JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 7/87

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

ALLAN MCGANN

Frank Phipps Q.C. and Miss Dawn Satterswait for Appellant

Kent Pantry, Deputy Director of Public Prosecutions and Kissock Laing for the Crown

July 26 and 27, September 27 and 28, 1993;
and April 26, 1994

RATTRAY P.:

The appellant Allan McGann was convicted of murder in the St. Catherine Circuit Court on the 22nd of January, 1987 and sentenced to death. His appeal was dismissed and his conviction and sentence affirmed by the Court of Appeal on the 30th of May 1988. Subsequently he petitioned the Governor-General for a referral of his case to the Court of Appeal for a re-hearing in accordance with the provisions of Section 29(1) of the Judicature (Appellate Jurisdiction) Act. In the meantime by virtue of the provisions of the Offences Against the Person (Amendment) Act 1992 his case was reviewed by a Judge of the Court of Appeal and classified as non-capital murder. Consequently his sentence was varied to life imprisonment from the 12th of January, 1993 with a direction that he serve a period of twenty years before being eligible for parole.

On the advice of the Privy Council the Governor-General has referred the case to the Court of Appeal for a re-hearing under the provisions of Section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act. It is by reason of that reference that we are now re-hearing this appeal.

Section 29 of the Act reads as follows:

> "29.-(1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either -
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
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> (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon, and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon".

The reference being made under sub-section 1(a) requires us to approach the re-hearing as though an appeal has never been heard before and dismissed by the Court of Appeal. Furthermore, where there has been an application by the appellant to adduce fresh evidence, in this case in the form of new medical evidence, we are obliged on the referral to hear this evidence without regard to the strict pre-conditions which must normally be established when application is made, under the ordinary rules of practice

relating to appeals, for fresh evidence to be adduced. The ordinary rules require that the reception of this fresh evidence depends upon it being shown:

> (a) that the evidence could not have been produced at the trial, or
>
> (b) that some point which could not have been foreseen arose at the trial upon which the fresh evidence would have been material. [Victor George Sparkes (1956) Cr. App. R. 8].

The Court of Appeal in a reference by the Governor-General will not treat itself as being bound by the general rules of practice if there is reason to believe that to do so would lead to an injustice or the appearance of an injustice.

The fresh evidence produced for our consideration was that of Dr. Willard F. Holder, MB.BS., Physician and Surgeon who described himself also as a Dermatology Consultant.

The prosecution's case basically had been that the deceased Carmen Batticks had formerly lived together with the appellant in a commonlaw relationship which had been terminated by the deceased. On the evening of the 29th of November 1984 a man, whom the Crown alleged was the appellant had thrown sulphuric acid on her from behind as she prepared to open the grill gate to enter her home. Injuries resulting therefrom had caused the death of Miss Batticks. The prosecution contended that injuries to the appellant's face and marks on his clothing were caused by splashing of the acid during the attack on Miss Batticks.

Medical evidence was given at the trial by Dr. Shivashanker who on the 9th December 1984 examined the appellant and "found a spot on his forehead, an acid burn spot on the forehead and one more spot on the chin". He referred the appellant to a Skin Specialist at the Kingston Public Hospital. The appellant had maintained that the burns were caused when "radiator steam, hot water spilt on his face".

Dr. Patricia Dunwell was the Dermatologist to whom the appellant was referred. She examined him on the 20th of December 1984. She gave evidence at the trial that she found on "the forehead a 2 mm. by 5 mm. approximately localized, depressed hyper-pigmented scar. He had three small scars, same description, depressed, pyper-pigmented, localized," on the forehead more centrally on the right side. On the right cheek he had "a 10 mm. approximately by 2 mm. scar of the same description". When asked what could have caused such damage she gave her opinion as:

> "Well, a burn say from sparks landing on the skin soon after - acid damage, those are more or less the two types of damages I could think of that would cause such localized, depressed lesions".

She further gave evidence that she would have expected damage caused by hot water and steam to be "superficial lesions and not only that, the immediate surrounding skin would be involved".

