JAMAICA

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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 112/76

BEFORE: The Hon. President
The Hon. Mr. Justice Watkins, J.A.
The Hon. Mr. Justice Henry, J.A.

R. v. SYDNEY CAMPBELL

Mr. B. Macaulay, Q.C. and Mr. K. St. Bernard for the appellant.

Mr. J.S. Kerr, Q.C., Director of Public Prosecutions and Mr. G. Andrade for the Crown.

February 21, 22, 24, 25, 28;
March 1; May 27, 1977

Henry, J.A.:

The applicant was convicted in the Home Circuit Court on June 17, 1976, of the murder of Richard Mills and sentenced to death. This was his second trial and conviction for this offence, the first conviction having been set aside on appeal and a new trial ordered.

The case for the prosecution was that what had started out as a business association between the applicant on the one hand and Mr. and Mrs. Richard Mills on the other, had developed, firstly into a family friendship and later, into a very close and intimate relationship between the applicant and Mrs. Mills.

This later development led to quarrels between the applicant and the deceased in the course of which the applicant was often heard to tell the deceased that his time was up with Celeste - the deceased's wife, and on one occasion he was

even heard to threaten the deceased that he was going to kill him. Matters reached a climax in 1974 - sometime in January or February - when Mrs. Mills went out one Saturday night with the applicant and did not return home until 2 p.m. the next day, (Sunday). As Ivy Fraser, who was employed as a domestic help to Mr. and Mrs. Mills, put it - "Mr. Campbell and Mrs. Mills went out the evening and Mr. Campbell never carry back Mrs. Mills until 2 o'clock ..... the next day."

In the confrontation that followed the applicant is alleged to have said to the deceased - "Leave Celeste and give me; leave Celeste and give me; your time is up with Celeste", and it took the efforts of the police, who had been summoned by the deceased, before the applicant could be prevailed upon to leave the Mills' home that Sunday afternoon. Thereafter (and up to the night the deceased was killed) the applicant ceased his visits to the matrimonial home of the Mills (at 46 Woodhaven Avenue in St. Andrew).

Because of the relationship which had developed between the applicant and Mrs. Mills the deceased had at one stage initiated the taking of divorce proceedings against them but these were not pursued.

The deceased, his wife, his infant son Ian and their household help Ivy Fraser lived at No. 46 Woodhaven Avenue. Their next door neighbour was Mrs. Christine Mitchell, and she was the principal witness in the case.

On May 18, 1974, Mrs. Mitchell had a birthday party at her home for one of her daughters and the entire Mills' household attended, their house having been locked up, but for the front door which was left open. Mrs. Mills left the party at about 7.30 to 8 p.m. and went away in a taxi. She did not return home until early the next morning. Mr. Mills who had been going back and forth between his house and Mrs. Mitchell's, finally left at about 9.30 p.m. and returned to his house along with his son and Ivy Fraser.

As far as was then known, the only persons in the house were Mr. Mills, his son Ian and the maid Ivy Fraser. At about 9.45 p.m. Ivy Fraser retired to her room after putting Ian to bed and Mr. Mills was left alone in the living-room watching a television programme. Sometime later Ivy Fraser heard a terrible scream coming from the direction of the living-room. She recognised the sound as Mr. Mills' voice and on hurrying into the living-room she found the television still on, the lights in the room still on, but no Mr. Mills. She then went to his bedroom and on switching on the bedroom light, she saw Mr. Mills lying on the floor by his bedside. She called to him but he did not answer.

Frightened she ran back to her room, shut herself in, and called out to her neighbour Mrs. Mitchell asking her to come over as something had happened to Mr. Mills.

Mrs. Mitchell came over, went to the front of the house and, according to her testimony, was about to step up on to the verandah when she saw the applicant coming out of the living-room door on to the verandah with Mr.Mills across his arms lying on his back. The applicant then proceeded to "plunk" Mr.Mills through the open left hand door of a Ford Escort car which was parked in the driveway.

