JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105 of 1982

BEFORE: THE HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

REGINA v. WILTON DaSILVA

Mr. R. Small & Mr. E. Frater for the Applicant.
Mr. F. Smith for the Crown.

September 29, 30, October 5, 1983;
February 5, 1985

ROSS, J.A.:

On October 5, 1983, we treated the application for leave to appeal as the hearing of the appeal, dismissed the appeal and affirmed the conviction. At the time we promised to put our reasons in writing and regret that this has been so long delayed.

June Davis died on August 4, 1981, after receiving multiple injuries and the cause of death was given by the pathologist, Dr. Ramu, as cardio-respiratory failure as a result of fat embolism which resulted from the injuries to her body. The evidence disclosed that prior to her death the deceased and the applicant Wilton DaSilva had been living together at 55 St. Joseph's Road off Spanish Town Road in the parish of St. Andrew but the relationship appeared to be a rather unhappy one and from time to time she would leave him and he would bring her back.

On Sunday, August 2, 1981, Miss Beverley Bloomfield was at home at 51 St. Joseph's Road when the deceased came there at about 11:00 p.m.; they spoke and the deceased remained there

until about 2:00 a.m., the following morning when the applicant came there and said he wanted the deceased who went out to him. While she was outside with him she was heard crying and saying "What me do you why you beating me?" When she returned into the house she was crying and she remained there until daylight when she left.

Miss Bloomfield next saw the deceased in the evening on Monday, August 3, when the latter was going out to a street dance, this being the day when our independence is celebrated.

The story is taken up by Miss Gloria Clarke who lives at 23 Spanish Town Road near to Bennett Lane or Bennett Land. At about 1:00 a.m., on Tuesday, August 4, 1981, Miss Clarke was at home and heard the voice of the deceased whom she knew. Miss Clarke peeped through a hole in the fence and saw the deceased and the applicant behind the house next door. The applicant asked her "Which dance you went?" She replied that she did not go to any dance and the applicant thumped her in her face and all over her body. He then held her hand and took her to the front of the yard where he took up a fence post and was beating her with it.

A man called to the applicant who left off beating the deceased and went and spoke to the man. The deceased then came over in to Miss Clarke's yard and went under the cellar. She was followed by the applicant who asked Miss Clarke for the deceased; Miss Clarke replied that she was not in the yard but the deceased made a sound and the applicant drew her out from under the house, kicked her and told her to walk back over to the house. The deceased walked to the fence but she was unable to go over the fence and the applicant pushed her over the fence and she fell on the other side. She was then dragged by the applicant to the front of the yard and he again was hitting her with a stick. The deceased appealed to him not to hit her with the stick and his reply was that he wanted to kill her because she had a man.

Miss Clarke related that the applicant continued to beat the deceased until the stick broke and he then threw a stone at her, after which he again hit her with a part of the broken stick. Finally, he held her by her foot and drew her towards the doorway of the house. Later that same morning he got a taxi and said he was taking her to the hospital.

Miss Marlene Williams lives in the same area and she related that in the early morning of Tuesday, August 4, 1981, she went on Cole Lane to where a small crowd was gathered and there she saw the deceased lying on her back in the road, completely nude; she spoke to the deceased but her only response was a groan. The applicant came up, looked at the deceased and said that he was not obliged to take her to a doctor, that "You could a dead fi all mi care." After this he went away, came back with a taxi and told the deceased to get up and go into the taxi but she could not get up and he was "roughing her up" so some of the people there helped her to get into the taxi. Later that same day Miss Williams saw the applicant at the pipe in the area and asked him what happened to June; he replied that she had come out and she asked how it was that she had been sent out in the condition in which she was, to which he said "Who caan hear must feel."

That same evening around 7:00 p.m., Miss Williams went to the home of the deceased to see her; there she saw the applicant sitting at the doorway. She entered the house and saw the deceased in bed lying on her back and groaning. While she was there the applicant tried to feed her with some mint tea from a cup but she could not take it. The applicant started to "rough up" the deceased and was going to hit her and Miss Williams left the house. She later returned to the house and saw the body of the deceased.

The defence of the applicant to the charge was a complete denial; he testified that at the time of the incident he and the deceased were not living together, although they had lived together at some time in the past. The deceased, he said,

was living at Cole Lane at the time of her death and in the morning of Tuesday, August 4, at about 8:00 o'clock, a man named 'Duck' came to his home at 55 St. Joseph's Road and spoke to him, as a result the applicant went to the deceased's home at Cole Lane where he saw her lying on a bed, and her body was black and blue; he asked her what had happened and she said she was "gang and beat" at the street dance, he then went and hired a taxi and took her to the Kingston Public Hospital where she was treated and X-rayed, after which he was told by the doctor that he could take her home as she was only feeling pain, and he could warm some water, put some salt in it and give her a bath at home. After this he took the deceased to his home where she remained until she died during the night.

