JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 39 & 40/78

BEFORE: THE HON. MR. JUSTICE HENRY, J.A.
THE HON. MR. JUSTICE ROWE, J.A. (Ag.)
THE HON. MR. JUSTICE WILKIE, J.A. (Ag.)

R E G I N A

v

GREGORY McGRAW

ANI INNIS

Mr. A. G. Gilman and Miss D. Lightbourne for Applicant McGraw.
Mr. D. Daley for Applicant Innis.

Mr. K. Pantry for the Crown.

July 11 - 13, November 20, 1979.

HENRY, J.A.

This is an application for leave to appeal from convictions in the Hanover Circuit Court of both applicants for the murder of Cheryl McBride. The application of both applicants having been refused on July 13, 1979, we now set out reasons for that refusal.

Cheryl McBride and her friend Ivy Fasko arrived in Jamaica from the United States on September 6, 1977. They rented a motor car and drove to Negril where they booked into a Negrillo Beach cottage. Later that same day they met the applicants on the beach and subsequently other social meetings took place. According to Miss Fasko, they went to a Yellow Bird cottage occupied by the applicants at about 7:00 p.m. on September 8, 1977 in consequence of an arrangement apparently made with Miss McBride that they should all have dinner together. Upon arrival they found the applicant Innis alone at the cottage. When they enquired for Joe (the applicant McGraw) Robert (the applicant Innis) told them that

Joe was waiting for them where they usually parked the car at the beach connected to their cottage. They talked for a few minutes and then Miss McBride left saying that she was going to look for Joe. She never returned. As soon as she left Innis attempted to make love to Miss Fasko but his advances were rejected. Some time later Joe came to the cottage appearing nervous and agitated. He called to them to go for dinner and said that Cheryl was on the next beach. Miss Fasko and Mr. McGraw walked towards the beach. Robert who was still in the cottage came out began walking in the opposite direction but turned round and followed when Joe called to him. They had reached a point on the beach where Miss Fasko expected to but did not see Miss McBride when she was struck in the head by Joe and fell to the ground. She was dazed but did not attempt to get up because she had been warned not to do so by Joe who said he had done this sort of thing before that he had a knife and that Miss McBride was tied up in the bushes and had not given him any trouble so she (Miss Fasko) should not. Joe also said that he wanted to rob her. At that stage Robert was about 12 feet away. Joe sent him for a rope from the cottage and on his return they tied her and told her to walk to the car which she and Miss McBride had rented. They entered the car and at first Robert attempted to drive it but when this proved unsuccessful he came to the back of the car to guard her and sat with a knife pointed in her direction while Joe drove. They proceeded to a spot which was pointed out by Robert in terms suggesting that Robert and Joe had previously decided upon that very spot, where she was tied to a tree. Joe then left in the car while Robert remained. Upon Joe's return some 45 minutes later, Robert went towards the car. After some minutes they both returned to the tree, Joe sent Robert back up to the car and then proceeded to inflict several more blows to Miss Fasko's head, apparently leaving her for dead. However she survived, managed to free herself and staggered to the road nearby where a passing motorist early the next morning stopped to assist her.

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The body of Miss McBride was discovered partly covered with a log, on the opposite side of the road from the spot where Miss Fasko had been left tied. She had received several blows to the head and death was due to brain injury.

Other prosecution witnesses gave evidence of subsequently seeing the two applicants in the car which had been rented by Miss Fasko and Miss McBride and one witness said the applicants had offered the car to him for sale. McGraw admitted offering the car for sale but explained that he was merely joking. Another witness said that he saw what appeared to be bloodstains on the back seat of the car but Joe said these were caused by red sugar syrup.

The applicant McGraw gave evidence on oath. He stated that he came upon the dead body of Miss McBride lying on the beach. Later Miss Fasko after trying to make out that she and Miss McBride had been attacked by unknown men, eventually confessed to killing Miss McBride by accident. He was so incensed at the killing of a girl he had liked that he struck Miss Fasko several times in the head and back. At first he proposed taking her to the Police but eventually "because she was a white woman and an American" he agreed to help her. They devised a plan to tie her loosely to a tree so that she could free herself and relate the story they had made, - up to the effect that she and Miss McBride had been attacked and raped by hitchhikers who had taken their car. He denied having killed Miss McBride.