It transpired that Mr.Mills was dead and the Pathologist testified that he had died from asphyxia resulting from constriction of the neck which could have been accomplished by a cord placed, in his opinion, from behind the neck of the deceased. It transpired, also, that the back of the chair in which Mr. Mills had reclined as he watched the television programme was close to an adjoining store-room in which was a meat-cutting machine to which was attached just such a cord - long enough to reach and encircle the neck of anybody sitting in the chair in which Mr. Mills had been sitting - and traces of human blood were found on that cord.

The defence was a denial that the applicant was at the deceased's home on the night he was killed - and it was

contended that either Mrs. Mitchell was deliberately lying or she was mistaken as to the identity of the man she had seen.

At the first trial one of the witnesses who gave evidence for the Crown was Mrs. Celestine Mills the widow of the deceased. She has left the Island for the United States of America and was not available to give evidence at the second trial. At the outset of the hearing of this application counsel for the applicant sought to have the evidence of this witness at the first trial considered by this Court pursuant to the provisions of either paragraph (a) or paragraph (c) of section 28 of the Judicature (Appellate Jurisdiction) Act. These provisions are as follows:

> " For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice -
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case, and
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> (c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application. "

We refused this request because we did not consider that it could properly come within the ambit of those provisions. The evidence of a witness at a previous trial can only be relevant to the second trial for the purpose of indicating inconsistencies in the evidence of that witness and of attacking the credibility of that witness. It cannot in any other respect be said to be "connected with the proceedings" in so far as the second trial is concerned and does not therefore qualify for production under paragraph (a) of the section. Paragraph (c) is clearly confined to the evidence of witnesses who are competent but not compellable and Mrs. Mills being a compellable witness her evidence could not be received pursuant to the provisions of this paragraph.

Several grounds of appeal were argued before us. It was argued that "the learned trial judge erred when he ruled that the no case submission must be made in the presence of the jury" and that he further erred when he overruled that submission. Reliance was placed on R v Falconer Atlee 58 C.A.R. 348 where it was stated at p. 354:

> " This Court has said again and again that it is very undesirable that this should happen where there is a submission of no case to go the jury either because the evidence for the Crown is suggested to be insufficient to justify leaving the case to the jury, or because, though there may be some evidence, it is so tenuous that it would be unsafe to leave the case to the jury. It is most undesirable that that discussion should take place in the presence of the jury. Inevitably the judge may express a view on a matter of fact, which is within the province of the jury. The presence of the jury may hamper freedom of discussion between counsel and judge. But the jury stayed there for what must have been quite a long time before the learned judge gave his ruling in favour of the husband but against the appellant. Etc., etc., etc.
>
> ..... this Court desires to emphasise once again that this sort of submission should, as a general rule, be made in the absence of the jury and not in their presence. "

There are no doubt cases in which counsel for an accused person may regard it as less inhibiting to make such a submission in the absence of the jury, but in the majority of cases it is more advantageous for the accused to have the jury present during the making of such a submission since if it does not succeed they would still have been exposed to arguments in his favour which will no doubt be repeated and further emphasized during the course of the final address to them. We are of the view that each case must be decided on its merits and it must be left to the discretion of the trial judge to decide whether in a particular case he will accede to the request of defence counsel that the submission be made in the absence of the jury. In the instant case the learned trial judge unfortunately did not permit defence counsel to complete his submission and, if he so intended, to indicate the reasons for his application. However, it has not been shown or indeed submitted before us that the applicant

was in any way prejudiced at the trial by the fact that the jury heard the no case submission. The submission contained a detailed analysis of the evidence for the Crown but in essence the effect of it was a contention that the main witness Christine Mitchell was so discredited that no reliance could be placed on her evidence and no reasonable jury properly directed could convict on that evidence. It will be necessary subsequently to deal with this matter in greater detail but it is sufficient for the moment to state that in our view the learned trial judge was correct when he ruled that there was a case to answer. In so doing he expressed no views on the facts and he was at pains to explain to the jury in his summing-up the effect of his ruling.

Complaint was made that the learned trial judge admitted evidence to show that Mr. Mills had given and subsequently withdrawn instructions for the filing of a divorce petition against his wife. This evidence, it was submitted, could only be admissible to establish motive if it could be shown that the applicant knew that those instructions had been given and withdrawn. We agree with this submission but we do not think the evidence was so prejudicial as to result in a miscarriage of justice.

