JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 102 & 103/83

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

R. v. YVONNE JOHNS.
FREDERICK McINTOSH

Mr. Richard Small & Mr. F. Hamaty for Appellants

Mr. F.A. Smith & Miss H. Walker for Crown

9th 10th 11th, 12th April,
& 8th June, 1984

CAREY J.A.

We propose to treat the hearing of these applications for leave to appeal as the hearing of the appeals, as the grounds filed and argued before us, raise questions of law.

These appellants, who are mother and son, were both convicted in the Circuit Court for the parish of Westmoreland held at Savanna-la-mar before Morgan J., and a jury on 20th December last, and sentenced to death on an indictment which charged them jointly with the murder of Altimont Johns on 23rd February, 1982. The deceased was the husband of the first appellant and the step father of the other.

The case for the prosecution was based wholly on circumstantial evidence, the quality of which was severely criticised by Mr. Small. The circumstances surrounding the charge, are of the sketchiest. The victim lived with his wife (the first appellant) and her two children, Vivienne or Carol McIntosh and Frederick McIntosh (the second appellant) at Pipers Corner a district in the parish of Westmoreland. On 22nd February 1982 at about 9.00 p.m., one Iveta Wright, a neighbour of the Johns family, was on her way home when she heard the raised voice of Mr. Johns coming from the bedroom occupied by his step-

daughter, Carol. What he said was never however vouchsafed to the jury as the learned trial judge did not allow the content of the statement to be admitted. Counsel who appeared for the Crown did not demur although as it later emerged, the first appellant was certainly present in the house when the statement would have been made.

In the early hours of the following morning, about 1.30 a.m., Ivan Wheatly who had stayed overnight in the neighbourhood, was awakened by shouts of murder originating from premises which adjoins the Johns. On investigation, he found Carol McIntosh kneeling by the steps of the house on those premises. When the lights were switched there, he noticed both appellants standing together by a sand heap in their own premises. The first appellant told him that - "they kill Mr. Johns." He next went accross to the Johns' house where he observed the body of Mr. Johns lying by the verandah steps. There was a large wound under the neck. He returned to Mrs. Johns who volunteered the information that while she was asleep she heard a stumbling outside and when she looked, saw 3 men running off. Wheatly said he went to the gate but saw nobody. Finally he touched the body which he found cold and commented as much. A police officer, Det. Sergeant Gayle arrived on the scene at 8.15 a.m. Both appellants were present. He saw the dead body of Mr. Johns which showed injuries to the forehead and neck. In response to his enquiry as to what had occurred, the first appellant said that after her husband arrived home, he had put on his pyjamas and repaired to the verandah where he sat on a chair drinking a beer. Subsequently she retired to bed but awoke at 2.00 a.m., to find her husband not in bed and on going outside, found him lying in the same position that Gayle had himself seen.

The officer pointed out what appeared to be blood-stains on the big toe of her right foot and asked her how it got there. She replied that she was unable to say but supposed it might have got there - "when me find him dead and a fool around the body." She agreed that some blood-stains on her

right knee looked like blood-stains. She produced the night-dress which she said she was wearing that night. The officer also found another night-dress which belonged to this appellant. Both garments bore signs of blood-stains. During this interview, the other appellant who was present, said nothing.

In the room occupied by the other appellant, the police retrieved what appeared to be the murder weapon from under the mattress of a bed in that room. The knife was claimed by the male appellant as his, but he said he did not know how it got there and the last place he had set eyes on it, was in the kitchen. Near the body, was seen a large concrete flower pot. It also had blood-stains. It had obviously been used to hit the deceased in the back of his head for in that area the police officer saw what he described as a "bash".

On 28th April, 1982 the appellants were both arrested for the murder of Altimont Johns. Neither appeared to have said anything after caution. The police officer was less than helpful in stating in evidence that he did not remember if either said anything, as it is inconceivable that the officer could have made this response if anything of significance had been said by either of them.

In their defence, both the appellants made statements to the same effect. After stating his or her name, each said:

> "I did not kill (the deceased)
>
> "I know nothing about his death,
> "That is all I wish to say."

It is convenient at this point to observe that however this approach might be supportable in the case of the 2nd appellant, it appeared somewhat curious that the 1st appellant who was alleged to have made statements both to a police officer and a private person and which statements were quite inconsistent with each other, could neverhteless be content merely to assert that she

knew nothing about her husband's death.

