JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 131/80

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice White, J.A.

R. v. NATHAN FOSTER

Mrs. Nosworthy-Alder for the Appellant

Mr. Donald McIntosh for the Crown

5th November, 1981

ROWE J.A.

On the morning of the 23rd of March, 1980, Mr. Bowen was passing through a property called Rolling Gully or Roaring River in the parish of St. Thomas, and he came upon an unhappy sight. He saw crows hovering in the distance, he saw a man lying on the ground, and this man appeared not to be moving. There was an unhealthy aroma, and from the physical features as well as a shield which was worn to the side of the man, Mr. Bowen concluded that it was a gentleman by the name of Calvin Williams.

Mr. Bowen raised an alarm and at about 11.30 that morning Detective Corporal Johnson went to the scene and he was of the same view as Mr. Bowen that the man who was lying there was Calvin Williams, that he was dead and that the body was in an advanced stage of decomposition. The Detective Corporal noticed that the left side of Mr. Williams head was bashed in and there appeared to be two stab wounds, one to the left side and one to the neck of the body, and that there was a knife stuck in the ground near his body.

This body was removed and there was a post mortem examination very perfunctorily held by Dr. Lampart on the 25th of March. The body was identified by Kathleen Lumley. Because of the advanced stage of

decomposition Dr. Lampart did not do a dissection, but he observed that the body was excessively swollen, the face was practically unrecognizable, and that there was a comminuted depressed fracture in the left occipital region of the skull, and he concluded that that fracture where the head was bashed in was sufficient to cause death. As a consequence he did not look any further. He gave his opinion that it was unlikely that a passive fall on however large a stone could have resulted in an injury of that nature. He was of the view that some traumatic event like being hit with a stone or some other blunt instrument could have caused the fracture to the skull of Calvin Williams.

Here it was, therefore, a dead body and circumstances which appeared to be homicide and the police began their investigations.

Evidence was led from one Reuben Daniels that he along with the applicant went to a property called Coolie Piece in St. Thomas for the purpose of stealing coconuts, and when they had got some fifty-two coconuts, Mr. Williams who was the Ranger came upon them and confiscated the fifty-two coconuts. It appeared that he said words to the effect that he intended to prosecute them and took the coconuts off to the police station. Mr. Daniels said he was not pleased with the action of Mr. Williams, because from time to time Mr. Williams had issued threats in relation to him to the effect that whenever he Mr. Williams saw Daniels with coconuts he was going to prosecute him, thereby imputing that Daniels was accustomed to steal from the property.

However, Daniels said he was not that upset to take any action in relation to Mr. Williams. Both himself and the applicant went home. They talked about it and he left the matter at that.

Daniels said he next saw the applicant on the early morning of Saturday the 22nd. He said that he had been in his bed asleep when the applicant came there, called him, and when he opened his window, he saw the applicant outside. He says in appearance the applicant was like somebody mad/out of his wits; his manner was grave like somebody who drinks rum, and the applicant said to him,'him done with the man'. Daniels

said when he heard those words he said, "Go away, I don't want to hear anything from you, you wrong if you do something like that. Go away, find you yard', because according to Mr. Daniels he understood these words to mean that the applicant had done something, had in fact killed Calvin Williams.

It was the evidence of Daniels that later that morning the commom law wife of the applicant, Una Thompson, came to him at his home and she had with her a plastic bag which contained clothing and there was blood on the clothes, "the clothes blood up." His evidence was to the effect that Una Thompson burnt up the clothes although he did not see when the burning was done.

When cross-examined Mr. Daniels first withdrew the statement which he made that he had stolen coconuts from the property, and he wished the jury to say that all the coconuts had come from his own property.

When Una Thompson gave evidence she said, yes, she did in fact take clothes to the home of Daniels but as Daniels saw them he "pawned them up and burnt them." Later on in her evidence she wasn't as positive, but she said that he went around the side of the house, he asked for kerosene oil, she smelt burning, although she did not see the clothes being disposed of by him.