Complaint was also made as regards the directions of the learned trial judge on circumstantial evidence. The learned trial judge had this to say:

> " Evidence in a case, members of the jury, may be of two kinds. We refer to them sometimes as direct or 'I see' evidence or circumstantial evidence. Both are good, equally good, whether it is direct or 'I see' or whether it is circumstantial evidence. Mrs. Mitchell says she saw Mr. Campbell in the yard. That would be direct evidence, but as to who it was who strangled Mr. Mills with the cord, the Crown is seeking to prove that by circumstantial evidence. We usually illustrate Circumstantial Evidence to you, members of the jury, by likening it on to a chain. You are all aware of the composition and the purpose of a chain. Each link of a chain by itself is useless but when all those links are forged together you have a length of unbreakable mass capable of withstanding stress and strain. This is why I say

" circumstantial evidence is sometimes likened unto a chain but you will remember that a chain is as strong as its weakest link and if the chain snaps you have no strong chain. So if the links in circumstantial evidence snap, then you never had a strong case of circumstantial evidence. It has been said, members of the jury, that circumstantial evidence consists of this: that when you look at all the surrounding circumstances you find such a series of undesigned and unexpected coincidences that as a reasonable person, which each and everyone of you there is, your judgment is compelled to one, and one conclusion only - guilty. The nature of the evidence, members of the jury, must be such that you must be satisfied that there is no rational mode of accounting for the circumstances other than the conclusion that the prisoner is guilty. "

These directions do not in our view differ in essence from the directions in Hodges case which this court in R v. Bailey (1975) 13 J.L.R. 46 described as the "rule in Hodges cases" which had in Jamaica "become a settled rule of practice". The directions made it clear to the jury that they could convict on circumstantial evidence only if it pointed to the guilt of the accused and to no other rational conclusion. This is all that is required.

Complaint was also made that the learned trial judge misdirected the jury on the evidence of Mrs. Ivy Fraser at page 592 when he told them:

" She heard Mrs. Mitchell talking around the front. She did not leave her room. Whilst - well, we don't know who Mrs. Mitchell would have been talking to, if she heard Mrs. Mitchell talking, as nobody else was there, but Ivy, Ian, the man in the bedroom and Mrs. Mitchell, at the time; but she said she heard Mrs. Mitchell talking around the front. "

The relevant portions of Mrs. Fraser's evidence are as follows:

In Chief at p. 49:

" Q. Now, from your room, did you hear anything around the front?

A. I heard Mrs. Mitchell talking.

Q. I see -

His Lordship: Only her voice you heard?

Witness: Yes, sir; I heard Mrs. Mitchell and I talk to her. I say, 'Mrs. Mitchell, where .....'

His Lordship: I don't want to hear what you said."

Under cross-examination at p. 64:

" Q. Now when Mrs. Mitchell got to the front of your house, she called to you?

A. Yes; she say where I am.

Q. Hold on; she called to you. You said she said where are you?

A. Yes.

Q. And you answered?

A. I said I am in my room.

Q. And .....?

A. And then she said she is round the front.

Q. She said she was in the front?

A. Because I ask her where were you and .....

Q. And she said she was in the front?

A. Yes, sir; because I heard her .

Q. Now, but you did not go out of your room?

A. No, I didn't go out, sir.

Q. Now, and I would be correct to say too, that shortly after you both had this talking, you and her talking to each other, shortly after that, you saw her come back over by your house again?

A. Yes; she came back over our yard.

Q. She came back over your yard?

A. After a while.

His Lordship: After she called to you?

Witness: After she said she was round the front. She was over our yard, Your Honour, and after that I heard her calling me .....

Mr. St. Bernard:

Q. She spoke to you and then shortly after she came back over to your yard and you heard her calling you again?

A. Yes.

Q. Now, and when she called you again, Mrs. Fraser, you spoke to her again?

A. Yes.

Q. And she spoke to you?

A. I talk to her.

Q. And she talk to you?

A. Both of us was talking to each other. "

At p. 71:

" Q. And she comes over?