Howsoever that may be, we can now advert to the grounds of appeal filed and argued on behalf of these appellants. The main thrust of the submissions made by Mr. Small was to challenge the learned trial judge's directions on circumsstantial evidence. In this connection, we were referred in his ground to the following directions, characterized by him as a misdirection (they appear at page 77).

> "..... eye witness can sometimes be mistaken. He or she can be mistaken about a person, mistaken about an act, or, as you hear very often, sometimes are influenced by grudge or influenced by malice. But you don't find that in circumstantial evidence. It is free from all these blemishes. They say it has the precision of mathematics ...."

The effect of these directions it was said, was to tell the jury to treat all circumstantial evidence as beyond taint. The trial judge should have told them that before they can test the circumstantial evidence to see if it had the inferrential and logical compulsion of a mathematical formula, they should be satisfied about the truth of each of the links that go to make a chain of circumstantial evidence.

In our view, if the effect of the directions of the learned trial judge taken as a whole, was capable of being understood by the jury as meaning that all circumstantial evidence was beyond the pale of fallibility, then, we would be impelled to say that such a direction would amount to a misdirection.

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. See the recent unreported cases of R. v. Lloyd Barrett C.A. 151/82 dated 4th November, 1983 and R. v. Carlton Linton C.A. 169/81 dated 16th January, 1984.

With this in mind, we may now examine the directions of the learned trial judge to see whether the strictures levelled at them, are at all warranted. Before doing so, there is one comment which we wish to make. This court has made it abundantly clear in many cases hitherto, that it will not prescribe formulae for summations, the sanction for which will be the allowing of appeals. A trial judge should be free to tailor his summing up, having regard to his assessment of the jury who are called upon to determine guilt or innocence, the nature or complexity of the facts, and the law which is applicable to those facts. So long as directions are clear, accurate in point of law, fair and adequate to enable a jury to understand the issues which fall to be considered, and the law they are called upon to apply to the facts before them, then a trial judge will have ably discharged his function and responsibility as such in relation to a criminal trial in this country. This court will not interfere in those circumstances.

The learned trial judge began by pointing out to the jury, correctly as we think (at page 73) that in order to be satisfied so that they felt sure of guilt, then, they had to be satisfied as to the credibility of the witnesses.

At page 73, she said this:

> "It is the crown who has brought these persons here and it is their duty to satisfy you to the extent that you feel sure that these persons are guilty of this charge. There is no duty on them. In our system of law they are innocent persons until you by your verdict say they are guilty. So, unless the crown satisfied you to the extent that you feel sure, it is your duty to acquit them. Insofar as the evidence goes, you look at the evidence, you decide what you are accepting and what you are rejecting. You have a witness in the box, you may wish to accept a part of the evidence of the witness or you may wish to reject the other part. Or, you may wish to accept all of what the witness says. On the other hand you may consider that the witness is telling so much lies, the witness is so untruthful you don't know what part of the story to believe and in this case you just reject everything. But, it is a matter entirely for you. You sat there, and I told you this at the commencemet of the circuit, you look at the witness in the box, you see how the witness gives the answers and as men and women of the world you know that you can just look at the person sometimes when they are telling a story, and know that they are lying or know that they are telling the truth. But you are to take all of that into account when you come to decide what you accept and what you reject."

She then went on to point out that it was open to the jury to draw inferences if the evidence from which it was drawn was credible. It was put in this way at page 75.

> "Now, when you find facts that are proved to your satisfaction, you are entitled to draw what is called a reasonable inference from those facts, and in order to assist you in coming to a decision."

This approach which she counselled the jury to adopt, she brought home realistically to them at page 87, where she was reminding the jury of the differing stories told by the female appellant. Before the jury could draw any inference from that circumstance, they would be required to accept that those statements were in fact made; the witness must have been found to be speaking truthfully. She directed them in this way:

> "What is the reasonable thing that you would expect, Mr. Foreman and Members of the Jury? Would she not be emphasizing this to the police - three men came and three men ran? That is if you accept that she did say so to Mr. Wheatly, and if you do accept that, what do you think of her failure to tell the police officer? Is this because it never happened at all? And if it never happened at all, why is she making it up? It was said in the witness-box. It is true, that she, by cross-examination denies that she had said it but you have no explanation coming from her for any reason why the police had not been told. Is this consistent with innocence? Or does it strengthen the inference of guilty knowledge? This is a matter for your consideration"

Having regard to what we have indicated above, we are not persuaded that the learned trial judge can fairly be faulted. We will consider later in this judgment the question whether the evidence adduced, satisfied the standard required where a charge depends on circumstantial evidence. But at this point we are content to conclude that the ground (ground 3) on which these submissions were made, fails.