It was this evidence in relation to acid burns which Dr. Holder was called to rebut. He examined the appellant on the 11th of September 1990 at the St. Catherine District Prison. He maintained that he found no scarring, healed or otherwise, anywhere on the body of Mr. McGann which would be consistent with being caused by injury from sulphuric acid.

Dr. Holder who gave his evidence before us stated that his examination revealed mild to moderate acne in various stages. There were no keloid or surgical scars consistent with acid burns. Under cross-examination however and in answer to questions asked by the Court he admitted that:

(a) not all injuries result in keloid scars;

(b) the same person can have keloid scars in one area and not in another;

(c) acne can develop leaving its own scars at a place where there was a scar before;

jug in his hand and "throw the thing that him have in the plastic jug on mi mother". After doing that the man dropped the jug in the driveway and ran behind the house. He was asked: "Who was the man you saw the night"? He replied: "I did not see him face". Further asked: "So how did you know who it was?" His reply was: "I don't know who it was". He described the man as having on a bright shirt.

Next morning he saw the appellant come to the house. "I see him go round the back". He then returned to the front of the house and left the premises. When cross-examined as to whether the bright coloured shirt was long sleeves or short sleeves he said: "I think it long but I don't too sure". He was further asked in cross-examination:

> "Q: That night or evening, that night did you hear your mother call out Jones name?
>
> A: Yes, sir.
>
> Q: And at that time was there somebody living at the house named Jones?
>
> A: Yes.
>
> ...
>
> Q: Now, the next morning. I am talking about, the morning after, did you tell anybody at all that your mother bawled out, 'Lord God, Jones burn mi up'? Did you tell anybody that?
>
> A: No".

The learned trial judge took over the questioning in relation to Jones as follows:

> "HIS LORDSHIP: Kevin, I am not quite certain what you mean when you say your mother called out Jones's name that night. What time you heard your mother called out Jones's name?
>
> WITNESS: What time?
>
> HIS LORDSHIP: Yes. What was happening then, was it before, after she get the burn or before or when?

"WITNESS: After she get the burn.

HIS LORDSHIP: What is that?

WITNESS: After she got the burn.

HIS LORDSHIP: Where was Jones at that time?

WITNESS: At work.

HIS LORDSHIP: He was not at home?

WITNESS: No.

HIS LORDSHIP: So when your mother called out the name Jones where was this man that you saw throw something on her, where was the man at that time?

WITNESS: Where the man was?

HIS LORDSHIP: Yes. You said you saw a man come from behind the dust bin, run to your mother, throw something on her and then run around the back of the house and you throw some stones around the back of the house, right?

WITNESS: Yes.

HIS LORDSHIP: You also said that you heard some time that night, you heard your mother called out the name Jones. What I am asking you, when she called out that name where was the man who you saw run from the dust bin?

WITNESS: I don't know.

HIS LORDSHIP: What is that? Face this way so they can hear what you say.

WITNESS: I see him run from behind the back of the house.

HIS LORDSHIP: It was after the man run behind the back your mother called out Jones?

WITNESS: Yes, sir.

HIS LORDSHIP: You answered a question and you said that the next morning you did not tell anyone that your mother said, 'Lord God Jones burn mi up'. Is that correct?

WITNESS: Yes.

HIS LORDSHIP: Did you hear your mother say that at any time?

WITNESS: Yes, I hear her say that.

"HIS LORDSHIP: Take your finger out and answer.

WITNESS: Yes.

HIS LORDSHIP: When you heard her say that?

WITNESS: When she running down Miss Icy.

HIS LORDSHIP: Can you describe the size of the man that you saw?

WITNESS: No.

HIS LORDSHIP: Jones is what size man? Is Jones a man?

WITNESS: Yes.

HIS LORDSHIP: I take it for granted is a man. Jones is a man?

WITNESS: Yes, sir.

HIS LORDSHIP: What size man?

WITNESS: Short and fat.

