

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 70/89

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA vs. IVAN JOHNSON

Howard Hamilton, Q.C. and Paul Ashley
for the applicant

Miss Diana Harrison for the Crown

June 3 and 17, 1991

MORGAN, J.A.:

On the 3rd June, 1991, we heard this application for leave to appeal and we propose to treat that hearing as the hearing of the appeal.

The appellant was convicted in the Saint Ann Circuit Court on the 27th April, 1989, before Smith, J. and a jury for the murder of Stephen Wisdom between December 8, 1987 and December 12, 1987.

The trial involved the consideration by the jury of the evidence of ten witnesses with the Crown relying on circumstantial evidence. The case for the prosecution was that the deceased was last seen alive on December 8, 1987 by the appellant who lived with him at his house, and, fully four days after, his body was found in an advanced state of decomposition, dumped over a wall. There was trampling on the grass for some distance to where the body lay. The victim's car was in his car-port although he was never known to go out and leave it.

Inside the house, his briefcase and the furniture in his bedroom were chopped, and there was blood on his bed and a trail of blood which ended with a spot on the step of a room occupied by the appellant. Dr. Joshi, who performed the post-mortem examination, was unable to give any opinion as to the cause of death because of the state of the body but the inference from all these facts plainly was that he died a violent death.

The tale begins early on the morning of Wednesday December 9 when the accused visited his friend John Atkinson and told him that Stephen Wisdom was missing. He gave a story that Mr. Wisdom chopped at him, he avoided it, then Mr. Wisdom used a fish-gun to shoot at him and he ran away. Atkinson accompanied the appellant to the home where the appellant opened the door. Atkinson went to the bedroom, peeped in and saw the bed rumpied, the room ransacked and a suitcase thrown on the ground. He suggested to the appellant that he should go and tell the brother of the deceased, Clinton Wisdom, and then he left.

About 10:00 a.m. the appellant turned up at Wisdom's shop and told Clinton Wisdom that "a little thing happened up a yard last night with him and Stephen". When asked to explain, he said that Stephen chopped at him several times with a machete and shot at him with a fish-gun; that he ran down the road, returned in fifteen minutes and that on his return he did not see Stephen. Wisdom advised him to go and make it up with Stephen and if he failed he should leave but if he did not see Stephen he should return the following morning. The appellant asked for money and was given \$20.00.

About 10:30 a.m. Jonas Gibson saw the appellant who asked if he had seen Stephen Wisdom and told him that the Tuesday night he went to buy cigarettes and when he returned he did not see Stephen. They walked to the house and the

appellant told him that Stephen Wisdom was acting strangely and chopped at him; that he was cooking and heard a female voice in Stephen's room "screaming and shouting and begging Stephen not to lick her any more". When he went to Stephen Wisdom's door and called, Wisdom came outside, turned up the radio and went back inside. The screaming and begging continued, he went to the window, called and everything was silent. He went inside the house, turned off the stove, then went outside when Stephen Wisdom called him. He responded and discovered that he, Mr. Wisdom, was hiding behind a door. He ran outside and ran down the hill being chased by Stephen Wisdom who flung a fish-gun at him. He ran a different route and returned home by a short-cut.

That very afternoon about 4 o'clock Basil Fullerton saw the appellant on the road and told him that he heard that he could not find Stephen Wisdom. The appellant said, "last night (Tuesday) Stephen came in and throw his car key and gave him and gave him some money to buy food, then he told him to lock up the house and carry the room key with him". He went to the shop and returned. While in the kitchen he heard Stephen Wisdom beating somebody and he called to him to be careful. He got no answer but Mr. Wisdom came out with a cutlass and chopped at him three times. He ran downstairs to the garage pursued by Stephen Wisdom who fired a fish-gun at him. He ran away and when he returned to the house he saw neither Stephen Wisdom nor any cutlass nor knife. He saw the house key and the car and searched for Stephen but did not find him.

The appellant had thus put forward four different versions on one day between 6:00 a.m. and 4:00 p.m. to four different persons.

On the Thursday morning, he returned to Atkinson and told him, in response to his offer to go and search for Stephen,

"that Stephen gone crazy and him don't know if him gone kill himself". However, along with one "Father B", they started a search. There were three short-cuts described as east, west and central. The central was the shortest one to the house but the appellant would not have them use it as, he said, it was too filthy to walk there and they should not go there. They obeyed. They used another route, which he directed, "Walk there". Unhappily, the unused short-cut was the one which led to the area where the body of Stephen Wisdom was later found behind a wall. The same day he returned to Clinton Wisdom and on his advice he went and fetched another brother, David, who visited the house and reported to Clinton, in the presence of the appellant, that he saw "blood, chop-up, chop-up" in Stephen's room and the fish-gun fastened in the window.

David, accompanied by the appellant, went to the police station at Runaway Bay. There the appellant reported that Stephen appeared to be under the influence of drugs and had chased him with a fish-gun. He said further that he ran away from the house and on his return he did not see him.

On Friday morning Atkinson was home when the appellant came along. While talking about the missing Stephen Wisdom, Atkinson saw crows flying over the central short-cut, pointed them out to the appellant, and asked him what he thought about it. The appellant said that they came from over George Brown's dump and that they came to eat up the "filth" over there. He did not go to look because no one would accompany him.

Later that day Clinton Wisdom saw him at his shop and on enquiring about Stephen Wisdom he said, "Boy me nuh know, all me know if man and man did go look for Stephen from same time Stephen would not dead". Prophetic words. Nobody knew then or suspected Stephen was dead. Clinton Wisdom visited Stephen's home that day and later took the appellant to

Detective Hamilton at the Runaway Bay Police Station to give a statement, returned to the house, saw the room ransacked, furniture and windows chopped up and bloodstains on the bed, floor and bathroom.