As to ground 2, it was stated in the following terms:

> "The Learned Trial Judge erred in failing to direct the jury that a finding that one or both of the accused had mere knowledge of the circumstances in which the deceased met his death could not constitute proof of the offence. This non-direction in the circumstances of this case amounted to a mis-direction, particularly in the light of the learned Trial Judge's directions to the jury at page 87:
>
> > "But you have no explanation coming from her for any reason why the police had not been told. Is this consistent with innocence? Or does it strengthen the inference of guilty knowledge? This is a matter for your consideration."

In support of this ground, it was argued that since it was open to the jury to come to the view that one or other of the appellants merely had knowledge about the circumstances of the killing without more and was withholding that information as it could possibly

implicate that appellant on some one else, then the trial judge was obliged to alert the jury that that knowledge was not enough to implicate that appellant in the crime charged. Mr. Small pointed to the quotation noted in the ground, and said the reference to "guilty knowledge" was singularly unfortunate as it suggested that knowledge per se was a sign of guilt. He relied on an Indian case Machander Pandurang v. State of Hyderabad (1955) A.I.R. (S.C.) 792 where it was held that:

> "Enmity and opportunity and motive which others shared, plus mere knowledge of murder are not enough to bring home a charge of murder".

Mr. Smith in a lucid and economic reply pointed out correctly, as we think, that the impugned direction must be looked at in the context of the defence raised. The female appellant apart from stating in her defence that she knew nothing about the matter and had not killed her husband did not at all advert to any of the conversations in which the crown alleged she had taken part. There was in the circumstances, evidence of two inconsistent exculpatory statements of this appellant. It was therefore entirely correct for the learned trial judge to have left the probative effect of the inconsistency for the jury's consideration. And she also required the jury to determine whether these statements had in fact been made by her, although there was no evidence contradicting them.

We think those arguments are well founded. The directions in this regard were concerned with the evidence adduced as to her conduct, viz, her relating inconsistent stories, which bore on the question of her participating in the crime and was not concerned with the state of knowledge of the particular appellant.

There is no gainsaying the obvious fact that the learned trial judge made use of the term "guilty knowledge." We are nonetheless quite unable to appreciate how the jury would understand that phrase to mean, that if the appellant were aware of the circumstances of the crime, then they were on that account and on that account alone, entitled to find a verdict of guilty. Where

an accused's conduct is in question, his untruthfulness is a consideration on the question of his guilt. As Lord Devlin in delivering the advice of the Privy Council said in Broadhurst v. R (1964) A.C. 441 at page 457:

> "But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depend of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

We think that when the learned trial judge used the phrase "guilty knowledge", this was in contradistinction to innocence not innocent knowledge. It is right to say the term "guilty knowledge" was unfortunate in that it was an imprecise use of language. The jury would however, in the context in which the phrase was used, understand the judge to mean that it was for them to make up their minds what they made of a wife who had reason to believe that her husband had been killed by intruders and failed to provide the police with that information, but who had, according to the evidence, given that information to a civilian and told the police that she awoke to find him dead. It was for them to say whether such conduct was consistent with guilt or innocence. This conduct on the part of the female appellant became part of the chain of circumstances to be considered with other evidence in the case by the jury in their determination of the guilt or innocence of this appellant. In this connection, there would be no need to direct the jury with respect to knowledge on the part of either of the appellants of the crime or for that matter their presence when the crime was committed. No question of common design arose for the consideration of the jury, seeing that the crown's case was that mother and son had participated in the crime. To direct the jury on these matters identified by learned counsel would in our view, unduly prolong the summing up and tend to confuse the jury as to the real issues which

fell to be determined by them. In our view, there is no merit in this ground.

There were two other grounds but with all respect to Mr. Small, although they were formulated as complaints of shortcomings in the summing up by the learned trial judge, in reality, they amounted to criticisms of the nature and quality of the circumstantial evidence adduced by the crown at the trial of the appellants. We have no intention whatsoever of ignoring them but will mention them so that they may be answered specifically and then we propose to consider what we would suggest, is the real gravamen of those grounds.

