JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL Nos. 51 & 52/1970

BEFORE: The Hon. President.
The Hon. Mr. Justice Luckhoo, J.A.
The Hon. Mr. Justice Edun, J.A.

REGINA v. GEORGE HARRISON and LENFORD BROWN

J.W. Kirlew for the applicant Harrison
S.C. Morris for the applicant Brown
L. Wolfe and P. Robinson for the Crown

October 20,21,22,23; December 18, 1970.

LUCKHOO, J.A.

On December 18, 1970, the convictions of both applicants George Harrison and Lenford Brown for the murder on September 2, 1969, of Canute McKoy were quashed, the sentences of death set aside and verdicts of acquittal entered. The Court promised to put its reasons therefor in writing and this it now does.

The deceased Canute McKoy who was also known as Mas Ken was brutally hacked to death at a point called Mount Delia in the parish of St. Catherine on September 2, 1969. His body was discovered by a farmer Hezekiah Cooper at about 6 p.m. that evening lying face downward in some bushes on rocky ground some distance off a foot track. Cooper reported his discovery to the police at Linstead Police Station at about 8 p.m. that evening and returned with the police on the following day to the spot where he had seen the deceased's body. The body was no longer there. An area in the vicinity of that spot appeared to have been freshly trampled and drag marks were observed leading from that spot through bushes to a mound of earth topped with stones. On the stones being removed and the earth dug up the deceased's body was found lying face downward with a stout piece of vine tied around the neck. The body was clothed in a torn plaid shirt, merino and underpants. A post mortem examination of the body made on September 10, 1969, by Dr. R. Lindo disclosed that the deceased had died as a result of shock and haemorrhage from multiple incised wounds

inflicted to the head, face, chest, abdomen and right forearm with a sharp instrument such as a machete. There was fracture of the right cheek bone and chest. The doctor's examination revealed that the deceased's eyes and testicles were intact and this is of significance when the testimony of the sole witness implicating the applicants in the commission of the crime, Jarvis Hopeton, a child 8½ years old comes to be examined. Hopeton, who at the material time resided with his mother Joycelyn Maxwell and her common law husband the applicant Harrison at Banbury, gave sworn testimony after the learned trial judge had examined him on the voire dire and was satisfied that he was competent to be sworn. It is common ground that his testimony implicating the applicants was uncorroborated. He spoke of setting out from Banbury on foot with the applicants at about 8 a.m. on September 2, 1969, for Coolshade and of coming upon the deceased who was walking ahead along a track into which they had turned at Lemon Ridge. He said that Harrison chopped the deceased on the forehead with his cutlass whereupon the deceased fell to the ground without uttering a sound. Then Brown cut off the deceased's right hand at the wrist with his cutlass and placed the hand in a bag. At the instigation of Harrison, Brown cut out the deceased's eyes with a small penknife, wrapped each eye separately in bits of newspaper and placed them in the bag. Brown also cut out both of the deceased's testicles, wrapped them separately in bits of newspaper and placed them in the bag. The witness spoke of Brown taking off the deceased's trousers and of Harrison removing a handkerchief and a bottle with some black liquid in it from the trouser pocket thereafter putting the bottle into his own pocket. The witness said that Brown threw the trousers into nearby bushes and that Harrison took off the deceased's shirt, put it around his own shoulders and later took it home and washed it. The deceased having been killed, the witness said that he accompanied Harrison and Brown to a hut some distance away and there Harrison and Brown cooked some rice and breadfruit along with some flour the deceased had been carrying in a bag on his head at the time he was attacked. They ate the food and thereafter departed for their respective homes arriving there at dusk. Harrison informed Joycelyn Maxwell that he had killed the deceased with Brown's assistance and thereafter placed his cutlass in their kitchen. The bottle which had come from the deceased's trouser pocket Harrison placed

on a table in the house. Harrison remained home that night. The story thus told by the witness was varied in the course of cross examination. He spoke now of witnessing the burial of the deceased's body later that night by Harrison and Brown who he said dug a hole with a pickaxe, fork and shovel, dragged the body from where it was lying to the hole and placed the body in the hole. Thereafter, the body was covered with earth and rocks placed on the earth. Later on in cross examination the witness said he did not see when the hole was dug but arrived there at a point of time when the body had already been interred and stones were being placed on the earth. It transpired that at the preliminary enquiry the witness had said that he had not witnessed the burial of the deceased's body. At the trial he admitted that he did tell this to the examining magistrate but said that when he was testifying before the magistrate he had forgotten that he had witnessed the burial. At the preliminary inquiry he had also said that it was Harrison who had cut out the deceased's eyes and when this was brought to his attention at the trial he said that he believed that it was Harrison who had done that act and not Brown as he had earlier testified. As has already been noticed the post mortem examination revealed that the deceased's eyes and testicles were intact. A partly torn shirt was found on the deceased's body when it was exhumed.