A. Yes; she come quickly too.

Q. And she called you from the front and she speaks to you from the front?

A. Yes.

Q. And you spoke to her?

A. I talk to her.

Q. But yet you do not come out of your room?

A. Don't come out at all, sir, because I told you I am always scared.

Q. And now, Mrs. Mitchell leaves the front and then you see her by her house?

A. In her yard.

Q. In her yard, and she calls you again.

A. To come out. "

On the face of it therefore Mrs. Fraser's evidence is that when Mrs. Mitchell came to the Mills' premises they spoke to each other. Mrs. Mitchell on the other hand gave evidence to the effect that when she went over to the Mills' premises she did not at that time see or speak to Mrs. Fraser but she saw the applicant carrying the body of Mr. Mills to a car parked on the driveway and she spoke to him. The D.P.P. argued that there was no misdirection because when Mrs. Fraser said she heard Mrs. Mitchell talking she must have been referring to the sound of Mrs. Mitchell's voice as she spoke to an unknown person at the fron of the premises. That the learned trial judge so understood the evidence is borne out, it is argued, by his question to the witness "Only her voice you heard?" This is a plausible argument, but the learned trial judge appeared to have recognised this as an area of discrepancy and so described it at page 572 when he said "There are discrepancies between the evidence of Ivy Fraser and the evidence of Christine Mitchell as to what transpired between her calling out to Christine Mitchell for help and Christine Mitchell coming and going back to her house". Mrs. Fraser, however, appeared to have been confused at times, particularly in relation to the occasions on which she spoke to Mrs. Mitchell - a confusion to

which counsel for the applicant at the trial sometimes contributed. No such confusion appears in the record of Mrs. Mitchell's evidence. Having regard to all the evidence and to the other directions of the learned trial judge we do not think that this misdirection on the evidence is of such a nature that it could reasonably be considered that the jury would not have returned their verdict had there been no such misdirection.

The main burden of the applicant's complaint was that the learned trial judge failed to crystalise and identify the issues of fact on which the jury should concentrate their attention. In particular it was argued that he had identified to the jury two questions for their consideration, the first being the identity of the person Mrs. Mitchell said she saw carrying the body of Mr. Mills towards the car, the second being whether, if that person was the applicant, he murdered Mr. Mills. Counsel for the applicant submitted that the first question for the jury to consider was whether Mrs. Mitchell could be believed when she said she saw the deceased being carried by someone on the night of May 18, 1974. It seems to us that this question was inextricably bound up with the preliminary question as to whether Mrs. Mitchell could be regarded as a witness of truth. The issue as to whether she saw someone was not an issue of fact arising from evidence to the contrary adduced by the defence. It was an issue as to her credibility which the defence alleged arose from the discrepancies in the Crown's case and from what was described as the strange behaviour of the parties concerned. This was the entire gravamen of the no case submission made by the counsel for the defence at the end of the Crown's case, and no doubt repeated in his final address to the Jury. The real question, therefore, is whether it can properly be maintained that this issue was not left to the Jury. We think not.

From very early in his summing-up the learned trial judge was at pains to point out to the Jury that the Defence was contending that the "whole of the Crown's case is a fabrication, or, if it is not a fabrication then Christine Mitchell is making a mistake

and it is a case of mistaken identity".

(See p. 568 of the summing-up).

This was shortly followed by explicit instructions to the Jury that they were "sole judges of the facts" and that "my only duty in respect of the facts is to remind you of the evidence which has been given and to make such comments which I may think reasonable or necessary or that may be of assistance to you in arriving at your verdict". He went on to direct the Jury as follows:

> "You are at liberty however, and I emphasize this, to discard any comment which I may make if I do make any comment, and substitute your own view if you do not agree with it. You will only act upon any comment or observation whichI make if it coincides with your view. If it does not, you toss it through the window and you substitute your own view of the facts because you are the judges of the facts. You are the persons who are being asked to find the facts in this case and come to a verdict on that finding. And the same applies to anything said by Counsel for the Crown in his address to you or Counsel for the Defence in his address to you. If anything they have said appeals to you you may act upon it and if you do not agree with it then you will discard it and substitute your own view of the facts. "