Ground 4 was in this form:

> "In reviewing the evidence, and in considering the possible inferences open to the jury, the Learned Trial Judge failed to adequately direct the jury on the need to keep the two cases against each accused separate and independent. The Learned Trial Judge failed also to direct the jury that an inference arrived at which was adverse to one accused did not necessarily mean that such an adverse inference should be drawn against the other accused. In particular, the Learned Trial Judge failed to direct the jury that if they were unsure as against which accused an adverse inference should be drawn, they should not draw such an inference against either accused. The Learned Trial Judge failed to direct the jury in relation to those aspects of the evidence which were capable of implicating one accused but which could not be used against the other."

The Learned trial judge approached the matter in this way. She indicated at page 97 the material put forward by the Crown in its case against each of the appellants and advised them that the case against each of the appellants should be separately considered. She said this at page 97 et seq:

"Now Yvonne Johns made a statement from the dock. What did she say? 'I did not kill my husband. I know nothing about his death. That is all I wish to say.' Frederick McIntosh also made a statement from the dock; and what did he say? 'I did not kill my step-father, and I know nothing about his death. That is all I wish to say." That is it, Mr. Foreman and members of the jury. How do you approach this? You have to look at the prosecution's case; you have to look at the case against each accused separately, and what the prosecution is saying as far as Mrs. Johns is concerned is that you are to look at her behaviour, at the opportunity, you are to look at the fact that she gave conflicting statements - look at the statement she gave to the police and the statement she gave to Mr. Wheatly. You are to look at the fact that there was blood on the nightie. As against that, the defence is saying that the statement Mr. Wheatly said she made she did not make it, and that the blood on her nightdress could have got there when she was fooling around the body. In respect of Mr. McIntosh they ask you to look at the knife, where the knife was found, the fact that the knife had the same group blood as the garment of the deceased, and to draw the inference that the knife belonged to the accused McINtosh, that he put it under the mattress, and that that was the knife that was used to kill the deceased, and that it was used by him. What the defence is saying about all that is that the knife could have gotten there by any other means, the knife could have been put there by Carol.
The matter of the shorts taken from the accused McIntosh and sent to the Analyst, the evidence of Mr. Wheatly is that when he went to the home of Mrs. Johns he saw McIntosh wearing pants. The pants were not sent to the Analyst. You are to look, along with that, on all the other circumstances in the case - the behaviour which has been pointed out to you during the summing-up, and the opportunity, and if you are satisfied that a case is made out you look at what the defence says, and the defence has said in cross-examination and from the dock, that they know nothing at all about the killing."

None of the circumstances therein isolated by the learned trial judge as affecting any one appellant, impinged upon the other. Any directions along the lines suggested in this ground of appeal would render the summing up nothing more than an arid disquisition on some legal principle wholly unconnected with the facts in the case. Nothing could be more calculated to divert the jury from focussing on the real issues which a trial judge is obliged to bring to the attention of the jury for their careful consideration. We would add that we were not able to find any bits and pieces of evidence which required any such treatment.

As to the other ground, it recited as follows:

> "The Learned Trial Judge failed to adequately assist the jury on the issue of the conflict between the case for the Crown and that for the defence as to whether the female accused had told the witness Wheatly that she had seen three men running from the scene."

It was the crown's case that the female appellant had told the witness Wheatly that she had seen three men running from the scene. During cross-examination he was challenged as to the truth of his statement and maintained that she had volunteered that information to him. In her statement from the dock, she contented herself by saying that she did not kill her husband and knew nothing of his death. Strictly speaking, the position at the end of the day was that there was unchallenged evidence, that the female appellant had told Mr. Wheatly that she had seen three men running from the scene. There was also uncontradicted evidence that she had related an altogether different tale to the police officer. Both stories were exculpatory and so consistent with the denial of the charge made in her statement. The jury were not required to resolve any conflict between the versions but to consider whether the fact of volunteering two different exculpatory stories was consistent with innocence or guilt. In these circumstances the trial judge would be obliged to leave the question of the truth or otherwise of Wheatly's statement for their

consideration.

At page 85 the learned trial judge on this point directed the jury in these terms:

> "If you believe that what he said here is the truth, that she told him these words that she viewed the three men running; if you believe that she said it, you put your own interpretation as to what you think it means and how you will use it."

