JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 151 OF 1982

BEFORE: THE HONOURABLE MR. JUSTICE KERR, J.A.
THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE ROSS, J.A.

REGINA V. LLOYD BARRETT

Robert Pickersgill for appellant.
F. A. Smith, Deputy Director of Public Prosecutions, for the Crown.

September 23; November 4, 1983

CAREY, J.A.:

On the 23rd September, 1983, we treated the hearing of this application for leave to appeal as the hearing of the appeal which we dismissed and undertook then to put our reasons in writing. This is in fulfillment of that promise.

The appellant was convicted in the Saint Catherine Circuit Court on 13th December, 1982, before Wolfe, J., and a jury for the murder of his paramour, Mavis Copeland. The indictment alleged that the murder was committed on a day between the 25th and 27th July, 1981.

The appellant had been living with the deceased for about a year before her death, at her mother's home in Portmore Gardens, Saint Catherine. The relationship was less than happy. Miss Copeland although she had borne him a child it had subsequently died. Prior to her association with the appellant, she had given birth to two children for two other fathers. The visit of these fathers to see their off-spring or to bring them some gift, invariably caused a fuss. There was even an occasion when he had treated her roughly, throwing her off the bed. This took place on 23rd July, 1981. Some days later, on the 25th, both parties left home together, at about 9:00 a.m. At 3:00 p.m., the appellant returned home, but he was shirtless, having left earlier in a shirt. He enquired whether Mavis had returned. Mrs. Sutherland, the deceased's mother, replied that she had not. He then explained that he had gone to sea with a friend and lost his shirt, which had been stolen.

Later on the same afternoon, when her daughter had not shown up, the mother again asked the appellant if he did not intend to go and look for his girl friend. His reply was that he did not know what direction she would take home. At about 8:45 p.m., a search revealed that the appellant had left the house, taking all his clothes and a travelling bag. It was not until 26th July, that the decomposing body of Mavis Copeland was discovered in some bushes within two yards of the appellant's coal kiln in Independence City, Saint Catherine. According to the medical evidence adduced at the trial, there were two external injuries, viz., a lacerated wound on the right side of the neck penetrating the arteries and a contused lacerated wound to the right side of the jaw. Death was due to shock and haemorrhage from the lacerated wound to the neck.

On 9th August, 1981, the appellant was found in a house at Bartons, Saint Elizabeth. Bartons is about 70 miles from Portmore, Saint Catherine. When the police officer told him that he was wanted for questioning in Saint Catherine in a case of murder, his reply was:

> "Me no come from Saint Catherine. Me come from Kingston and I come down here about four months ago, and started to do some farming."

On 18th August, while the appellant was detained, he intimated that he wished to make a statement in regard to Mavis Copeland's death. A Justice of the Peace was invited to be present and the appellant duly gave a statement, the usual caution being first administered and the document being duly signed. That document was tendered and admitted in evidence without demur from counsel who appeared below on behalf of the appellant:

> "Yes, it was a Saturday the 25th July this year I sent my baby mother, Mavis, to town to buy up some items. While at home waiting, all of us at home waiting to see her come, that mean her mother and everyone. I didn't see Mavis come and I put on my shirt and went to Independence City Road to meet her. When I go out there I saw her come off a bus. While coming across the common four gunmen attack me. One lay hold of my baby mother and say 'What happen to the Five Hundred Dollars that me give you to rent room and make we set up back again, you a ginnal no?' I only know this man as Dian. Him take her across to the left section meanwhile the next two take me across to the right. While standing there the two that take my

> "baby mother come there and said to me 'Boy, whey you come from?' I tell him Saint Elizabeth. Him say where in Saint Elizabeth and I said 'Bartons.' Him said, 'you are to be heard and not seen when I done with you.' While saying that one of the men cut at me two times with a long knife and I ease away from it. The knife cut my belley. See it here Inspector. Same time the one that them call Dian inject me in my hand here (pointing to right arm). When I recover I was at the bottom of Spur Tree Hill foot lying on the bank and mi two hands tied behind me. I went home in pain. This was the Sunday. The Monday I was going to Maggotty to lodge an information. While going I see a jeep come down, stop me, asked me what is my name. I tell them and them say them going to detain me. Them take me to the station and that is all. While trying to tell them what going on them say they have no time to take a mad man to Bellevue."

The appellant made an unsworn statement in which he reiterated what he had already said in his statement under caution.