The applicant Innis gave a somewhat rambling unsworn statement in effect denying complicity in the killing. He merely went along with McGraw to find out the cause of what was happening. "I followed to find out."

Counsel for the applicant McGraw sought and obtained leave to argue 10 grounds of appeal. He however abandoned 5 of them and relied only on the remaining 5. Grounds 1 and 2 which were argued together are as follows:

1. That the indictment laid contained one Count, namely Murder of Cherryl McBride and in proof thereof evidence was led and admitted by the Court concerning an assault on the witness Ivy Fasko; that such evidence was improperly prejudicial to the accused.

2. That during the conduct of the case, undue emphasis was placed on the circumstances and details of the said assault on the said Ivy Fasko.

In support of these grounds Counsel submitted that while the injuries from which Miss McBride died were being inflicted on her, Miss Fasko on her evidence was with Innis at the cottage and there was nothing to show any attempt to attack or assault her; that the attack on her was removed in time from that on the deceased and the details given in evidence of the attack on Miss Fasko were more prejudicial than probative of the charge on the indictment. In our view the evidence discloses a series of activities which began prior to the arrival of Miss Fasko and the deceased at the cottage occupied by the applicants, the sequence of which continued unbroken until the body of Miss McBride was dumped under a log on one side of the road and Miss Fasko left for dead tied to a tree on the opposite side of the road. The evidence was plainly relevant and admissible in proof of the prearranged plan which the prosecution alleged existed between the applicants and to show the part played by each in carrying out that plan. We see no merit in these grounds.

Ground 3 was "that during the cross-examination of the witnesses Ivy Fasko and Franklyn Mullings concerning use of dangerous drugs by them the Learned Trial Judge improperly interrupted Counsel for the defence and inhibited counsel from exploring an area which was vital to the accused's defence." Counsel referred to two passages at pages 37 and 83 of the transcript which are as follows:

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Q. Up to that time - up to that point in time would you say you were a user of ganja?

A. No.

Q. That was your first attempt?

A. It is the first time I had ever smoked ganja, yes?

Q. Do you remember any other occasion smoking ganja?

HIS LORDSHIP: Mr. Robinson, before you go on with these questions.....

MR. ROBINSON: This, m'lord, is not designed to incriminate.

HIS LORDSHIP: Well, she should be warned she does not have to answer it. It is an offence to smoke ganja in Jamaica.

MR. ROBINSON: These questions I assure you, m'lord, are most worthy.

HIS LORDSHIP: But why? She doesn't have to answer them. Miss Fasko?

A. Yes, sir.

HIS LORDSHIP: Any question designed - well, not designed - any question which tends to show you up to some offence you need not answer. You can claim that you needn't answer it on the ground of privilege.

A. Yes, thank you, m'lord.

MR. ROBINSON: Very well, m'lord.

Q. Now Mr. Mullings, on how many occasions did you indulge in the smoking of ganja with Ivy?

HIS LORDSHIP: I am sorry, what is the relevance of that to the case?

MR. ROBINSON: M'Lord, you will remember I put certain questions to Miss Fasko and very soon the relevance will be made clear.

HIS LORDSHIP: Let me see if it is relevant, if it is not relevant I will throw it out. What is relevant you indicate to me.

MR. ROBINSON: Very well M'Lord, there has been a certain admission which I won't press any further. No further questions.

In so far as the first passage is concerned it is clear that all that the learned trial judge did was to warn the witness that she was not obliged to answer incriminating questions. In the second passage the learned trial judge enquired from counsel what was the relevance of the proposed questions and counsel being either unwilling or unable to indicate the relevance did not pursue the question. We do not see that in either case there can be a proper ground for complaint.