Una Thompson, who as I said earlier was the common law wife of the applicant, gave evidence that she lived with him for some two years and on the night of the 21st she did not sleep at home because when the applicant came in at about 7.00 o'clock she asked him for money, he abused and cursed her, threatened to kill her, and so she left the house and slept elsewhere, but she returned at daybreak on the 22nd and as she pushed open the door which was closed but not locked, she saw a plastic bag which contained the clothes which the applicant had been wearing on the night before. When she looked at the clothing she noticed that they were all bloodied up. She took flight, she took the plastic bag and she went to the home of the landlord. He not

being there she went and spoke to the witness Daniels and showed him the clothes. She was quite positive that not only the shirt and the pants, but the underwear were all bloodstained, and she was quite positive about it, they were the clothing which the applicant had been wearing on the Friday night.

Other evidence adduced by the crown came from one Walter Hutchinson, and he said he lived a half chain away from the witness Daniels and about some ten chains from the applicant, and on the 21st of March about 7.00 o'clock in the evening he was at home and he heard a talking coming from the home of Reuben Daniels. Daniels was speaking on the top of his voice, he was talking of his grievances and he said "he was going to do nuf things." He couldn't see the person to whom Daniels was speaking, but he heard a voice saying, 'You talking too loud for when I going to do my business I don't want nobody to know.' He said he recognized that voice to be the voice of the applicant whom he had known for some two years before. He said after that reply had been made he saw the applicant walk from the home of the witness Daniels, walk pass his own home, and therefore he was well able to recognize the applicant as somebody who had been with Daniels on the Friday evening.

In the course of his examination Daniels was asked if he had seen the applicant after they parted about 3.00 o'clock on the 21st and before he saw him on the morning of the 22nd, and Daniels said no. It was not specifically put to him that the applicant had been seen coming from his home on the evening of the 21st.

The clothing which the applicant was wearing at the time of his arrest were taken from him by the police and submitted to the Police Forensic Laboratory for examination and evidence was given by Mrs. Yvonne Spence, Government Analyst about them. She said that the trousers when examined was found to have blood present in brown stains, drops and smudges on front and back. It was human blood and of Group O. The clothing which the deceased Clavin Williams was wearing

at the time of the post mortem was also submitted to the same Analyst and she found that it contained blood of Group O. It was her evidence that fifty-two percent of the people in Jamaica have blood Group O.

When the applicant was arrested and cautioned he made no statement. At trial he gave an unsworn statement in his own defence in which he referred to the incident with the coconuts spoken of by Reuben Daniels, and he went on to say that Daniels was lying on him, and that was the end of his statement.

The jury after deliberating for some thirty-seven minutes returned a verdict of guilty of murder and sentence of death was accordingly passed upon the applicant. From his conviction and sentence he has appealed and before us this morning Mrs. Nosworthy-Alder has sought to argue a number of grounds of appeal.

Her first ground was that the credibility of the first witness, Reuben Daniels was so impugned that the Learned Trial Judge erred in not instructing the jury that his evidence should not be relied on. Instead the Judge proceeded to rehabilitate the witness by offering explanations for contradictions which were not supported by any evidence led at the trial.

We have looked at the manner in which the learned trial judge dealt with the several contradictions, and how he treated with the question of the credibility of Reuben Daniels. In a long passage which it is necessary to set out in order to properly understand how we have approached this matter, the learned trial judge said:

> "Now before you consider, and in pondering over Reuben Daniels' evidence, there are certain things that you must weigh up. Learned Attorney for the defence has told you you can properly reject his evidence as totally discredited, amounting to a lie. He said so because Reuben Daniels told a lie or at least contradicted himself in his evidence because in evidence-in-chief he did say he went to steal coconuts. Under cross-examination he says no, it wasn't stealing. It was his coconuts. But what he went on to say is

"that it appeared there was bad blood between them and Calvin Williams who had made known his intention that any time, anywhere he sees them with coconuts he is going to take them in whether the coconuts were from Bowden Estate or the coconuts of Reuben Daniels. That is the evidence before you I recall is being said."