Before us, Mr. Pickersgill, who did not appear below, argued the following grounds of appeal:

> "1. The Learned Trial Judge erred in law when he did not accede to the no case submission made by Learned Counsel for the defence.
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> 2. The Learned Trial Judge misdirected the jury as regards the law relating to circumstantial evidence."

Learned Counsel for the appellant put his argument in respect of ground one in this way. He said at the end of the Crown's case, two versions emerged, each inconsistent with the other. The Crown's witnesses in relating the appellant's remarks to the mother of the deceased, said that he had given Mavis money to go to Town, that he had gone "to sea" and his shirt had been stolen. There was also tendered in evidence in support of the Crown, he said, the statement of the appellant under caution, which is inconsistent with his earlier oral statement. No mention was made in the cautioned statement about his going off to sea.

In our view, at the end of the Crown's case, the learned trial judge had before him, in addition to other evidence in the case which is detailed later, explanations as to his conduct, which were inconsistent with other facts. These explanations on the part of the appellant form

part of the suspicious circumstances which make up the circumstantial evidence in the case against the appellant. It is fallacious then to refer to these explanations as versions capable of accounting for the way in which the deceased came to her death, and reducing the prosecution case to one of a tenuous character.

Mr. Pickersgill relied on R. v. Galbraith (1981) 1 W.L.R. 1039, in which it was held that:

> "..when a submission of no case was made the case was to be stopped when there was no evidence that the person charged had committed the crime alleged ..... "

and these were the important words to which our attention was drawn:

> "if the evidence was tenuous and the judge concluded that the prosecution's evidence taken at its highest was such that a properly directed jury could not properly convict on it;"

We feel that this tenuous character of which the Learned Chief Justice spoke, comes within the Practice Note of Lord Parker, C.J., (1962) 1All E.R. 488, where in guiding Justices of the Peace, he said:

> "When 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."

Lord Widgery, C.J., in R. v. Barker (Note) (1975) Cr. App. R. 287 at page 288 emphasized the duty on a judge to whom a submission of no case is made, by saying:

> "It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks the witness is lying ...."

There was no suggestion by Mr. Pickersgill that the prosecution case had been so destroyed by cross-examination that the evidence was tenuous, nor was it being urged that some element to establish the crime had not been proven. What was ernestly put forward, was that on the Crown's evidence the appellant had been shown to have given two explanations for the disappearance of his mistress. Plainly, this was not, as we apprehend the law, a proper basis for a submission of no case. At the end of the prosecution case, there was evidence that:

1. The parties had left home together in the morning of July 25th, 1981 both well attired.
2. The appellant returned home later the same day at 3:00 p.m. shirtless.
3. When asked about Mavis Copeland, he explained that he had given her money for shopping, while he had gone to sea and had lost his shirt.
4. He shewed not the least anxiety at her failure to arrive home.
5. While relatives of the deceased went off in search of her, he departed taking his clothes with him.
6. On July 27th, 1981 the decomposing body of Mavis Copeland found in close proximity to the appellant's coal kiln. Cause of death, shock and haemorrhage from chop to neck.
7. The appellant was found by police in St. Elizabeth on August 9th, 1981 and said, he did not know St. Catherine when told that the police were investigating a case of murder in that parish. He also stated that he had come down to the parish four months previously and started farming.
8. While being detained, he volunteered a statement to the police in which he said that some men had seized Mavis Copeland and he had been injected with some substance so that he lost consciousness. When he came to, he found himself at the foot of Spur Tree (Manchester).
9. There was some evidence as well, that the relationship was not a good one, because of the jealousy of the appellant.

The learned trial judge did not accede to learned counsel's submission that there was no case to go to the jury. We see no reason to differ from that ruling, which we think to be correct. There was evidence of motive, opportunity and suspicious circumstances in the light of the conduct and statements of the appellant, fit to be left to the jury. We do not see how this evidence can fairly be described as tenuous. We conclude therefore that this ground fails as being without merit.