The next ground argued was "that during the trial, leave being given for counsel representing the accused McGraw to withdraw the learned trial judge ought to have afforded the said accused an opportunity to make other arrangements to be legally represented." We have considered this ground from two aspects - the requirements of the Constitution and the interest of justice. At the close of the prosecution's case at 10:55 a.m. on the fourth day of trial, counsel for the applicant McGraw sought and was granted a ten minutes adjournment on the ground that, in his words....."since morning I have spoken to the accused, McGraw, and he has indicated something and by virtue of this I would like to take further instructions because in the light of what he is saying I might be obliged to adopt a certain course."..... At 12:18 p.m. he had not apparently resolved the problem and the luncheon adjournment was taken. On the resumption at 2:07 p.m. counsel sought leave of the court to withdraw from the case because the instructions which he said he had only received for the first time that morning would place him in an embarrassing position and make it impossible for him to continue without breaching his duty to the court. In response to an enquiry from the learned trial judge he intimated that he had explained the position in some detail

to his client. The following dialogue then ensued:

HIS LORDSHIP: Mr. McGraw, stand up please. I don't know if you have heard what Counsel has said, but he has indicated some certain, somewhat rather late instructions, and if he were to put those instructions before the jury, it would place him in an embarrassing position having regard to the duty which he owes to you and the duty which he has and owes to the Court, and by reason of that he would be placed in an impossible position, and has to withdraw. I am assured by him that he has explained all this to you. The position is that you will have no legal representation. That is what the effect of it is. Have you got anything to say?

A. You mean that he is going to leave the court room.

HIS LORDSHIP: I have not given him leave to withdraw yet.

A. Does it mean that he is going to leave and not represent me in any way?

HIS LORDSHIP: That is what it means if he carries out those instructions, it would be a breach of his duty to the Court and it would be impossible for him to do that, so he would have to leave.

A. That he would have to leave?

HIS LORDSHIP: I could, of course, ask him to stay and give you such legal advice as you might require, but he would not be regarded as appearing on your behalf.

A. On the summation to the jury, would he be allowed to make a summation?

HIS LORDSHIP: I am afraid not.

A. What you are saying is that you are putting me over a barrel.

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HIS LORDSHIP: I am not putting you anywhere. I am explaining to you a situation; I am placing you nowhere. Perhaps you don't understand the situation.

A. I understand. If I get up and tell the truth the way I want it to be told, my lawyer is going to withdraw from the case and leave me stranded.

HIS LORDSHIP: Please address me, you are not making any speeches at the moment. You have given your lawyer certain instructions and those were received during the adjournment which I allowed him earlier this morning. He says he cannot put those instructions to the Court and by reason of that he is obliged to withdraw from the case. The Court is not putting you anywhere; you are the author of it. The situation is that you will have no Counsel, but I am prepared to ask him to stay and give you legal advice if you wish it, but he will not be appearing for you; he will not address the jury, not put any argument. Would you like some time to consider that? I will allow you some time to consider your position.

A. Yes, I would like that, certainly (Time: 2.17 p.m.)

(Time: 2.19 p.m.)

PRISONER: I have made my decision. I have decided that he has not helped me all along so I might as well go up and do it myself. If he would like to stay and give me assistance, well, he can stay and advise me, if he wish, but I would

rather go up and make my statement instead of sitting back and looking like a dummy and being charged for something I did not do.

HIS LORDSHIP: You are not being asked to make a speech. You will be allowed to give your evidence in due time.

Counsel is granted leave to withdraw from this case.

MR. ROBINSON: Much obliged, mi lord.

HIS LORDSHIP: I did indicate to the accused that if you wish, you could stay and give him certain legal advice.

MR. ROBINSON: In the light of the accused man's last remark I hardly think I could be of further assistance to him, so may I be granted leave to withdraw?

HIS LORDSHIP: Yes.