The Crown also adduced evidence to show that Harrison was seen in the vicinity of Coolshade at about 11 a.m. on September 2, 1969, and that therefore there was opportunity for him to kill the deceased. Standford Lewin testified that he was walking along the Lemon Ridge Road on his way to work when he saw Harrison walking ahead of him. Harrison turned off onto a road leading to Coolshade. About ten minutes later he heard two dogs barking and a man bawling out. He heard the sound of a machete chopping bush and the sounds were coming from the direction in which he had seen Harrison go after turning off the Lemon Ridge Road. He (Lewin) stopped for ten minutes and then continued on his way to work. Joseph Francis testified to the effect that at sometime prior to the date of the deceased's death Harrison and Joycelyn Maxwell had come to him and enquired where the deceased was sleeping. He told them that he did not know where the deceased slept. The same enquiry was made by Harrison and Maxwell on another occasion and on a third occasion Harrison alone came and

said "Yes, I have a man to kill, now, now, now. Him head is to be off right now, now, now;" to which the witness said he asked "Yes, man, how from such and such a time - how all the while from month before last month you talking about you going to kill and kill and kill, who you can kill and who you going to kill" and to which Harrison replied "All right, man, day longer than rope." This witness, obviously a man of poor intelligence as the learned trial judge and counsel had themselves observed, was quite unable to give any intelligible answers to indicate at what times before the deceased's death the events he described took place.

The only other evidence of note bearing on the case against Harrison was that relating to his reaction when the police came to his premises on September 5, 1969. They had obviously received certain information as a result of which they went in search of Harrison and Brown. On reaching Harrison's premises Sgt Thomas spoke to both Maxwell and Hopeton. Harrison was then at the back of his premises and Sgt. Thomas went in search of him. He saw Harrison and told him that from information received he suspected that Harrison and Brown had killed the deceased. He cautioned Harrison who put his hands to his head and said that he could not think as his head was hurting him. Hopeton showed Sgt. Thomas where Harrison's machete was in the kitchen. Harrison was then arrested and taken to the Linstead Police Station. Hopeton was also taken to the police station and locked up in a cell. He was kept there until he testified at the preliminary inquiry after which he was taken by the police to a place of safety where he was kept until he testified at the trial.

The Crown adduced no evidence of motive on the part either of Harrison or of Brown.

The defence of both Harrison and Brown was an alibi. Harrison who testified on oath denied that he had spoken to Francis about the deceased or uttered any remarks as alleged by Francis. He denied being on the Coolshade road on September 2, 1969 as alleged by Lewin. As to the evidence of Sgt. Thomas he denied using the words attributed to him. He said that one of the policemen on approaching him with a revolver told him to put his hands to his head and he did so. Joycelyn Maxwell testified in support of the alibi set up by Harrison and denied that Harrison ever told her that he had killed the deceased. Brown made an unsworn statement from the dock.

After a careful and painstaking summing up by the learned trial judge the jury retired and some 42 minutes later returned to request further directions in relation to the evidence of Hopeton and Lewin. In respect of Jarvis Hopeton the foreman said that the jury were not quite sure on the point as to what exactly Hopeton had seen and in respect of Lewin the jury wished to know "whether he (Lewin) had seen Harrison the particular time and the distance away from him." The foreman also stated that they the jury were not concerned about the evidence of the burial of the deceased's body. We think it is a fair inference from that statement following as it did the jury's request for further directions in respect of Hopeton's evidence that the jury had discarded as unreliable Hopeton's evidence relating to his witnessing the burial of the deceased's body. The learned trial judge gave further directions in relation to the evidence given by Hopeton and Lewin and the jury again retired. After deliberating for a further period of 20 minutes the jury returned with a verdict of guilty of murder against both Harrison and Brown.

The convictions of both Harrison and Brown have been challenged on two main grounds -

(1) that the learned trial judge erred in allowing the witness Jarvis Hopeton to give sworn testimony as the evidence showed that the witness did not understand the nature and obligation of an oath;

(2) the verdict was unreasonable and could not be supported having regard to the evidence.