HIS LORDSHIP: The man that you saw throwing the thing on your mother, was he a bigger man or a smaller man or the same size as Jones?

WITNESS: A taller man.

HIS LORDSHIP: Tall like who?

WITNESS: Tall like Allan McGann.

HIS LORDSHIP: Speak up a little louder, please.

WITNESS: Tall like Allan McGann".

The evidence of Enid Batticks the sister of the deceased established that Paul and Lettrice Jones, husband and wife, were tenants in a portion of the house in which the deceased lived. Enid Batticks further gave evidence of a conversation she heard on her verandah between the appellant and a woman named Shane. She heard the appellant say to Shane: "Carmen tell you why me and her not talking"? Shane said no. She then said "yes". The appellant

asked: "What did Carmen told you"? Shane replied: "She told me it was over money problem". The appellant said: "Is lie, yuh don't hear that her man coming December and she is going to get married"? The next morning at about 7 o'clock on her way to Carmen's house Enid said she met the appellant who said: "What is that mi hear happen to Carmen"? She replied and said: "Yuh don't hear that they burn up Carmen". He asked her where was Carmen and she replied: "She is in the Spanish Town Hospital". She noticed that the appellant had a scar on his face, somewhere about his jaw, something looking like a sore.

Acting Cpl. Davy, the Investigating Officer, gave evidence of having searched the yard where the deceased lived and finding a blue long sleeve shirt stuffed in the branches of a tree located at the left side of the house. This shirt had what appeared to be burns on it. The tree was nearer to the rear of the premises. The shirt was folded up and stuffed among some branches of the tree. He later went to Lot 31 McNeil Boulevard, Central Village, where the appellant lived. He went into a room in the house pointed out to him as the appellant's room. He looked under a screen and took out a red short sleeve guernsey shirt which he examined and saw several dark spots on the front. On the 3rd of December he went to the Spanish Town lock-ups and spoke to the appellant. He saw scars or blisters on the appellant's face and hands. He cautioned the appellant and told him that he was investigating a case of assault occasioning bodily harm committed on Carmen Batticks on the night of the 29th of November 1984. The appellant said: "She seh mi trouble her"? He asked the appellant how he came by the scars or blisters and the appellant replied: "A radiator bun mi a Falmouth Court House". To the query where was he between 6:30 to 7:30 p.m. on the 29th of November 1984 he responded: "Carib Theatre". He showed the appellant the blue long sleeve shirt which he took from Lot 24 Spaulding Gardens, the home

of the deceased and asked him if he knew it. The appellant said: "Yes, dis a mi shirt. Mi dash it wey two weeks ago, mi no know how it burn up so". Presented with the red short sleeve guernsey the appellant said: "Dis a my shirt too". Regarding the spots on the shirt, the appellant said: "Dis a must be grease, mi work pon car inna it sometimes". The appellant made no reply when shown the white plastic container and asked if he knew anything about it.

The two shirts were among other items examined by Dr. David Lee, the Government Analyst at the Forensic Laboratory in Kingston who found both shirts to be damaged by sulphuric acid. There was also the residue of sulphuric acid in the plastic container recovered from the deceased's driveway.

The totality of the evidence therefore which the prosecution relies upon to link the appellant to the committal of the crime is the blue long sleeve shirt found in a tree in the back of the house of the deceased which had sulphuric acid on it, and which Acting Cpl. Davy said the appellant admitted to be his but did not know how it got into that condition, the red shirt found in the house of the deceased admittedly belonging to him which had evidence of sulphuric acid on it, and blisters on the face of the appellant which the medical evidence confirmed to be caused by sulphuric acid.

With respect to the red shirt, however, Dr. Lee found that the sulphuric acid penetrated the front and the back of that shirt. He was asked by Mr. Phipps, Q.C., representing the appellant:

> "Q: If the garment is being worn at the time that the quantity of sulphuric acid, that is the garment next to the skin, would you expect some evidence of acid on the body of the wearer, bearing in mind the penetration in the area, back and front?
>
> A: Yes, some evidence".