Leave was granted to argue three additional grounds of appeal which had been filed recently. These grounds of appeal related to the issue of the admission in evidence of unfairly prejudicial material and the question whether the learned trial judge properly exercised his discretion in the circumstances and whether the summing-up was adequate.

During the trial there were allegations by prosecution witnesses that the applicant had regularly beaten the deceased in prior incidents unconnected with her death, that the applicant had been in jail, and that he was a thief. Mr. Small submitted that this evidence was not only inadmissible but also so prejudicial that it was very unlikely that any jury could exclude them from its mind when it came to determine the issue as to whether or not the applicant was responsible for the death of the deceased. It was further submitted that the learned trial judge wrongly exercised his discretion in allowing the trial to continue instead of discharging the jury, and that even if the learned trial judge did exercise his discretion in circumstances where no error can be identified, that the way in which the matter was left to the jury did not contain sufficient safeguardsto ensure a fair trial.

Mr. Small then referred the court to the passage from the record relating to the incidents complained of and the passage in the summing-up where the matters were dealt with. The first incident complained of was at p. 46 of the record. In the course of cross-examination of the prosecution witness, Miss Marlene Williams, by Mr. Frater for the defence this exchange took place:

> "Q. In fact ..... Do you know whether Wilton (accused) and June (deceased) had separated just before all this thing?
>
> A. Every minute him beat her, and she go away and anywhere she go him go fi her and beat her and carry her back. Is just so him handle her.
>
> "His Lordship: You saw him beating her?
>
> Witness: Yes sir. Is not the first.
>
> Question: When you see him beat her?
>
> Answer: Is true. Her hand did break and him tek 'axe-saw' (sic) and cut off the something - the 'plaster-polish' (sic), and bound her fi wash him clothes.
>
> His Lordship: You say she would go away?
>
> Witness: Yes, everytime him beat her she run 'way, and him go fi her and carry her back."

There was no application by the defence to discharge the jury after this exchange.

The next incident to which attention was directed by Mr. Small was at p. 62 of the record during the examination-in-chief of Mr. Samuel Brown when he was relating an incident which took place in the morning of 2nd August, 1981:

> "Q. What happened after that?
>
> A. June Davis said to Silva 'Everything you come and beat beat me up.
>
> His Lordship: Everything what?
>
> Witness: Everything you come in and you hear you come beat beat me up.

"His Lordship: Yes, June said that to the accused, everytime what?

Witness: You come in and you hear anything you come beat me up and when you deh a jail is only me one you see come there and come look fe you.

Q. Did anything else happen after that, Mr. Brown?

A. She said, No family, no friend no come look fi you, is only mi alone but a leave you to the police dem.

That is what June said."

At the end of the examination-in-chief of this witness, Mr. Frater applied to have the jury discharged because of the unfairly prejudicial nature of this evidence, his application was refused by the learned judge who stated that he would deal with it at the appropriate time.

The third incident occurred during the cross-examination of the prosecution witness, Samuel Brown, by Mr. Frater: it was a part of the case for the defence that the deceased and the applicant were at one time living in the witness' yard and that the witness was then having an affair with the deceased. The record shows the following exchange between this witness and Mr. Frater at page 80:

"Q. Wasn't the accused man once living in your yard?

A. No.

Q. I suggest to you that he was living in your yard at one time?

A. Not my yard.

Q. And that he moved out because you and June were dealing?

A. Nothing like that.

Q. And that is how they both go to live at 55?

A. How I come by a thief like that in a my yard?"

It must be noted that there was no application by Mr. Frater for the discharge of the jury after the above exchange

and one might well ask whether the defence can properly complain that the learned trial judge should have discharged the jury. To this Mr. Small's reply is twofold:

(1) The cumulative effect of these pieces of prejudicial evidence would be such that the applicant could not be said to have had a fair trial;

(2) that having regard to the earlier refusal of the application for the discharge of the jury it was most unlikely that another similar application would have fared any better.