Detective Hamilton visited the scene and made observations, among them that there was a trail of blood from the room of the deceased through the living room and on to the room occupied by the appellant. There was also an area of blood in the appellant's room which showed signs of an attempt to wipe it from the floor. A fish-gun was in the car-porte beside the car and a spear gun was stuck inside a louvre window. He returned to the station and told the appellant he was investigating the disappearance of Stephen Wisdom and if he could assist. The appellant gave him a story. The detective told him he was not satisfied with the explanation given and that he intended to detain him pending investigations. The appellant then asked if he could send a message for him to his people. When asked for the message, he said, "Tell them say them find Stephen dead and lock me up".

Nobody knew then if Stephen Wisdom was dead. The information did not get about until next morning about 9 o'clock. The dead body was found by a wall and a machete belonging to Stephen Wisdom, which the appellant used, was found a chain away.

In his defence, which the appellant gave in an unsworn statement, he said that he knew nothing of the death of Stephen Wisdom. He spoke of Stephen Wisdom sending him to buy food, of his cooking when he heard Stephen swearing; that Stephen called him and then ran him down outside with a machete and a fish-gun and threw the gun at him. He escaped and that night he never slept in the house. Next morning he called for him and went inside the house but never heard him. In the doorway of his room he saw some clothes and a suitcase; that he went

to the police station on four occasions and was detained on the last visit. Detective Hamilton, he said, told him, "Me find the man dead you know", and he replied, "After me nuh kill nobody me nuh know anything about it a four time me come a station".

Leave was granted to Mr. Hamilton who argued two grounds of appeal:

1. The learned trial judge erred in law by not acceding to the no case submissions made by learned counsel for the defence as the evidence presented by the Crown amounted to merely a high degree of suspicion.
2. The learned trial judge erred in law by withdrawing the issue of provocation from the consideration of the jury and thereby denied the appellant/defendant the opportunity for a verdict of manslaughter.

A no-case submission can only succeed if -

- (a) there is no evidence to prove an essential element in the alleged offence,
- (b) the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Practice Note of Lord Parker, C.J. (1962) 1 All E.R. 448.

At the end of the Crown's case the learned trial judge had before him the following facts:

1. The appellant lived at the home and was the last person to have seen the deceased alive.
2. The declaration by the appellant that the deceased was missing when on his own account he did not enter the room but looked in from the doorway.
3. The several inconsistent versions of events of the Tuesday night given to Atkinson and others.
4. The state of the room of the deceased which indicated robbery.

5. Directing Atkinson away from the short-cut area.
6. Dissuading Atkinson and others from investigating the presence of the scavengers in the same area.
7. Telling Clinton Wisdom words to the effect that if an effort had been made to find Stephen he would not have died.
8. Sending a message to his people that "them find Stephen dead" when there was no certainty then that Stephen had died.
9. The presence of an attempt to wipe up blood in the house, something which no intruder would stop to do, as such indicating it was done by someone who had access.
10. Proximate distance from house where body was found.
11. Machete used by him discovered approximately one chain from deceased body.
12. The various observations of Detective Hamilton.

Counsel would have each fact examined individually and labelled as inconclusive, or a non-factor or raising suspicion only.

The Crown relied wholly on circumstantial evidence. In R. v. Yvonne Johns & anor. S.C.C.A. Nos. 102-103/83 (unreported, delivered 8th June, 1984, Carey, J.A., in the judgment of the Court, had this to say:

"The evidence required in proof of a criminal offence, is either direct or circumstantial. In the case of the former, the evidence is the result of the perceptions of an eye-witness; in the latter case, it is the total effect of inferences to be drawn from the result of the perceptions of a witness. The jury in either case is required to be satisfied as to the credibility of the witness who appears before them. A clear precondition for acting upon circumstantial evidence is the acceptance

"of the witness who testifies as to the primary facts. Thereafter, if fallibility there be, it must, necessarily, be a fallibility of inference. In order to satisfy the standard of proof required in a criminal charge which depends wholly on circumstantial evidence, such evidence i.e. the inferences therefrom must point in one direction only and that being guilt, it must be inconsistent with any other conclusion."

The facts, then, when taken together, must produce a series of undesigned, unexpected coincidences that all the circumstances relied on, point in one direction only. Plainly, therefore, each element cannot be weighed by itself for no single element can point in any direction. It is the array of circumstances which will allow for a conclusion of guilt or innocence. We cannot accept Mr. Hamilton's submission as well-founded.

Adopting this correct statement of the law, the facts, as enunciated, amounted to evidence of motive, opportunity, method and suspicious circumstances which the jury were entitled to consider as a whole, inferentially, whether or not when taken together went beyond mere suspicion, and pointed in one direction only. The no-case submission, in our view, did not satisfy either limb of Lord Parker's directions and was properly rejected.

As to Ground 2, counsel submitted that provocation arose on the Crown's case as the state of the room was indicative of a fight and as such a provocative act; that there was a duty on the judge to leave with the jury all possible defences emerging from the evidence of which the defence can avail itself, and he did not.

There are three elements of provocation:

1. The provocative conduct.
2. The loss of self-control.

3. The retaliation following,
proportionate to the provo-
cation.

(See R. v. Delroy Samuels [unreported] S.C.C.A. 85/89 dated 4th March, 1991): There was no evidence to suggest the factual situation of a loss of self-control neither on the Crown's case nor the defence, and to this counsel conceded.

There is no merit in this ground.

We find that the directions of the learned trial judge were correct, ample and clear. For these reasons the appeal is dismissed, the conviction and sentence affirmed.