In re-examination he was asked by Mrs. McIntosh, Counsel representing the Crown:

> "Q: If a garment like that had sulphuric acid say to only the front portion of it and such a garment were folded, would it damage the back or could it go through to the back?
>
> A: I expect a transfer of some from it."

The appellant gave evidence on oath denying the commission of the act, and called witnesses to support an alibi that he was elsewhere at the time the crime was committed and therefore could not have been the person who threw acid on the deceased. In arriving at their verdict the jury must have rejected this defence.

The grounds of appeal argued are in relation to four areas:

(1) The failure of the trial judge to withdraw Kevin's evidence from the jury.

(2) The judge's direction on how the jury should treat the statement allegedly made by the appellant to the investigating officer in relation to the red shirt.

(3) The effect of the deceased calling out on her way down to Miss Icy: "Lord God, Jones burn mi up".

(4) Whether or not the verdict was one which could properly be supported by the evidence.

The validity of any or all of these complaints by the defence requires inter alia:

(a) a careful examination of the evidence of Kevin Brown, the only eye-witness to the incident;

(b) the effect of his evidence that:

(i) he did not see the face of the man who threw acid on his mother and did not know who the person was;

(ii) that his mother called out Jones' name that night, Jones being a person who lived on the same premises as his mother and himself;

(iii) that he heard his mother saying when she was going down Miss Icy, "Lord God, Jones burn mi up".

(iv) that the man whom he saw throw the acid on his mother was of a different stature to the Jones whom he knew;

(v) that the man who threw the acid was tall like the appellant;

(vi) the adequacy of the Judge's summing-up on this aspect of the case.

We need also to examine:

(a) the linkage sought by the prosecution to be established between the appellant and the person who threw the acid by virtue of the identification of two shirts, as belonging to him, their condition in terms of whether they had acid on them or not and such evidence as would tend to connect their ownership with the appellant;

(b) the judge's direction in relation to the statement concerning the blue shirt:

> "Yes, dis a mi shirt, mi dash it 'way two weeks ago, mi no know how it burn up so".

The learned trial judge directed the jury that with respect to the evidence of Kevin Brown, a boy of tender years the law required him to warn them that there is a risk or danger of acting on his uncorroborated evidence. Having done this and having given

the reasons why this is so there appears no basis for the particular complaint that the trial judge should have withdrawn Kevin's evidence from the jury. He left it to the jury with the proper directions. Indeed there is nothing to contradict Kevin's evidence as it stands that a person, unidentified by him but of the same height as the appellant threw on his mother from a plastic jug, recovered from the scene, the liquid which caused the fatal burns. That person did run to the back of the house. It was in that general area that the blue shirt was found later that night in the branches of a tree. Early next day the appellant came to the house and he went around to the back. The inference left to be drawn could be as to whether his going to the back of the house next morning was for the purpose of recovering the blue shirt he had left there the night before after committing the act.

We therefore can find no merit in this ground of appeal.

With respect to the statement allegedly made by the appellant regarding the blue shirt and which statement the appellant denied making, the gravamen of the complaint is in respect to the judge's direction to the jury concerning the words: "Yes, dis a mi shirt, mi dash it 'way two weeks ago, mi no know how it burn up so".

It was submitted that the trial judge was obliged to give a careful direction as to how the jury should treat what was in fact a mixed statement:

(a) incriminatory in that it was an admission that it was a shirt belonging to the appellant;

(b) exculpatory in that he was saying he did not know "how it burn up so" and he had discarded it some weeks before.

The whole statement was put by the trial judge to the jury for their consideration "whether you accept that bit of evidence or not what Detective Davy said. Because if you accept his evidence that it is the accused man's shirt you will have to ask yourselves, how did it get in that tree branch? How did it get sulphuric acid on it"?

The trial judge did not invite the jury only to consider the admission of ownership of the shirt without a consideration of the part of the statement which alleged that the appellant did not know how the shirt came to be burnt.