In his summing-up the learned trial judge referred to the evidence and then directed the jury in these words (pp. 141-142):

> "I thought I would remind you of what took place in this trial, Mr. Foreman and members of the jury, and my advice to you is that in a trial, you may find as I have said witnesses who are over-anxious and deliberately come out with a few words or sentences or something which can be regarded as highly prejudicial. Some counsel ignore the whole thing, don't follow it up at all. The judge, too, may take a silent posture and particularly in a long trial, part of it the jury may even forget it. In this case it wasn't so. It wasn't ignored. It seems that it was driven home by the attorney even after he was put on his guard. My advice to you is this: do not allow your mind to be influenced by anything which came out during the trial either by cross-examination - twice by cross-examination of two witnesses cross-examined and in examination-in-chief by one witness who was apparently trying to deal with the question that was asked him suggested that the accused had been to jail, we don't know for what. In any event you can't try a man by his past record, you have to try him on the facts surrounding the particular charge of which the prosecution complains. That is what he is on trial for nothing else. So, do not allow yourselves to be influenced by anything of that nature. That is what I have to say on it."

In support of his submission on this ground Mr. Small referred to several cases, among which was: R. v. Weaver (1967) 51 C.A.R. 77, and invited the court to follow Weaver's case. The headnote of this case reads:

> "Where some matter prejudicial to the defendant has inadvertently been admitted in evidence, the decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the Court of Appeal will not lightly interfere with the exercise of that discretion. Every case depends on its own facts and it is very far from being the rule that in every case where something prejudicial to the defendant has been admitted in evidence through inadvertence the jury must be discharged."

In this case, there were incidents in the cross-examination of a police officer. In the first incident, it came out that when the police came to speak to the two appellants, they proceeded immediately to address the police with the words of the caution, thereby suggesting that they were persons who were frequently interviewed by the police and familiar with police procedure because they were of questionable character. In the second, reference was made to a particular address with which the appellants were associated and in reply to questions put about the address the police officer stated: "It is an address which is known to the police and has been circulated." An application to discharge the jury was refused and it was decided that the trial should continue. The appeal against the decision of the learned trial judge was dismissed.

In the course of his judgment, Sachs, L.J., said:

> "Then one comes to the final question: is there anything in this case .... to induce the Court to say that the discretion of the Deputy Chairman was wrongly executed when he declined to discharge the jury? Cases parallel to the present one have been brought before the Court of Criminal Appeal on a considerable number of occasions in the course of the last few years and the modern practice has become well defined. In each of those cases, of course, it has been natural for counsel for the appellant or applicant to cite a trio of cases which are mentioned in Archbold's Criminal Pleading etc. 36th ed, para. 503; Peckham (1935) 25 C.A.R. 125; Palmer (1935) 25 C.A.R. 977 and Firth (1938) 26 C.A.R. 148. Those cases cannot, however, be looked at in isolation. As already stated, the modern practice indeed in the light of these cases is that in essence, as has now often been said (see for instance a passage which appears in Parsons (1962) Crim. L.R. 63 whether or not to discharge the jury is for the discretion of the trial judge on the particular facts and the Court will not lightly interfere with the exercise of that discretion.

> "It follows, as has been repeated time and again that every case depends on its own facts. It also as has been said time and again, thus depends on the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what in the light of the circumstances of the case as a whole, is the correct course. It is very far from being the rule that in every case where something of this nature gets into evidence through inadvertence the jury must be discharged."

In the light of this authority which Mr. Small urged the court to follow, let us look at the three incidents referred to above.

The first related to evidence that the applicant had in the past frequently beaten the deceased. The evidence in the case, if accepted, is that the deceased was brutally beaten to death by the applicant whose defence is that not only did he not touch her but that he was the good Samaritan who tried to help her after she had been beaten up at a street dance. In these circumstances, it seems at least arguable that evidence of the relationship between the applicant and the deceased, whether it was a happy or unhappy one, is relevant and admissible. Assuming for the moment, however, that the evidence was inadmissible, it must be noted that defence counsel at the trial did not consider it of sufficient importance to form the basis of an application to discharge the jury and did not make any such application.

The second incident related to the evidence of Samuel Brown that the deceased had said to the applicant that she is the only one who went to visit him when he was in "jail". This bit of evidence came out in examination-in-chief and an application was made for the discharge of the jury without success; the learned trial judge stated that he would deal with it in his summing-up, which he did. There was no indication as to whether it was one or many occasions on which she had visited the applicant in jail, or the circumstances in which the applicant was jailed. The authority referred to above makes it clear that whether or not to discharge the jury is for the

discretion of the trial judge on the particular facts.

The third incident related to the reply by Mr. Samuel Brown to defence counsel in cross-examination when the witness was being pressed with questions suggesting that the applicant at one time lived in the witness' yard and the witness said: "How I come by a thief like that in my yard?" suggesting as I understand it, that the applicant was a thief. Again, no application was made by defence counsel for the discharge of the jury after this incident. Mr. Small submitted that any such application would have been refused as was the case earlier, but to our minds that is no reason for failing to make the application, and to suggest, as was done, that the learned trial judge ought to have invited defence counsel to make the application is, to say the least, a novel one without any basis or authority in support of it. It is reasonable to assume that defence counsel is competent to carry out his functions as counsel for the defence.

