blow to the head and his throat slashed thereafter.

The witness Johns admitted in cross-examination that she knew that women were not hanged in Jamaica and that recently executions of men were not usual. It was clear to us that it was only when she realized that within a week her only son would suffer the final sanction of death that to save him she fabricated this story. Her credibility was shattered in cross-examination and we rejected her confession as to her being solely responsible for the death of the deceased.

The strategy of the defence at the trial was self-evident. The appellants by maintaining a conspiracy of silence concerning the killing of the deceased, in the absence of direct evidence could only be convicted if the evidence was sufficient to support the inference of common design. Theirs was a forlorn hope. There was ample evidence to support such an inference. In that regard we saw in this further appeal no reason to differ from our earlier decision upholding the verdict of the jury. Accordingly we dismissed this appeal and once more affirmed the conviction of the appellant.

Nevertheless, before parting with this matter, we feel constrained by certain facts which emerged at the hearing and certain comments on the evidence made by Mr. Frankson in the course of his submissions to advert to the following circumstances:

(1) From the evidence of Yvonne Johns, supported by a birth certificate, the appellant was born on January 6, 1964, and accordingly, when the offence was committed he was just forty-eight days above the age of 18 years - the age under which a person convicted of murder would not be liable to the death penalty but to a sentence of detention during Her Majesty's 'pleasure' - Section 29(1) of the Juvenile Act.

(2) From the evidence of Yvonne Johns, that night the deceased, as was his custom when under the influence of drink, was abusing her and it was the evidence of the Crown witness Iveta Wright, that on the night in question about 9:00 o'clock while on the track passing the Johns' home she heard the raised voice of the deceased coming from the rear bedroom of the house. Unfortunately the actual words were not allowed in evidence though on proper foundation such would have been admissible. However, it tends to support the evidence that there was some family dispute in the home that night.

(3) That in any such dispute or conflict filial sentiments would move the appellant to take sides with his mother against the deceased.

(4) As Mr. Frankson pointed out, regardless of what view is taken of the evidence, it is undeniable that the mother, Yvonne Johns played a dominant role in the affair even to the extent of influencing the appellant to support her in remaining silent.

(5) That it is a reasonable inference that the killing was sudden and in the heat of passion.

We feel that these circumstances are worthy of consideration by His Excellency the Governor-General in the making of his ultimate decision.