JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 5/88

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. BYFIELD MEARS

Bert Samuels for Applicant

Canute Brown for the Crown

October 19 & November 14, 1988

CAREY, P. (Ag.):

We now give our reasons, as promised, for refusing this application for leave to appeal.

In the Clarendon Circuit Court on 14th December last, this applicant was convicted of the murder of Adrian Brown, before Wolfe, J., and a jury and sentenced to death. The facts which gave rise to this charge can be stated quite shortly. The main witness for the prosecution, Sonia Jagaroo, lived with the applicant up to 1985 when they separated. She bore him a son, and it appears that the birth of the child and the separation coincided. On occasion, she would take the child to visit him. He began to pester and harass her including assaulting her after the relationship came to an end. Because of this conduct, she often reported him to the police. At about midday on 7th August, 1986, the applicant kidnapped her and the baby and took them by taxi to a guest house in May Pen. He imprisoned her in a room he had taken, while he went out to fetch food. He again left the room locking her in and returned with a soft drink and some rum. She declined to have anything but relented when

the pangs of hunger forced her to eat some of the food which he had offered. She, however, declined to partake of the rum as she was invited to do. He, however, drank by himself.

Then he intimated to her that he had something to disclose which, although unbelievable, was quite true. Thereafter, he confessed that he had killed a little boy whom she was given to understand was Adrian Brown also known as "Pension". When she enquired how it happened, he condescended to particulars. He explained that he came upon the lad after he had returned from taking a bath. He called the young man to him but instead the latter tried to run off. He held him in his throat and shot him in his ear. At this point, the applicant broke down in tears, repeating that he shouldn't have done it. He also complained of having a headache and was told to stop drinking. She obtained two phensic tablets and gave them to him. Miss Jagaroo also testified that in his confession, the applicant stated that he had burnt the body and if she thought he was lying, she should enquire in Lionel Town whether the little boy was missing.

She remained that night at the guest house. Next morning she returned home, he having departed before she did.

She confided in her sisters what had been disclosed to her. One of them, Carla, went to the police station. Subsequently, the witness reported the matter to the police.

The slain youth was last seen alive by his brother Joseph Nangle, a witness called for the prosecution, on the evening of 3rd August, 1986. He was on his way to have a bath dressed in a red guernsey and a pair of khaki shorts and carrying a rag and a cake of soap. On 8th August, having received some information, he went to Hayes in Clarendon where, in a shallow hole in a canefield, he saw the burnt body of his brother. He identified him by the clothes in which he had last seen him alive.

The medical evidence confirmed that the body had been burnt. At the post-mortem examination, the pathologist found extensive thermal body burns to the scalp, face and neck with extensive charring and heat fractures of both upper and lower extremities. There were also burns to the chest,

the abdomen and the posterior torso. The body was in a state of decomposition. Under the left frontal scalp there was subcutaneous haemorrhage. The underlying bone, i.e., the frontal bone, showed a 3" linear fracture extending to the left parietal bone.

Cause of death was attributed to the head injury with skull fracture, extensive body burns and there was a possibility of strangulation. The pathologist found a piece of red cloth tightly tied around the remains of the neck.

In his defence, the applicant denied, on his oath, that he had made any confession to Miss Jagaroo on 7th August but acknowledged that he kidnapped her and took her in a taxi to a guest-house where they spent the night. There they quarrelled and fought because she had complained to a doctor that he had used a gun on her. Just prior to that, on 1st August, they had a quarrel which resulted in his hitting her with an umbrella. He compelled her to go with him in a taxi to see a doctor, Dr. Chin, but upon arrival, found the surgery closed. They went on to the same guest house and on the following morning, having purchased clothes for her, took her to the doctor who treated her.

A conviction in this case depended entirely on the credit-worthiness of Miss Jagaroo, and from the jury's verdict, it is plain that she was accepted as a witness on whose testimony reliance could be placed. Learned counsel who appeared before us was not able to point to any aspect of her evidence which had been shaken in cross-examination, nor was he able to point to discrepancies or internal conflicts in her evidence. He attacked the learned trial judge's summing-up in two respects and leave was granted to enable him to argue those matters.