It should also be noted that the accusation was one of dishonesty and if the charge before the court related to an offence involving dishonesty it may be that the learned trial judge would have been more inclined to grant the application to discharge. As it was, it appears rather improbable that any jury would have been influenced by the statement complained of in the circumstances of the instant case.

It was further argued that the cumulative effect of the three pieces of evidence alluded to was such that the applicant could not be said to have had a fair trial. It does not seem to us that this is a case where it can be said that the effect of the incidents is in direct proportion to the number of incidents, that is, that the effect of two will be greater than one, and that the effect of three greater than that of two. It all depends on the nature of the evidence, and it is for the learned trial judge to have regard to what has been said and to all the circumstances of the case in deciding whether or not to exercise his discretion and discharge the jury. As Sachs, L.J.,

stated above the court will not lightly interfere with the exercise of that discretion. Having exercised his discretion not to discharge the jury, the learned trial judge gave an adequate direction to the jury as to how they should deal with the evidence, the admission of which was complained of by the applicant.

Another complaint by Mr. Small was that when Mr. Frater applied to the court to discharge the jury after the second of the incidents related above the learned trial judge in refusing the application referred to the first incident which had happened the previous day. Mr. Small went on to submit that what took place on the previous day (the first incident) was one of the factors which were relevant to the learned trial judge's decision to refuse the application. As we understand the decision the learned trial judge was merely saying that after the incident of the previous day it would in any event be necessary for him to give a direction to the jury as to the allegation of the applicant beating the deceased on previous occasions and the later allegation that formed the basis of Mr. Frater's application could conveniently be dealt with at the same time in the summing-up to the jury, as both incidents related to the admission of unfairly prejudicial evidence suggesting that the applicant was a person of bad character.

A further complaint was made in regard to the cross-examination of the applicant by counsel for the Crown. At page 124 of the record we have the following:

> "Q. So you ever hit her (deceased) during the time you knew her?
>
> A. No, me and her never in no fight no time.
>
> Q. You never hit her?
>
> A. No, no time at all.
>
> Q. And you didn't tell the police that you lick her?
>
> A. No, I never give the police no statement; the police never take any statement from me."

Mr. Small submitted that any cross-examination directed at an accused person on the basis that he has made an admission to

the police as to any important element of the prosecution's case is improper and unfair, unless the prosecution has proved affirmatively to the satisfaction of the Court and as a part of its case that such a statement was obtained voluntarily; in the absence of such it must be assumed that the statement, whether written or oral, was obtained involuntarily, if obtained at all.

No evidence had been adduced as to any statement, cautioned or otherwise, made by the applicant to the police.

It is noted at pages 83 - 84 of the record that the prosecution had proposed to call as its last witness a police officer to give evidence of his investigation and arrest of the applicant, and from a statement made to the learned trial judge by Crown Counsel it appeared that there was a statement to the police which may have been put in evidence. But the police officer was not in court when required and after the learned trial judge had given a broad hint that this would not take the case any further, Crown Counsel closed the case for the prosecution. There was therefore no statement before the court nor was there any evidence of any statement by the applicant to the police.

Mr. Small submitted that in the light of the previous unfortunate disclosure of the existence of a statement the learned trial judge ought to have directed the jury at the same time when the question was put that they ought not to draw any adverse inference against the applicant in view of the questions and answers given; further, that the failure of the learned trial judge to give similar directions to the jury in his summing-up constituted a grave irregularity at the trial.

There is merit in the submission that it was improper for Crown Counsel in the circumstances to have suggested to the applicant that he had made an admission to the police, and that it was desirable that some comment be made by the learned trial judge at the same time or in his summing-up or both.

To suggest however that the failure of the learned

trial judge to comment on this to the jury in his summing-up constituted a grave irregularity at the trial is to exaggerate the effect of one incident which when one looks at the trial as a whole can be regarded as a minor incident, having no significant impact on the trial.

The evidence against the applicant in this case was overwhelming and the matters complained of could have had very little effect on the trial as a whole. The jury retired for seven minutes before returning with a unanimous verdict.

As Sachs, L.J., said in the Weaver case:

> "There was nothing in these particular matters which introduced such a degree of prejudice that it could not be cured by the judge acting wisely in his discretion in the later stages."

As we stated earlier the learned trial judge dealt adequately with the complaints made, except for his omission to mention in his summing-up the fact that there was no evidence adduced by the prosecution of a statement by the applicant. Accordingly, we would, for the reasons given above, dismiss the appeal and affirm the conviction.