The requirements of section 20(6) (c) of the Constitution are that "Every person who is charged with a criminal offence - (c) shall be permitted to defend himself in person or by a legal representation of his own choice." The provisions were considered in R. v. Pusey (1970) 12 J.L.R. 243 where it was held that while it was fully appreciated that the Constitution of Jamaica enjoins that every person who is charged with a criminal offence must be permitted to defend himself by a legal representative of his own choice if he so desires, yet the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future money sufficient to retain the services of counsel; the applicant having invoked the aid of the Poor Prisoners' Defence Law and having had counsel assigned to him could not now be heard to complain that he was deprived of any of the constitutional rights guaranteed him under s. 20 (6) (c) of the Constitution of Jamaica following upon his rejection of the counsel assigned to conduct his defence.

We are of the view that a similar situation arises where an accused person by his own act deprives himself of the services of counsel assigned to him particularly where this occurs during the middle of the trial, and that he cannot then be heard to complain that he has been deprived of his constitutional rights.

We have given particular consideration to the gravity of the offence and the fact that the applicant is apparently a non-Jamaican, but in all the circumstances we cannot see that the learned trial judge acted unreasonably or that a miscarriage of justice may have resulted from the completion of the trial with the applicant unrepresented. To put it another way we cannot see that the interest of justice required that new counsel be assigned at that stage to represent the applicant for the remainder of the trial. This was not a case as in R. v Mary Kingston (1948) 32 C.A.R. 183 where counsel was present in court and would if requested have assumed the defence of the applicant. Indeed it is doubtful whether any counsel could properly have appeared and put forward the case which the applicant put forward in his evidence when it was apparent that during the presentation of evidence for the prosecution the defence fore shadowed was that of diminished responsibility - For example, during the cross examination of Miss Fasko by the Attorney for McGraw the following question was put to her:

" Q Let me suggest to you that when you were hit in the head by McGraw on the beach that at that time McGraw appeared more like a mad-man."

Miss Fasko had come from the U. S. A. to give evidence and not one word of the new style defence had been put to her while she was in the witness box. McGraw had been legally aided and even if another counsel could be found to accept an assignment in the circumstances either

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the jury would have had to be discharged and a new trial ordered or a lengthy adjournment with the consequent inconvenience to all concerned would have been required to enable counsel to be assigned, to receive instructions and to familiarize himself with the details of the trial up to that point. Neither course could be said to be desirable in the interest of justice. We are not unmindful that an accused should be afforded a reasonable opportunity if he wishes to retain and instruct counsel and that to deny him an opportunity would be a denial to him of natural justice (vide Allette v. Chief of Police (1965) 10 W.I.R. 243 R. v. John Kerr (1969) 13 W.I.R. 517 Galos Hived v. The King (1944) A.C. 149). But where as in this case, counsel has in fact been assigned to an accused person and has appeared at the trial and has been obliged to withdraw through the act of the accused himself, it must be left to the discretion of the trial judge whether the accused will be afforded a further opportunity to obtain counsel. In all the circumstances we cannot say that that discretion has been wrongly exercised in this case. This ground of appeal also fails.

Finally it was argued that the verdict was unreasonable and cannot be supported by the evidence. In this regard it was submitted that the evidence was circumstantial; that the motive of robbery was fanciful, that the behaviour of the applicants in making no attempt to alter the registration plates or disguise the identification of the car was at best strange if they had indeed committed murder and that McGraw's account is more plausible, consistent and probable than Miss Fasko's. In the final analysis the jury had to decide whether they accepted Miss Fasko's evidence or Mr. McGraw's. If they accepted Miss Fasko as clearly they must have done, we cannot say that the verdict was unreasonable. In so far as the motive was concerned it may well be that the motive ascribed was unrealistic but there was in any event no duty on the

Crown to establish motive. This ground of appeal also fails.