He continued:

"That is the position as far as the defence are saying - you must reject Reuben Daniels. He also says there is another aspect of his evidence which should make you feel that he is not a witness of truth, because in his evidence he said that the blood-up clothing those which Una Thompson brought to him, he looked at them and they looked funny like blood was on them, but he didn't touch them. It is true that afterwards he told you the circumstances of how he came to say that Una Thompson burnt them up. He admitted he didn't see her but she is supposed to have told him so. Therefore, what is important is that he said he didn't do anything with these clothes.

Una Thompson, Mr. Foreman and members of the jury, you will remember she said that she saw the blood-up clothing - the shirt, the pants and underwear; she put them in a plastic bag, she went and intended to show them to one Pulloo who is some landlord. When she shouted she didn't hear Pulloo but apparently she either saw or heard Reuben Daniels and when they were shown to Reuben Daniels, using her words, Reuben Daniels pawned up the clothes and went around the side of the house, took kerosene oil, but she didn't see whether he burnt them. On this aspect learned attorney for the defence would invite you to say there is a contradiction and a conflict in the evidence, as between Reuben Daniels and Una Thompson.

If you accept Una Thompson as correct, then Reuben Daniels is an untruthful witness. Equally, because of what he said about stealing the coconuts, and afterwards saying he didn't steal them, then again he is an untruthful witness; also the fact that he did not say he saw the accused person on the Friday evening, that is after the Wednesday (the 19th) when they went to steal coconuts. His evidence is that he afterwards saw him on the Saturday morning, but Hutchinson says that Reuben Daniels and the accused were together on the Friday evening. There again learned Attorney for the defence is inviting you to say another conflict in the evidence - a contradiction - and if you believe Hutchinson then

"Reuben Daniels is an untruthful witness.
Now, it is my duty to direct you as to how you deal with a witness whose evidence you may feel is in conflict with the evidence of some other witness, or a witness who has contradicted himself. What you have to consider, contradictions and things like that go to what is called credibility - whether the witness is reliable, whether he can be believed either in the entirety of his evidence, or whether, notwithstanding those contradictions there is any area of his evidence which you can still say you accept as truthful. If the contradictions and conflicts in your view are very material, very substantial, then of course you would be entitled to say a man who told these untruths in such important areas of the case is an untruthful witness, and it would be dangerous, in fact it would be unsafe for me to rely on his evidence. If on the other hand you feel that the conflicts and contradictions are not really very significant, and that, for example, as far as the coconuts go Reuben Daniels may afterwards be worried as to whether he should brazenly come and say he stole coconuts, so he comes and says he did not steal them, whether it was a question of like on the Friday evening the accused did visit him, he was afraid to come out with it for fear of being considered in some conspiracy with the accused, therefore he left it out, whether as far as the burning or just say the pawning up of the bloody clothes he again feared that if this were said by him people would feel that he is involved and therefore, having done it to protect the accused, he at the same time wants to be silent about it, or to tell an untruth, you have to consider all those matters, you are the best judges of those things. If you feel that because of these things his evidence is totally unreliable, then of course the question of what the accused said to him, that is his evidence as to what the accused said to him, is gone out completely because you would reject his evidence."

Now, from that very long quotation from the judge's summing up, it appears to us to be absolutely clear that the learned trial judge brought to the attention of the jury the pieces of evidence which were said to amount to contradiction, and he properly directed them as to how they should consider contradictions when they were so found.

We therefore find no merit in Ground 1 (a) as argued.

Ground 1 (b) complained that the learned trial judge erred in withdrawing from the Jury the reasonable possibility that the witness Reuben Daniels was an accomplice and as such should have instructed the Jury how to deal with the evidence of an accomplice and (c) that he had motives for killing the deceased.

