JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 195/87

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA

v

HERMAN DUNKLEY

D. Daly for Appellant

Vinette Grant for Crown

31st October - 1st November, 1988 and January 23, 1989

GORDON, J.A. (Ag.):

This was an application for leave to appeal against conviction on 21st October, 1987 for the offence of murder before Patterson J. sitting with a jury in the Manchester Circuit Court. The application was treated as the hearing of the appeal and on 1st November, 1988 the appeal was dismissed, we then promised to put our reasons in writing. We do so now.

About 9.30 o'clock on the morning of the 4th September, 1985, Mr. Jerome Lawrence discovered the body of Miss Icilda Lewis in his field at Buena Vista Mountain in St. Elizabeth. Miss Lewis had farmed the field adjacent to his field. He reported his discovery to the Santa Cruz Police who commenced investigations into a case of murder. The injuries inflicted on Miss Lewis were gruesome. There were nine incised wounds to the body.

(1) There was a fourteen (14") horizontal wound to the back of her neck extending to the right side of the neck partially severing the head.

(2) An eight inch (8") long deep incised wound extending from the forehead backward, fracturing the skull and splitting the head.

(3) & (4) An eight inch (8") oblique incised deep wound to the right of her neck with a deep 8 inch long incised wound extending backward and above.

(5) A ten inch (10") long deep oblique incised wound to the left cheek extending from the left ear to the center of the chin.

(6) A fourteen inch (14") long deep incised horizontal wound on the left hip.

(7) Part of the left hand was completely severed to the level of the mid palm.

(8) & (9) Two deep horizontal incised wounds to the back of her left forearm.

(10) The right little finger was partially severed.

Dr. Ian Vincent gave the cause of death as being due to 'severed Spinal cord and also the severe head injury - the chop to the head. The injuries were consistent with infliction by a machete and it required a tremendous amount of force' to sever the head.

The appellant was arrested on the 4th September, 1985 and subsequently charged with the capital offence. The evidence presented by the prosecution was circumstantial and there were witnesses who contributed to the web of evidence that enmeshed the appellant.

The deceased and the appellant were both farmers who cultivated independent lots of land at Buena Vista Mountain in St. Elizabeth. The appellant assisted the deceased on her field, the appellant and the deceased enjoyed a visiting relationship as boyfriend and girlfriend. There was some evidence to suggest that the relationship was foundering. Mr. Jerome Lawrence was at Mr. Oswald Stewart's shop about four o'clock on the afternoon of the 2nd September, 1985 when the appellant came to the shop. They had a drink together and the appellant who appeared vexed said he was going to do some murder, 'he was going to kill; if he Lawrence thought it was a joke he was going to see.' Mr. Lawrence

said he tried to dissuade him by discussing some of God's words, but without success as he left saying 'him going to do some murdering and if is even his mother in the way and when him ready him going to do a thing.' When he walked away from witness he was vexed and said he wanted to hear no argument from witness.

On the evening of the 3rd September, 1985 Sandra Stewart, the daughter of Icilda Lewis, saw her mother by the stand-pipe catching water. The appellant went up to Miss Lewis and said something to her, she did not reply and he walked away.

Roy Williams, the brother of the deceased said he lived at the appellant's home prior to the 3rd September, 1985. About 2.30 p.m. on 3rd September, 1985, he was at home with the appellant. The appellant spent some time sharpening his machete. The machete he knew was owned by the appellant as he had worked with the appellant in his field and had used the said machete from time to time. He recognised it by a mark on the handle and a split in the hook. The appellant having completed his chore placed the machete in the house. After dinner the appellant told him he was going to Miss Green's house at Northampton Mountain and that he was going to lock up the house - locking the witness out. The appellant proceeded to lock up the house and thereafter left taking a 'hang-pon-me' bag with him. This was about 5.00 p.m. The witness went to his grandmother's home for the night.