We turn now to the applicant Innis. Counsel for this applicant having obtained leave to argue 8 supplementary grounds abandoned 2 of them. The first three grounds argued are as follows:

1. (a) That the learned trial judge failed to put the defence adequately or at all before the jury in that:-

(a) he failed to direct the jury that, if as the evidence seemed to indicate, the deceased was killed while the applicant was at the cottage with the witness Fasko then, there was no evidence that he was present and actively participating in the acts which resulted in the death of the deceased even if they found that there was an agreement with the other accused to rob the two women that evening;

(b) He failed to direct the jury that the evidence of Ivy Fasko disclosed that for the most part the applicant was not present when ever acts of violence calculated to cause physical injury were done either to the deceased or herself,

(c) he failed to direct the jury that they could infer from the applicant's apparent reluctance throughout the incidents following the return of McGraw to the cottage that he was an unwilling participant in the robbery of Ivy Fasko and not a party to an agreement to kill or cause serious injury to either of the two women.

2. That the learned trial judge's directions in relation to the action of the applicant at the time when the deceased received blows which injured and probably killed her (pp. 321-328) were one sided and biassed in favour of the prosecution in

that the learned trial judge invited the jury to infer the applicant's guilt from all of his alleged actions and failed to bring to the jury's attention any of the several inferences in favour of innocence which could be drawn from these actions.

In particular:-

(i) he failed to point out that there was no evidence that the applicant at that time knew of the acts which were being committed in relation to the deceased or that he took any steps to separate the witness from the deceased as the prosecution had alleged he had done as part of a pre-conceived plan to kill or inflict serious injuries on the deceased;

(ii) he failed to direct the jury that the alleged reluctance of the applicant to go with the witness Ivy Fasko and the other accused was not only consistent with an unwillingness to participate in robbing the deceased and the witness but also with a lack of knowledge of the acts already committed against the deceased;

(iii) he failed to direct the jury in respect to the foregoing that where two equal inferences could be drawn from the same act one unfavourable and the other favourable to the accused they were obliged to draw the inference which was favourable to the accused.

3. (a) That the learned trial judge failed to direct the jury that they should not allow themselves to be prejudiced against the applicant by the evidence of his alleged participation in the acts of violence

against the witness Ivy Fasko and that they should entirely disregard this evidence except and only in so far as it could be inferred by his aforesaid actions that the applicant was a party to a prior agreement with the other accused to kill or commit serious injury to the deceased;

(b) To the contrary the trial judge's directions in this regard were confusing and likely to mislead the jury to think that the allegation of the applicant's participation in these acts constituted evidence, on which they could act, of his participation in the acts which killed the deceased.

In considering these grounds it is we consider necessary to take into account the pattern of the summing-up and its effect when taken as a whole. The learned trial judge commenced his summing-up with the usual preliminary directions as to the respective functions of judge and jury the burden of proof and the necessity for the jury to consider the case against each accused separately. He then proceeded to review the evidence given by the prosecution showing the chronological sequence of events, after which he dealt with the question of circumstantial evidence. Next he reviewed the evidence given by the applicant McGraw. He then repeated his directions on the law which had to be applied emphasizing in particular the question of common design and the evidence in relation to it led by the prosecution. Finally he dealt with the statement given by the applicant Innis, leaving with the jury for their consideration a number of questions designed to ascertain whether there was a common design to which Innis was a party and if so, what was the part he played. Towards the very end of the summing-up he told the jury

" In so far as the accused Innis is concerned, if the statement he has made, giving it the best consideration you can, giving it such weight as you think fit, as you think it deserves,

convinces you that he is speaking the truth, that he is a plain simpleton, a fool, attaching himself to this American gentleman who has more money that he wants, and he went along to see these strange events go on; that he took no part whatever, he was present but he did not aid and abet, nor assist in any shadow or form - if you find all that, then of course, he is not guilty, and you are obliged to acquit him; it is your duty to do so. If the effect or his story is to raise a reasnuable doubt in your mind, whether he helped or did not help, it would mean the crown has not established that he helped and then again you would have acquit him, even if you say his story has no weight, that again is not an end of the matter, you have to look at the Crown's case and see if you find in the Crown's case an array of circumstances in relation to the accused Innis, which points in one direction and one direction only which is inconsistent with innocence, which leads your mind irresistibly to a conclusion of guilt. It is only in those circumstances - if you find an array of circumstances that you are entitled to return a verdict of guilty against him."