At page 93 the learned trial judge directed the jury in this matter:

> "On the evidence there is nothing to show that he is an accomplice. So I am not directing you on the question of accomplice because on the evidence there is nothing to show he was an accomplice. But on the basis of what learned attorney for the defence is saying, if you were to form the view that Reuben Daniels had an interest in this matter in the sense that at least he would have wished Calvin Williams to be out of the way then, of course, you would be entitled to weight his evidence and to view it with suspicion and you would be entitled to consider that it would be dangerous for you to accept what he told you that the accused said without any other evidence which somehow makes you feel reasonably sure that the accused did say to Reuben Daniels what he told the court. The reason for this warning to you is that it is said that if a person has some interest to serve he quickly will want to lie in order to get himself out of any difficulties."

Miss Nosworthy's argument is that from his actions in this case there was evidence either that Reuben Daniels was a conspirator with the applicant, to either cause grievous bodily harm or death to the deceased or he was an accessory after the fact. She bases the first part of her submission on the evidence of Mr. Walter Hutchinson in relation to the conversation on the evening of the 21st of March.

We do not feel that there is sufficient evidence on which anyone could say that there was a conspiracy, even if Mr. Hutchinson is believed as to every word he said he heard coming from the witness Daniels and the applicant. Daniels said "he was going to do nuf things", he was talking on the top of his voice but there is no evidence as to what the nuf things were, and significantly what Mr. Hutchinson said the

applicant said, "You talking too loud because when I am going to do my business I don't want anybody to know."

We do not see anything in the evidence from which conspiracy between these two men to do grievous bodily harm or to kill could be inferred from those circumstances.

As to the question of accessory after the fact, the evidence relied upon by Mrs. Nosworthy-Alder is that on the morning of the 22nd, at the highest, Mr. Daniels burnt the bloodied clothing which is said to have been the property of the applicant. She relies upon the case of the Queen v. Davies 38 C.A.R. at p. 11 for the statement of the law that accessories after the fact fall in the category of accomplices. What it is necessary to show, however, is whether on the facts of any given case a person does fall into the category of an accessory after the fact. The quotation which I wish to refer to is that which comes from paragraph 4155 of the 36th Edition of Archbold dealing with accessories after the fact, and here it is said:

> "An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.
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> To constitute this offence it is necessary that the accessory at the time when he assists or comforts the felon, should have notice, direct or implied, that he had committed a felony. It is also necessary that the felony should be completed at the time the assistance is given.
>
> Any assistance given to one known to be a felon, in order to hinder his apprenhension, trial or punishment, is sufficient to make a man an accessory after the fact."

In our view the important question in relation to an accessory after the fact is that the assistance should be given to the felon himself and that whatever assistance is given should either have the effect of assisting him to escape arrest, to prevent his apprension or to prevent his trial.

There is evidence from which it can be implied that Mr. Daniels was suspicious that something had gone wrong, because according to

Mr. Daniels, the applicant had said to him, "Me done with the man", and now when he sees the blooded clothes, that suggests harm, even to the point that death had been caused. Merely destroying an exhibit, the clothing of the applicant, would not in our view be sufficient to prevent his apprehension or interfere substantially with his trial so as to make Daniels clearly an accessory after the fact. We are of the view, therefore, that the learned trial judge was correct in not treating him as an accomplice or an accessory after the fact. However, the directions which the learned trial judge gave in relation to a person who had an interest to serve were almost identical to those which he would have had to give if he had decided that there was evidence on which the witness Daniels could have been treated as an accomplice vel non.

There is no merit in the ground that the verdict was unreasonable and could not be supported by the evidence as it was not correct to say that the only credible evidence in the case was that of Una Thompson, and that that evidence standing alone could not convict the applicant of the crime.

In the final analysis the application is treated as the hearing of the appeal and the appeal is dismissed.