He then referred to the address of counsel for the defence, which was in the main a reiteration of his no case submission, in which he urged the jury to say that the behaviour of the principal witnesses in the case was such that they (the jury) could not believe a single word of Mrs. Mitchell's evidence. And he told the jury that it was for them to say whether they considered the behaviour of the principal witnesses strange or not and that even if they so did, it would not absolve them from answering the two main questions in the case, namely, was it the applicant that Mrs. Mitchell saw carrying the body of the deceased towards the car, and if so, was it the applicant who caused the death of the deceased by strangulation.

Counsel for the applicant has argued that put that way the question pre-supposes that Mrs. Mitchell did in fact see someone lifting Mr. Mills' body out of the house. That may well be so, but it was clear from the Judge's summing-up, taken as a whole, that that question only arose for the jury's consideration if they rejected the submission of the defence that Mrs. Mitchell's evidence should be rejected in its entirety, in that she should be treated as a totally discredited witness. Actually, the argument might have had more merit if Mrs. Mitchell's evidence had been that she saw someone whom she did not know, bringing Mr. Mills' body out of the house and that she later attended an identification parade and pointed out the applicant as being the person she had seen bringing the deceased's body out of the house. But this was not the case here.

Mrs. Mitchell's credibility was put in issue, and particularly so because the defence was an alibi. This was made clear to the jury by the learned trial judge. He reminded the jury in detail of the alibi put forward by the applicant (at p. 568) and he told the jury "so apart from saying that Christine Mitchell is mistaken or telling a deliberate falsehood, he (i.e. the applicant) is saying, he is putting forward what in law is known as an alibi".

At several other stages of his summing-up he reminded the jury that the defence was asking them to reject the evidence of Mrs. Mitchell in its entirety. After pointing out that there were discrepancies between the evidence of Ivy Fraser and the evidence of Christine Mitchell, between the evidence of Ivy Fraser and the evidence of Clarence Walker, between the evidence of Mrs. Mitchell and the evidence of Clarence Walker, he addressed the jury thus: "And where these discrepancies involve Mrs. Mitchell you will examine them even more closely to say whether or not you can reconcile them, bearing in mind that Mrs. Mitchell is the key witness in this case and you have to test her testimony all the way against the evidence of the other witnesses, particularly that of

Walker and Fraser. In effect, members of the jury, what the defence is saying in this case is that - he has not used those words but this is what it amounts to - the discrepancies may be small, the discrepancies may be great, but whether they be small or great the cumulative effect of them is such that you cannot believe a word of Christine Mitchell's evidence."

He then proceeded to obtain confirmation from counsel for the applicant that he had correctly represented what the defence was contending.

Next we find him telling the jury that in deciding what answer to give to the first question, i.e. was the accused the person who Christine Mitchell saw that night, carrying the body of the deceased towards the car, they should bear in mind that her testimony on this stood alone and he emphasized, more than once, that if they were not satisfied that Christine Mitchell saw the applicant, that would be an end of the case and their verdict would have to be one of not guilty. Dealing further with the first question, he told the jury that "the certainty of the identity as told you by Mrs. Mitchell, is of vital importance. If you believe she is lying on this, or if you believe she is mistaken, or if you find that she is acting out of any improper motive, which would induce her to lie on this vital issue, then that would be an end of the matter". And he added "In this respect, therefore, you must look at all the surrounding circumstances and examine her evidence very critically in arriving at a conclusion as to whether or not you can believe her on this".

Dealing again with the question of her identification of the applicant, he told the jury "You will critically examine the evidence of Christine Mitchell and say what you make of it. And if you accept her evidence that it was the accused she saw in the Mills' yard on this fatal night, then and only then you proceed to the second question: Was it the accused who caused the death of Mr. Mills by strangulation?"