Miss Cyris Green, a farmer, lived at Northampton Mountain, St. Elizabeth. She had been the girlfriend of the appellant and that friendship produced two (2) children, one he acknowledged the other he did not. This friendship broke up in 1983 before the second child was born in 1984. Since the friendship ended she saw him occasionally but he never slept at her home. On the night of the 3rd September, 1985 about 10.00 o'clock the appellant came to her home and said he wanted to stay for the night. He remained until before dawn next morning when he left. He wore then a jeans pants and a rag shirt. He carried over his shoulder a bag referred to as a "hang-pon-mi." She

estimated the distance between her home at Northampton Mountain and Buena Vista Mountain as four (4) miles.

About 7.30 a.m. on the 4th September, 1985 Lawrence Spooner saw the appellant at Warminister by a shop. The appellant had approached from the direction of Buena Vista Mountain. Sandra Stewart said that at about 6.00 a.m. on the 4th September, 1985 the deceased, as was her well-known habit, left home to go to her cultivation. Mr. Jerome Lawrence as already mentioned, discovered the corpse of the deceased about 9.30 a.m. Miss Cyris Green saw the appellant about 11.00 a.m. same day at Alvin Hill's shop at Northampton Mountain. He was then dressed in a striped trousers and striped shirt, which were different clothes from that which he wore when he left her home that morning. She also told of a conversation she had with him then and another about 2.00 p.m. after she had returned from the scene of the murder. The machete the appellant owned was found on the 7th September in a tank which was on a track that led from the scene of the murder and about 3/4 mile from where the body was found. One branch of this track led to Warminister and the other to Northampton Mountain.

The appellant in a statement from the dock said he slept at the home of the witness Green on the night of the 3rd September, 1985, he left Green's home at Northampton Mountain at 4.30 a.m. on 4th September, 1985 and returned to his home. Thereafter he left his home for Northampton Mountain some 2½ miles away about 6.30 a.m. arriving there at about 8.00 - 8.30 a.m.

Later, while in Northampton Mountain he heard of the death of the deceased. He admitted seeing and speaking with Cyris Green, who informed him he would be charged with committing the crime, and said he told her he knew nothing about it.

The conversation between Cyris Green and the appellant was a part of the circumstantial evidence led by the prosecution in discharging the burden of proof.

Mr. Daly for the appellant obtained leave to argue

Mr. Daly for the appellant obtained leave to argue supplemental grounds filed. He urged in ground one of the supplemental grounds of appeal -

> "that the learned trial judge, to the great prejudice of the defence, erred in fact and in law by directing the jury that the accused's denials to the witness Cyris Green of having killed the deceased in the circumstances alleged by the witness, could be regarded either as an admission of guilt or as being insincere and thereby forming a link in the chain of circumstantial evidence pointing to the accused's guilt (see pp. 118-119; c/f. pp. 32 & 38)."

Before dealing with the impugned directions given by the learned trial judge, it is desirable to highlight the relevant part of the evidence of Cyris Green including the conversation that formed the basis for the directions given. This is as hereunder:-

> "Miss Green said that about 11.00 o'clock on the morning of the 4th September, she saw the appellant at Alvin Hill's shop at Northampton Mountain, she spoke to him saying, 'Herman a hear dem chop up yuh girlfriend over Buena Vista Mountain'.
>
> He replied 'hmm hmm.'

She then left and went to where the body was discovered. On the evidence this was some 2-4 miles away.

About 2.00 p.m. she was at home and the appellant visited her there she observed "him a perspire hard'. She said to him 'Herman yuh deh here so and hear you girlfriend chop up?'

In response to that she said:

> "Him turn to mi and seh him give me three hundred dollars and seh ah mus give him sister."
>
> "Mi turn to him and seh, 'Ah you do it?
>
> "Him seh is Icilda did go report him seh him threaten her."
>
> "Mi ask him again "Herman ah you do it? and him turn to me and seh, him hold on to me finger, this finger and seh ah must go wid him and ah seh, ah not going wid yuh Herman."

The witness' mother then required some attention and after attending to her she the witness returned to the appellant to continue the conversation:

> "Mi seh Herman go over, yuh dont hear the people ah murmur seh is you."
>
> "Him seh him ah go sleep over and I seh, no, I dont want to get involved with government." After that him seh to me that I must tell him uncle to sell the cow hire him Barrister."
>
> "Mi seh to him seh, Herman is you do it? and him seh no."
>
> "Him seh to me, him seh if is even if mi...(vagina) I must take it and go get obeah man and help him." Mi turn to him and seh "Herman is you do it? and him seh no."