The passages about which complaint is made in ground 2 occur in that section of the summing-up where the learned trial judge was specifically dealing with the Crown's case. He correctly dealt with the questions of circumstantial evidence and common design and, looking at the summing-up as a whole we cannot say that he failed to deal adequately with the defence.

Grounds 4 and 5 correctly complained of inaccuracies in the summing-up as follows:

> That the learned trial judge's directions that the applicants alleged admission to the watchman of seeing one woman lying on the beach and McGraw hitting the other, put him "with murder" (p.269) and that its effect was "to put him on the spot where some violence was being done to the girls"

(p.332), were inaccurate and misleading in that:-

(a) the applicant's statement did not place him on the scene when violence was done to the deceased resulting in her death; and

(b) in the absence of a clear direction distinguishing the acts committed against Ivy Fasko from those done to the deceased, the directions of the judge tend to suggest that presence of the one was the same as presence at the other.

5. That the learned trial judge:

(a) misdirected the jury that the applicant had drops and droplets of blood of the same group as the deceased's on his shirt (Ex. 18) and trousers (Ex. 19) (pp. 332, 341), and invited them to speculate from this, without any foundation for so-doing, that the applicant was present when violence causing death was done to the deceased.

At the same time he failed to direct them-

(i) that the evidence of Harold Garriques (pp.202, 209 and 210 disclosed that there were no drops or droplets of blood on the said Ex. 18.

(ii) that Ivy Fasko's evidence (pp. 164 & 5) is that the applicant had on another shirt (Ex.11) and that no blood of the deceased's type was found thereon.

(iii) that the applicant was first seen in Ex. 18 some six days after the deceased's death and that there was no evidence that he had been wearing Ex. 18 on the day of the murder;

(iv) that in the light of the evidence that 44% of the population had similar type blood, it had not been established that the blood found on Exhibits 18 and 19 did not come from the applicant himself or some other source;

(v) That the presence of blood on the applicant's trousers, if it were the deceased's blood, was not inconsistent with the deceased having been struck and killed in the absence of the applicant, as was indicated by the evidence of Ivy Fasko, and that the said blood could have got on the deceased's trousers if he came in contact or close proximity with the body of the deceased after she was killed.

We do not however consider that accurate directions to the jury in these respects would have brought forth a different verdict.

Finally it was argued that the verdict was unreasonable having regard to the evidence adduced at the trial. We cannot agree. During the course of cross-examination of Miss Fasko by counsel for the applicant Innis Miss Fasko said that while they were walking to the car Innis said he was going to try and keep McGraw from killing her but didn't know if he could do it. In our view this was evidence if they accepted it from which the jury could draw the inference that Innis was aware of McGraw's intention to kill Miss Fasko, and was aware that McGraw had killed or intended to kill Miss McBride. It was therefore open to them to conclude, having regard to Innis' conduct throughout, that he was party to this plan. Innis must have had this knowledge prior to the two women's arrival at the cottage and his act in indicating that McGraw was waiting for them on the beach, could very well have been the initial part he was assigned to play. His conduct thereafter in co-operating fully with McGraw in the assault on Miss Fasko is explicable only on the ground that he was a willing conspirator with McGraw. The jury must have been

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impressed with the fact that as McGraw drove the car with Miss Fasko and Innis, there was a conversation between McGraw and Innis in which they said they had looked beforehand for a suitable place and Robert (meaning Innis) knew better where it was. It was Innis who was guiding McGraw to the spot they had agreed upon and according to Miss Fasko all their conversation was centred around finding the spot. In the end McGraw twice asked of Innis, "Is this the spot?" and Innis replied, "no, no this wasn't it, it is further up ahead on the road."

It was therefore open to the jury to conclude, having regard to Innis' conduct throughout that he was party to the plan to murder Miss McBride and actively participated in the carrying out of the plan.