The grounds were, firstly, that the learned trial judge's comments were, in part, a usurpation of the jury's function as sole judges of the facts and in other parts went beyond mere comment. In this regard, he called attention to four (4) extracts from the summing-up as illustrative of his submissions. We will deal with them in a moment. And the second ground was that the learned trial judge was wrong when he directed the

jury that there was sufficient evidence to suggest that the applicant's reference to "the little boy" was in fact a reference to "Pension" with whose murder he had been charged.

The first extract to which we were referred, appears at page 73. It is as follows:

> "I recoil to think that any human being could be so degenerate, so wicked that they would concoct a story like this, especially a woman who has borne from her womb, a child for a man. I am not saying, but to me, it is inconceivable that a human being could do this, just to settle a score. But you are the judges of the facts, it is a comment I am making;"

Learned counsel put this comment forward as going beyond what a judge sitting with a jury would normally be allowed to make, and he did not think it was saved because the learned trial judge correctly indicated that it was a personal view.

The law is usefully stated in R. v. Delroy Grant [1971] 12 J.L.R. 390 where this Court, speaking through the mouth of Fox, J.A., at page 394, said this:

> "A judge is entitled to express his views strongly in a proper case, but the facts must always be left to the jury to decide. The stronger the comments the greater is the need to make it abundantly clear to the jury that if they do not accept the judge's view of the facts, they must discard it and substitute their own."

The comments of the judge, especially an experienced judge, can be of great assistance to the jury in appreciating the significance of the evidence adduced before them. But a judge should always bear in mind that he is not the trier of facts and therefore he should not in any way convey the impression that his view is paramount. The duty on this Court, thereafter, will be to determine whether the judge's comments are far stronger than are warranted on the facts. Plainly, the fact that a judge expresses himself strongly, is not enough. But if the comments of the trial judge amount to a usurpation of the jury's function, the result is that the accused would be deprived of the substance of a fair trial.

In the present case, the learned trial judge commented strongly on his assessment of Miss Jagaroo's character. He did so in a context where defence counsel had expressed his views on the witness, observing in the course of his closing speech, that she was a woman scarred, whose love had turned to hate and should be regarded as a vicious woman. We do not doubt, although we have not the benefit of Crown counsel's closing address, that he portrayed her otherwise. For all we knew, the trial judge adopted Crown counsel's view. Be that as it may, he introduced his comments in this way:

> "And this is a comment I make ....."

And he concluded thus -

> "But you are the judges of the facts, it is a comment I make."

Two views were put before the jury and they were invited in their good judgment to make up their minds about which accorded with the reality of Miss Jagaroo. We do not think the learned trial judge was putting forward an unfair or unbalanced picture of the facts as he saw them. We, cannot, therefore, agree either that the learned trial judge usurped the jury's function or that his comments were unfair and impermissible.

The next question is at page 81 where the learned trial judge is recorded as observing:

> "Now the accused man said, 'Have bath?. I don't bathe in a canal. I bathe at my house.' I don't know if you know these people on the estate operate that way. It is not all of them that go to canal don't have water at their yard; but sometimes a man feel to have water - a bath in the running water, the canal water."

Learned counsel submitted that it was a question for the jury whether the applicant did or did not have a bath and he had also given the jury the benefit of his knowledge of human behaviour. In so doing, he had usurped the jury's function.

The comment which attracted this criticism is comprised within the two sentences underlined above. We note that the comments, to be understood, must be read in its context. And it appeared in a paragraph in which the learned trial judge was suggesting to the jury that although the applicant

denied that he ever bathes in the canal, it was unlikely that Miss Jagaroo would fabricate that story for a number of reasons which he stated but which we need not recite. In that context, we think it was quite reasonable to point out a fact of life well-known to a Clarendon jury. The comment was in point of fact, perfectly true and in the context of the case, warranted on the facts. We were not persuaded that the comment amounted to any usurpation of the jury's function.

The third extract which learned counsel offered for our examination, appears at page 85 and was an example of the trial judge's usurpation of the jury's function.