As to the second ground which dealt with the learned trial judge's directions on circumstantial evidence, it was argued that the directions were inadequate and confused. There was, he said, an over frequent use of the word "guilt." The jury should have been told that as respects indirect evidence, the jury were not to consider so much whether the facts are consistent with the prisoner's guilt, but whether the facts are inconsistent with any other reasonable conclusion for it is only on that basis that they can safely convict. The learned trial judge in this regard said the following:

> "Now, I have already told you that the Crown relies on circumstantial evidence. In other words, the Crown hasn't brought anybody here to say, I saw when the accused man inflicted those injuries upon Mavis Copeland; they are relying upon circumstances to say that it is the accused man who killed Mavis Copeland. It is not always that a charge can be proved by the evidence of eye witness. The fact that there are no eye witnesses to the commission of the offence does not mean that the offence can not be legally proved. A charge may be proved by inference from surrounding circumstances; this is what is called circumstantial evidence. Some authorities are of the view that circumstantial evidence is even sometimes better than eye witness evidence because where an eye witness can fabricate evidence, it is said that circumstantial evidence is not capable of any such fabrication. Circumstantial evidence going to prove the guilt of accused is this, one witness must prove one thing, another proves another thing and these taken together prove the charge to the extent where you feel sure of it; but none of them taken separately proves the guilt of the accused. Taken together, they lead to the one inevitable conclusion of guilt, and if that is the result of circumstantial evidence, it is much a safer conclusion to come to than if one witness goes into the witness box and gives direct evidence and says, 'I saw the crime committed.' An eye witness may sometimes be mistaken, mistaken about a person or about an act, or he may be influenced by grudge or spite. Circumstantial evidence is free from these blemishes. Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences then as a reasonable you find you are compelled to come to one conclusion. All the circumstances relied on must point in one direction and one direction only. If the circumstantial evidence falls short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all. Circumstances may point to one conclusion but once the circumstances are not consistent with guilt, it breaks the whole thing down. You may have all the circumstances consistent with guilt but equally consistent with something else too, that is not good enouth. What you want is an array of circumstances which point only to one conclusion and to all reasonable minds that one conclusion only, namely, guilt. So there you are as to what circumstantial evidence is."

When the jury, after retiring to consider their verdict, returned to ask further directions on this aspect of law, the learned trial judge in effect, reiterated the substance of what we have earlier set out.

On any fair reading of these directions, it is plain that the learned trial judge in directing the jury on circumstantial evidence, highlighted two factors which if a verdict adverse to the prisoner was to be returned, should co-exist, viz.:

1. An array of circumstances which point to one conclusion, and to all reasonable minds, that conclusion is guilt.
2. Those circumstances must not have gaps nor be equally consistent with innocence.

The learned trial judge did precisely what learned counsel complained he did not do. There can be no formula restricting a trial judge to the form of his direction. The duty of a trial judge is to make it clear to the jury that the onus of proving an accused guilty of any crime, is upon the prosecution. In discharging that important task, it appears to us inevitable that the word "guilt" or "guilty" will be used much more often than the word "innocent" or other synonym. The function of the jury is to consider whether the facts adduced on behalf of the prosecution satisfy them to the required standard. The whole thrust of the defence is to demonstrate that the evidence has not attained the standard necessary to prove guilt.

In R. v. Cecil Bailey [1975] 13 J.L.R. 46, this Court speaking through Edun, J.A., said at page 49:

> "It cannot be disputed that in Jamaica the rule in Hodge's case has become settled that such a special direction as to the way in which purely circumstantial evidence is to be viewed should be given to the jury."

This Court in that case had considered McGreevy v. D.P.P. (1973) 1 All E.R. 503, where it was held by the House of Lords that there was no rule, that where the prosecution case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.

The weight of authority beginning with R. v. Clarice Elliot 6 J.L.R. 173; R. v. Elijah Murray 6 J.L.R. 256; R. v. Burns and Holgate 11 W.I.R. 110 and R. v. Cecil Bailey (supra) is that where the case for the prosecution depends on circumstantial evidence, the judge should make it clear to the jury that not only must the evidence point in one direction and one direction only, and that being guilt, it must be inconsistent with any other conclusion. The approach in this country is not the same as in England. In the present case, we are clear that the learned trial judge had firmly in his mind the decisions of this Court based on Hodge's case (1838) 2 Lewin C.L. 227. His directions, in our judgment, were impeccable, and accordingly, we are not persuaded that there is any merit in this ground which thus fails.

There was no argument before us that the verdict was unreasonable and could not be supported having regard to the evidence. Nevertheless, we have carefully considered the evidence adduced in this case and in our view, that evidence would have inevitably led the jury to a conclusion of guilt. The conduct of the appellant as set out earlier in this judgment led to one conclusion and one conclusion only, and was inconsistent with innocence. No reasonable jury could have failed to convict. It was for these reasons, we affirmed the conviction.