In cross-examination the witness said that on every occasion she asked him if he had done it he said no.

After reviewing this evidence the learned trial judge directed the jury at pages 118-119 of the transcript thus:

> "Now an accused person is not bound to incriminate himself but it does not follow that a failure to answer an accusation or question where an answer could reasonably be expected, may not provide some evidence in support of an accusation; whether it does will depend on the circumstances. The rule of law undoubtedly is that a statement made in the presence of an accused person even upon an occasion which should be expected, reasonably, to call for some explanation or denial from him is not evidence against him of the facts stated, save insofar as he accepts the statement, so as to make it in effect his own. Now he may accept the statement by word or conduct, actions or demeanour, and it is the function of you Mr. Foreman and members of the jury to determine whether the words, actions, conduct or demeanour of the accused man at the time when a statement was made, accepted it in whole or in part. Let me tell you this, it does not necessarily follow that a mere denial by the accused of the facts mentioned in the statement necessarily renders that statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead you the jury to disbelieve him and constitute evidence from which an acknowledgement may be inferred by them."

Mr. Daly submitted that this direction was confined to the appellant's response to the accusation, because the learned trial judge had already amply directed the jury as to how the surrounding circumstances ought to be approached. The direction when so confined, he contended, left it open to the jury to find in effect that the appellant's denial in answer to the question..."did you do it?" could constitute a fact on which a finding adverse to the appellant could be made. This response,

he submitted, could not however be considered either as an admission, or as a fact forming a link in the chain of circumstantial evidence against the appellant.

Mr. Daly conceded that he found no fault with the directions as a pure statement of law. What he faulted was the learned trial judge's application because he invited the jury to find that the response could be regarded as an admission. He further submitted that even if the directions could be construed as referring to the appellant's denials of guilt within the context of the wider circumstances contained in the evidence of Cyris Green, namely, his words and actions that morning, the directions were erroneous and constituted a misdirection. The effect of the direction Mr. Daly maintained was to invite the jury to interpret adversely to the appellant and in a manner conclusive of his guilt the single most salient bit of evidence, namely, his answer "NO" which was capable of placing an innocent interpretation on his other words and conduct as related by Cyris Green, thereby eroding a significant aspect of the defence.

In the directions complained of, the learned trial judge was dealing with the entire evidence of the witness Cyris Green including the narrative reproduced, of the conversation she had with the appellant. Immediately before this direction, some specific aspects of this conversation had been dealt with. Thus the learned trial judge in dealing with the appellant's request that Cyris Green should inform his uncle to sell a cow and engage a barrister and that she should sell her body to solicit help of obeah man, said at p. 116-118 -

> "Now Mr. Foreman and members of the jury if you accept that bit of evidence you will have to say what you make of it. The prosecution is saying that a reasonable inference to be drawn is that here is a man who knows he has done something and as it were, he expects to be arrested so he is putting his house in order, gives his sister Three Hundred Dollars, tells his uncle to sell cow to get barrister for him; asks an old time girlfriend try and help me raise some money even to use your body, use your body get some money help me. Why is he doing that, Mr. Foreman and members of the jury?

> "On the other hand, what the defence is saying; the evidence is that she told him that people are murmuring that is him do it. People are murmuring. If you accept the evidence, the man must be prepared, if he is arrested, he would like to be defended since he knew that he did not do anything. So just in case he is arrested for something he has not done, 'Tell mi uncle to sell the cow so mi barrister can help mi. You work, too, and get some money and help me because people are saying is me kill her'. Mr. Foreman and members of the jury you will have to say what you make of it, you are the judges of the facts. As I told you, I cannot tell you what facts to find, you will have to decide, if you accept that bit of evidence from Miss Green. You must remember that the evidence is quite controversial, that is when he made his unsworn statement. He did not deny that this argument took place between Miss Green and himself, but that does not mean that it is necessarily true. You will have to say, if you accept it or not, there is no onus on the accused man to prove his innocence, the Prosecution must satisfy you so that you feel sure."