> "Now Mr. Foreman and Members of the Jury, let us examine this part of the evidence. If a man is migrating, going back home to his wife to live, what sort of furniture he would leave in a house for people to smash up at the time? You wouldn't expect him to sell out the things or give them away? What him leaving furniture in a house for somebody to go smash up? If you are going away, if you are on stand-by and you are at airport, you can't run back home and say you are going to sell off your things. What sort of things you have in your house for them to smash up? He is sending her home because he is going to go away for good, but he is saying that when he goes to airport they come and smash up his furniture and take away his things. If he is going to live in Cayman, what sort of clothes he is leaving, wouldn't he take his clothes with him? You are the judges of facts, this is the sort of things you have to look at, whether this man is speaking the truth or the girl is lying."

In that citation, the trial judge, he said, withdrew a question of fact, viz., would a person circumstanced as the applicant said he was, act in the way the applicant said he did.

We are not attracted by that argument. No question of fact was being withdrawn from the jury. The learned trial judge was expressing his opinion on the implausibility of a statement made by the applicant in the course of his evidence. The comment itself occurred at a stage in the summing-up where the learned trial judge was contrasting the evidence of Miss Jagaroo with the response of the applicant. Miss Jagaroo had stated that when the separation took place, the applicant gave her a bed and a

suit-case to pack her things. The applicant asserted that she had destroyed his furniture. It was in that context that the learned trial judge commented as he did. We are quite unable to say that the view being put forward was wrong. The comment was prompted by the applicant's statement that the break-up of the intimate relationship between himself and his mistress came about because he had decided to be reconciled with his wife. In this instance, the learned trial judge did not preface his comments by saying that he intended to make a comment nor did he afterwards say that he had done so. We think, however, that the language makes it plain that he was making a comment, and the jury could have been in no doubt but that the trial judge was expressing a personal view on the evidence which the jury were free to accept or reject. He had so directed them.

The final extract appears at pages 87-88:

> "Now these questions are being asked of her to show why would the accused man, why would this man having this terrible relationship with this woman, choose her of all the persons in Clarendon to tell her this, knowing that the relationship is such that it might not have been safe for him to do so. Well, Mr. Foreman and members of the jury, you have a saying that truth is sometimes stranger than fiction and when a heart is burdened, a conscience is burdened, it sometimes does strange things. It might very well be that notwithstanding the relationship, the man believed that because she bore him a child, notwithstanding the relationship, he could confide in her on the basis that for the sake of the child she probably wouldn't hurt him; for the sake of the child she wouldn't go and tell anybody that her child's father killed a man. He probably thought that. That is a matter for you. Bearing in mind the relationship which existed between them - the bad blood between them - his beating her up - did he tell her what she said he told her?"

Learned counsel submitted that in this passage, the learned trial judge usurped the jury's function.

The learned trial judge had expressed the same view at page 73 of the record and that extract appears herein. We do not think it is necessary to repeat what we have already said. The trial judge expressly left for the jury's consideration the important question - "did he tell her what she said he told her?"

In the result, we have come to the conclusion that the comments were fair and balanced and were warranted on the facts of the case. We reminded counsel in the course of exchanges between himself and the Court that a summing-up does not take place in a vacuum: it is tailor-made for the jury which has heard the evidence and the addresses of counsel for the defence and the prosecution. When, as often is the case, counsel appearing before us did not appear below, he is not likely to be aware of the content of those addresses or the particular points made or stressed before the Court and jury. But the test which we must adopt is to see whether the comments were such as to deprive this applicant of the substance of a fair trial. In our view, the comments isolated did not transgress the limit of fair comment. The ground of appeal cannot succeed.

Whatever other grounds were put forward, were either abandoned or learned counsel candidly conceded that they had no merit.

We have, however, ourselves, carefully examined the transcript of the evidence and the summing-up, and we are of opinion that the issue for the jury was identified and left to the jury for their consideration. The directions were correct, fair, and adequate and Mr. Samuels did not seek to challenge them save for the learned trial judge's comments with which we have dealt.

It was for these reasons that the application for leave to appeal was refused.