After referring to certain aspects of the cross-examination of Wheatly, the learned trial judge ended up by saying this at page 86.

> "..... that is the evidence of Mr. Wheatly, Mr. Foreman and members of the Jury, This is what the Crown says happened, and what the defence says is that, he is not speaking the truth. It is entirely a matter for you whether you believe him or not. You saw him, you heard him; how did he impress you? Do you think he is making up these things? Do you think he is speaking the truth? Do you think he is lying? It is entirely a matter for you."

Our attention was drawn to a New Zealand case, The Queen v. Duhar (1969) N.Z.L.R. at page 763 where it was held that:

> "Where lies or evasions of the accused constitute an important element in the chain of proof put forward by the crown a clear direction from the trial Judge to the jury is necessary. How far a direction is necessary will depend upon the circumstances of each case.

In the circumstances of this present case, we do not see what clearer directions could have been given. In our judgment, the directions were clear and adequate.

This brings us to the matter of substance which we earlier mentioned, whether the circumstantial evidence in this case pointed in one direction and one direction only, that being guilt, and was inconsistent with any other conclusion. In the case of the female appellant, as indeed that of the other appellant, no evidence whatever of motive was adduced. The evidence against the female appellant consisted of facts which are confined to the

inconsistent exculpatory statements made by her, her opportunity for committing the crime, the fact that blood stains were found on her night dress and person, the fact that when Wheatly touched the body of the deceased man, it was cold and this at a time when according to her explanation to Wheatly her husband must have been killed shortly before. The sequence and content of her stories viz, first telling Wheatly that 3 men had killed her husband and then telling the police she knew nothing about it, the curious form of her statement from the dock which was identical to that of the other appellant were all links in the chain of circumstantial evidence and factors to be considered by the jury in their deliberations.

As to the other appellant, the evidence against him was that one of the murder weapons, which he admitted to be his property, was found in his room and he had the opportunity of committing the crime and secreting the knife under the mattress in his room. The jury would also have been entitled to look at the nature of the injuries inflicted on the deceased. These were a compound fracture of the frontal bone of the skull which caused a cerebral laceration to the front of the brain and severance of the left external jugular vein. Death was attributed to the compound fracture of the skull, the cerebral laceration of the brain and the laceration of the external jugular. It was plain also that the flower pot found in close proximity to the body after death, was the weapon used to damage the skull. It is not difficult to visualize that the victim must have been first hit with the flower pot and then had his throat cut. It was also open to the jury to come to the conclusion that whoever participated in the killing of Mr. Johns must have been members of the Johns household. The stories told by the first appellant are explicable on no other rational hypothesis. Then there was

evidence of the raised voice of the deceased before his death coming from the room occupied by the step daughter and the second appellant. The evidence of Iveta Wright which was not challenged, showed that it was the step daughter who occupied that room. The police officer under cross-examination accepted a suggestion that the room was occupied by both. This evidence was probably hearsay on this point.

From what has just been said it is in our view, sufficient to dispose of the argument that the learned trial judge should have acceded to the no case submission made on behalf of the second appellant. The crown's case did not rest entirely on the finding of the appellant's knife, that being the murder weapon in his own room under the mattress of a bed. Since the room was locked, it could only have been placed there by the murderer or a person in particeps criminis. Further, we do not agree that the learned trial judge inadequately and wrongly directed the jury on the possible reasonable inferences that were open on the evidence relating to Frederick McIntosh. In this connection, we quote the relevant directions which appear at page 98:

> "In respect of Mr. McIntosh they ask you to look at the knife, where the knife was found, the fact that the knife had the same group blood as the garment of the deceased, and to draw the inference that the knife belonged to the accused McIntosh, that he put it under the mattress, and that that was the knife that was used to kill the deceased, and that it was used by him. What the defence is saying about all that is that the knife could have gotten there by any other means, the knife could have been put there by Carol."

We consider this direction adequate and fair. It left for the jury's assessment the possibilities suggested by both sides. In these circumstances, we are of opinion that the trial judge cannot be faulted.

We conclude finally that the evidence adduced, despite the absence of any proved motive went beyond mere suspicion and the jury were entitled, having regard to the directions given and the evidence adduced to arrive at the verdict which they did. The appeals are accordingly dismissed; the convictions affirmed.