Then again, when reviewing in more detail the evidence of Christine Mitchell, he reminded the jury that the Crown was asking them to say if the answers in the conversation between Mrs. Mitchell and "and this person who she says was carrying the body" did not show intimate knowledge of the Mills' household. But the learned judge also again reminded the jury that the whole of this was conditional on whether or not they accepted the evidence of Christine Mitchell. "First of all, he says to her - he looks at her and says: "You are Mrs. Mitchell," so he recognises [illegible] recognises her - this is if you accept it. [illegible] this is if you accept it."

Later, he again, told the jury: "It was suggested to her that she was not being truthful to the court. She said she had been truthful from the beginning to the end. It is not incorrect when she says she saw Campbell at 4 Devonaven Avenue, carrying Mr. Mills. And the question was put to her: "I am putting it to you that you saw nothing on that night". Her answer was: "I saw everything that I told this court".

And at the very end of the summing-up, at the instigation of counsel for the defence, the learned trial judge again reminded the jury that the defence was saying "that the discrepancies may be slight or they may be great but the overall effect is so great that Mrs. Mitchell ought not to be believed". And his final words to the jury, by way of a reminder of what he had said earlier, were as follows:

> " Where the discrepancies involve Mrs. Mitchell you will examine them even more closely to say whether or not you can reconcile them, bearing in mind that Mrs. Mitchell is the key witness in this case and you have to test her evidence all the way against the evidence of Walker and Fraser."

When one examines the discrepancies it becomes clear that the only issue which can arise from them as to the credibitility of Mrs. Mitchell is the issue as to whether she saw someone carrying the body of Mr. Mills from his home.

It cannot, therefore, in our view, be properly maintained that this issue was not left to the jury.

It appears to us, however, that appraisal of the veracity of Mrs. Mitchell's evidence based on what is referred to as the strange behaviour of Mr. Walker and the Police Officer after they spoke to Mrs. Mitchell can only be made in consequence of speculation as to precisely what these witnesses were told by Mrs. Mitchell. In so far as a witness is prevented from giving evidence as to the reason for his actions we question the validity of inviting a jury to speculate as to what those reasons must have been and to use such speculation as a basis for casting doubt on the credibility of another witness. However, it cannot be said that the jury were not permitted and indeed invited to indulge in such an exercise in the present case. And such an exercise could only have been to the advantage of the applicant as its only purpose could be to cast doubt on Mrs. Mitchell's credibility in relation to her evidence that she saw someone carry the body of Mr. Mills out of the house and dump it in the Ford Escort car that was parked in the driveway.

When, therefore, the learned trial judge invited the attention of the jury to these discrepancies and to that behaviour in relation to Mrs. Mitchell's evidence he could only have done so for the purpose of inviting them to consider her credibility on this issue and no reasonable jury could possibly have understood otherwise.

Of course, it followed that if they did conclude in favour of Mrs. Mitchell's credibility, then the only two questions which they had to consider were the two questions which the learned trial judge described at p. 570 as "the two main questions which you will have to answer".

We do not, therefore, consider that the learned trial judge can be regarded as having withdrawn from the jury the question of fact as to whether Mrs. Mitchell saw someone, or as having failed to identify to the jury the issues for their consideration. We would add however, that even if it could

properly be said that the learned trial judge erred in failing to bring specifically to the jury's attention the issue as to whether Mrs. Mitchell saw anyone carrying the body of Mr. Mills, we would be prepared to apply the proviso to S. 14 (1) of the Judicature (Appellate Jurisdiction) Act and to hold that in all the circumstances of this case there has been no miscarriage of justice.

The jury had the opportunity of observing Mrs. Mitchell in the witness box and it is clear from their verdict that they accepted her as a witness of truth notwithstanding the discrepancies and strange behaviour brought to their attention by defence counsel in the course of his submission at the close of the Crown's case and in the course of his final address to them, as well as by the learned trial judge himself in the course of his summing-up. Logically it is inconceivable that the jury could have answered the two questions mentioned by the learned trial judge without first deciding that Mrs. Mitchell saw someone carrying Mr. Mills' body out of the house.

In so far as the learned trial judge's directions on the question of identification are concerned they have been described by counsel for the applicant as impeccable and we concur.

It is for all the above reasons that by a majority decision the application for leave to appeal was refused.