The authorities cited before us by learned counsel for the appellant were all examined in the judgment of Kerr J.A. in the earlier consideration by the Court of Appeal of the appellant's application for leave to appeal. We also have carefully re-examined them and can find no merit in the complaint concerning the manner in which this aspect of the summing-up was dealt with by the trial judge. We adopt the words in the judgment of Kerr J.A. in the earlier appeal, S.C.C.A. 7/89:

> "In the light of these directions the jury could be in no doubt that the guilt of the applicant rested on the cumulative cogency of the circumstantial evidence and not on any single fact. We do not agree that the directions were such as would lead the jury to infer that his admission of ownership would be conclusive on the issue as to his wearing the shirt at the material time".

The jury was not told to ignore any part of the statement which could be considered exculpatory. Furthermore the defence on the sworn evidence of the appellant was a denial of having made the statement at all.

In Cedrick Whittaker v. The Queen, Privy Council Appeal No. 36 of 1992 where the question of a mixed statement also came for consideration the trial judge had referred to the exculpatory part of the statement as being self-serving. The Judicial Committee of the Privy Council in the face of an admitted misdirection in this regard gave a judgment delivered by Lord Slynn of Hadley which stated:

> "Accepting, however, that there was such a misdirection the question remains as to whether there is any risk of a miscarriage of justice if the conviction is upheld. The test is clearly laid down in Anderson v. The Queen [1972] A.C. 100 at page 107 following Woolmington v. Director of Public Prosecutions [1935] A.C. 462, at pages 482-3, namely whether 'if the jury had been properly directed they would inevitably have come to the same conclusion'."

We hold that the jury were properly directed and consequently the issue in Whittaker's case (supra) does not arise for consideration.

This leaves for consideration the direction to the jury by the trial judge on the effect of Kevin's evidence that the deceased had said: "Lord God, Jones burn mi up". This statement was sufficiently contemporaneous with the attack on Carmen Batticks for it to form part of the res gestae. The trial judge did not tell the jury to ignore the statement attributed by Kevin to his mother. After reciting the evidence concerning Jones the trial judge said:

> "Your duty is to judge the case on the evidence that you have heard, the evidence you have heard, not what has not been presented to you, what has been presented to you. If there is a sufficiency then you act on it. If there is insufficiency of evidence in your view then you will be true to your oath in returning a verdict according to the evidence that you have heard".

Later on he referred to this aspect of the case as follows:

> "Now the prosecution is saying Kevin can't say who it was. Only four persons were there, the deceased, she is dead, she can't talk now and in any event you may well say from the injuries she received if you accept what the doctors said she was in no condition at all to make out anyone that night, but Mr. Phipps has asked you to consider and you will have to consider it, the evidence that came from Kevin that she did call out a name after the man had run away. And when she went down to Miss Icy's house she did say something to Miss Icy

> "which would be inconsistent with the accused being present. But you will view all that in the light of whether or not she was able to identify any person. Kevin said it was night, it was dark. Nothing was thrown on Kevin, he was not able to make out anybody".

We would only emphasize the fact that for whatever reason she accused Jones it was certainly not because she had seen her assailant. It is abundantly clear from the evidence of Kevin that she could not have seen anyone. On the issue of identification a charge against Jones would be impossible to sustain. Hence the statement has no evidential value.

It was therefore left to the jury to decide on the standard of proof clearly and correctly given to them by the trial judge, whether despite that statement by the deceased, on all the facts acceptable to them it was the appellant who that night threw acid on Carmen Batticks which act resulted in her death. The jury so found and the finding cannot be regarded as unreasonable.

There was a sufficiency of evidence from Kevin Brown although he did not identify the appellant, linked with the condition of the shirts admittedly belonging to the appellant, the injuries to his face, the motive, and the rejection of the appellant's evidence of his being elsewhere at the time the incident took place, for a reasonable jury properly directed as this one was to arrive at a conclusion of guilt.

For these reasons we would dismiss the appeal and affirm the conviction and the sentence as varied.