Before dealing with the submissions made in respect of the first of these two grounds of appeal it should be pointed out that in Jamaica, as it is in England, the sworn testimony of a child of tender years is not required by law to be corroborated but it is a rule of practice to warn the jury that there is danger in acting on the uncorroborated evidence of such a person, though they may do so, if convinced that the witness is speaking the truth. Again as in England (see s.38 of the Children and Young Persons Act, 1933) the unsworn testimony of a child of tender years may be received if in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth (s.53 of the Juveniles Law, Cap. 189 /J./ provided that where evidence admitted by virtue of that

section is given on behalf of the prosecution the accused is not liable to be convicted unless that evidence is corroborated by some material evidence implicating him. Mr. Morris for the applicant Brown in the course of his submissions on the first main ground contended that the answers given by Hopeton to the learned trial judge when examined on the voire dire showed that he did not have any notion of eternity or of a future state of rewards and punishments and that therefore the learned trial judge wrongly exercised his discretion in allowing Hopeton to be sworn. He further contended that the testimony given by Hopeton ought in the circumstances to have been treated as unsworn evidence and there being no corroboration of that evidence in some material particular implicating the applicant Brown and indeed the applicant Harrison they ought both to have been acquitted.

The learned trial judge in the course of examining Hopeton ascertained that Hopeton could recite the alphabet and could spell some simple three letter words. He then asked Hopeton the following questions and received the answers stated below -

"Q. You know what it is to tell a lie?

A. Yes sir.

Q. You know what it is to tell the truth?

A. Yes sir, I am talking the truth.

Q. If you take an oath and don't talk the truth what happen to you?

A. God kill me, sir.

Q. So if you take an oath and don't talk the truth you say God will kill you?

A. Yes, sir.

Q. So if you take an oath what you must do?

A. Read.

Q. You know what it is to swear, to take an oath, to swear by the bible?

A. Yes, sir.

Q. And if you swear by the bible and you must tell lie or tell truth?

A. Talk the truth, sir, if I don't talk the truth, sir, God will kill me, sir."

The learned trial judge thereupon directed that Hopeton be sworn.

The answers given by Hopeton showed that he had in mind not only that it was wrong to tell a lie but that it was a wrong that would result

in God himself meting out the extreme penalty to the wrongdoer. The reception of the evidence of Hopeton on oath was in our view in these circumstances justified and nonetheless so because when actually sworn to tell the truth the witness spoke of things which were clearly shown to be without foundation in fact whether proceeding from deliberate falsehood, the figment of his childish imagination or from any other reason. The first main ground of appeal therefore fails.

The second main ground of appeal - that the verdict was unreasonable having regard to the evidence - was earnestly argued by Mr. Kirlew for the applicant Harrison his submissions in that regard being adopted and relied on by Mr. Morris for the applicant Brown.
Mr. Kirlew pointed to the several inconsistencies and contradictions appearing in Hopeton's testimony. These have already been set out in reciting the evidence given by that witness. Mr. Kirlew stressed the following matters -

(i) the witness stated that Harrison and Brown each gave one chop varied later in his testimony to one chop by Harrison and two by Brown whereas the post mortem examination disclosed no fewer than seven incised wounds;

(ii) the witness stated that the deceased's right hand had been cut off at the wrist by a chop delivered by Brown whereas the post mortem examination disclosed that the fingers of the right hand only were cut off;

(iii) the witness stated that Brown (later he said Harrison) had removed the deceased's eyes with a penknife whereas the post mortem examination disclosed that the eyes were intact;

(iv) the witness stated that Brown had removed the deceased's testicles and placed them in a bag after wrapping them separately in paper whereas the post mortem examination disclosed that the testicles were intact;

(v) the witness stated that Harrison removed the deceased's shirt, took it home and washed it whereas it was shown that when the deceased's body was exhumed it was found clothed inter alia in a torn plaid shirt;

(vi) the conflict in the evidence of Hopeton relating to the burial of the deceased's body on the night of September 2.