After giving this direction the learned trial judge went on to say -

> "Now Mr. Foreman and members of the jury, learned counsel for the defence told you that every time this argument did take place, everytime she asked him 'is you do it?' his reply was, not me, everytime."

Thereafter he gave the direction challenged by Mr. Daly. The impugned direction is based on a passage in the judgment of Lawton L.J. in R. v Roy Francis Chandler (1976) 63 Cr. App. R. 1 at p.4. In the passage Lawton L.J. stated what the law has always accepted based on the pronouncement of Lord Atkinson in Christie (1914) 10 Cr. App. R. 141 at p.155.

A trial judge is required to make his summation custom-built for the case in hand and we find that in the circumstances of this case the directions given by the learned trial judge were particularly apposite.

Cyris Green and the appellant spoke on even terms and the jury's attention was directed to the issue of whether the appellant's response was such that guilt could reasonably be inferred.

Having given these directions the learned trial judge

continued at p.119 -

> "Mr. Foreman and members of the jury, you may ask yourselves, if you accept that on each occasion he is asked all he said is, 'No'. Why just mere no. Somebody is accusing you of a serious thing or asking you, 'Is you do it?', 'No'. Is that the answer that you would expect, Mr. Foreman and members of the jury? That is something for you to consider, you are the judges of the facts, you must consider those things and see what you make of them."

Learned counsel for the appellant referred throughout his submissions to the chain of circumstantial evidence and links in the chain. While this is popular and accepted usage, we think that a more appropriate exposition of the nature of what is circumstantial evidence is to be found in R. v Exall (1866) 4 H & F at p.933 per Pollock C.B.

> "It has been said that circumstantial evidence is to be considered a chain and each piece of evidence as a link in the chain, but that is not so; for then if any one link broke the chain would fail. It is more likely the case of a rope composed of several cords twisted together, one strand of the cord might he insufficient to sustain a weight but three or more strands together may be of quite sufficient strength to sustain the weight.
>
> Thus in circumstantial evidence there may be a combination of circumstances no one of which would raise a reasonable connection or more than a mere suspicion, but the whole taken together may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of."

The directions on circumstantial evidence were lucid and eminently correct and the issues were fairly left to the jury for their consideration. We found there was no merit in this ground of appeal.

The second and third grounds of appeal argued by the appellant's counsel are conveniently covered under the umbrella - 'The verdict was unreasonable and cannot be supported having regard to the evidence'.

Mr. Daly submitted that the evidence led by the prosecution amounted to nothing more than grave suspicion and the learned trial judge should have upheld a no case submission and withdrawn the case from the jury. He also submitted that the evidence adduced by the

prosecution did not provide an unbroken chain pointing unequivocally to the guilt of the appellant. Counsel did not dwell long on his submissions on these grounds and at the conclusion we did not call on counsel for the Crown.

The learned trial judge dealt with the issues fairly and correctly. He placed before the jury the defence and the prosecution's case and the decision by the jury is quite consistent with the evidence. The learned trial judge was right in not acceding to the no case submission. Indeed this case was a strong case of circumstantial evidence. All the elements in a case of circumstantial evidence were there; interest opportunity and conduct. See R. v Treacy (1944) 2 All ER 229 at p.231G.

Interest often referred to as motive was in the fact that the relationship between the appellant and the deceased had been breaking down and in his own words she had reported to the police that he had threatened her. Opportunity, he had as the evidence disclosed that he had left the home of Cyris Green at Northampton Mountain before dawn, he went to Buena Vista Mountain where he lived and went on to Warminister by about 7.30 a.m. His route would have taken him in the area where the deceased's body was found and his machete, which could have been used to commit the crime, was found in a tank 3/4 mile from the body and along the same route. His threat to kill someone made in the presence of Mr. Jerome Lawrence, his sharpening his machete on the 3rd September, 1984, his response on being informed of his girlfriend's death, his reaction to the observations of Cyris Green and his response to questions asked by Miss Green, constitute conduct prior to and subsequent to the death of the deceased which the jury must inevitably have taken into consideration.

We concluded that there was no merit in the appeal which we accordingly dismissed.