Mr. Kirlew observed, correctly the Court thinks, that everything of importance this witness spoke of implicating the applicants which could be checked against the evidence of other witnesses was proved to be unfounded in fact and was

probably due to a childish flight of imagination. In such circumstances, Mr. Kirlew urged, it would be most unsafe for a jury to accept and act on those bits of evidence implicating the applicants which could not be checked against other evidence in the case. Mr. Kirlew cited to us a number of cases where the Court of Criminal Appeal in England had quashed convictions on the ground that the verdicts were unreasonable or could not be supported having regard to the evidence. We do not propose to refer to those cases which were decided on the particular facts of those cases. Further, Mr. Kirlew submitted that the learned trial judge did not properly direct the jury on the necessity for corroboration of Hopeton's evidence. While conceding that the learned trial judge did give a direction in regard to the question of corroboration early on in the summing up, and did in fact tell the jury that there was no corroboration of Hopeton's evidence in any material particular implicating the applicants Mr. Kirlew contended that this direction ought to have been in stronger terms and should have been repeated at a later stage in the summing up and again in the course of his further directions to the jury after the jury had indicated that there was difficulty in separating fact from fiction or fantasy in Hopeton's evidence. He urged that had the trial judge not failed to do so a reasonable jury would not have found the case against the applicants proved. The direction on this question given by the learned trial judge early in the summing up was as follows -

> "I must tell you that you must approach the evidence of this boy with caution and care. He is the only witness, no other, who has come before you and said I saw so and so - naming the accused men - chop Canute McKoy. Children are prone to fanciful thinking, going off in flights of fantasy, indulging themselves in this sort of fantastic thinking. The sworn evidence of a child of tender years does not need, as a matter of law, to be corroborated, but I must warn you that there is danger in acting on the uncorroborated evidence of the young boy, though you may do so if convinced that he has told the truth. That is to say, Members of the Jury, in such respects as you think, as you conclude he has told you the truth, you may, as a jury, act upon it, bearing in mind, of course, the warning which I just gave you."

The learned trial judge then went on to define corroboration -

> "Corroboration, Members of the Jury, is independent testimony implicating an accused person - in this case the accused men -

> and which confirms in some material particular not only the evidence of Jarvis Hopeton that a crime was committed, that is to say, that McKoy was chopped in the bush on that day, and also that on going home that day, after the chopping, he saw McKoy dead, but also there must be corroboration in the evidence in relation to the evidence of the same boy, Jarvis Hopeton, that the two prisoners did it. In this latter regard, there is no corroboration in this case that the two accused men did it. The evidence of the boy stands alone. In relation to the commission of the crime as I just referred to - corroboration as to that - that is to say that the crime was committed, you may think that Dr. Lindo corroborates him to the extent that Dr. Lindo said the body of McKoy had seven incised wounds inflicted with a sharp cutting instrument, and a sharp machete could do it and in particular Exhibit 1, in court, could do it. So that in that regard, in relation to the commission of a crime as distinct from who committed it, you may think Dr. Lindo corroborates the boy as to the commission of a crime."

These directions we think were correct and were adequate in their content. The learned trial judge in dealing with the credibility of the witness Hopeton went on to point out in great detail the contradictions and inconsistencies which were apparent in the boy's evidence both internally and on a comparison with other testimony in the case. While it is true that the learned trial judge did not repeat the directions referred to above it is clear to us that the way in which he analysed the evidence the jury ought not to have failed to appreciate the necessity of being sure that the boy did in fact witness the attack by the applicants on the deceased before conviction could follow. While we are of the view that the jury were adequately directed both on the evidence and on the law relating thereto the question still remains - was the verdict arrived at by the jury unreasonable having regard to the evidence?

This is a case where the only evidence implicating the applicants in the commission of the crime came from a child of tender years and a considerable body of that evidence was shown conclusively to be without foundation in fact. It is conceded on all sides that children of tender years are prone to fanciful imagination and that the body of evidence unfounded in fact proceeded rather from the fanciful imagination of Hopeton, a child of tender years, than from any desire on his part to lie. Disproof of this evidence has proceeded from a comparison of the testimony of the witness with that

given by other witnesses and in respect of the burial from the contradictory accounts given without any satisfactory explanation by the witness in that regard. As Mr. Kirlew observed the other matters implicating the applicants, deponed to by the ~~applicants~~ witness, did not lend themselves to the test of comparison. This evidence of the boy stood alone there being nothing in the other evidence in the case which could be said to implicate the applicants or either of them in an attack upon the deceased. There being no corroborative evidence, had the jury properly applied the learned trial judge's direction as to the circumstances in which they could properly convict in the absence of corroboration of Hopeton's testimony implicating the applicants they would have realised that in the circumstances of this case they as reasonable men could not be convinced that Hopeton had told them the truth. The Court thinks that no reasonable jury, properly directed as the jury in this case was, ought to have come to the conclusion that the Crown had proved the case against the applicants beyond reasonable doubt.

For these reasons the Court by a majority decision granted the applications of both applicants for leave to appeal and treated the hearing of the applications as the hearing of the appeals. The Court allowed the appeals, set aside the convictions and sentences, and ordered verdicts of acquittal to be entered.