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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 150/97

BEFORE: THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA vs. ROBERT SMALLING

Delford Morgan, Esq. for the applicant

Miss Lorna Shelley for the Crown

September 30 and October 30, 1998

PATTERSON, J.A.:

On November 14, 1997, Robert Smalling ("the applicant") was convicted at the St. Elizabeth Circuit Court of the offences of murder of Maud Turner, Robert Smalling (Jnr.) and Ojay Brown. He was sentenced to death. He now applies to this court for leave to appeal against the convictions.

The case against the applicant depended to a large extent on a confession by him, recorded in a cautioned statement which the Crown alleged he made voluntarily. On the other hand, the applicant in his defence denied giving the statement voluntarily and alleged that he signed it because his life and limb had been severely threatened.

The deceased Maud Turner had "a relationship" with the applicant which produced a son, Robert Smalling (Jnr.). Prior to that the deceased had another son, Ojay Brown. During her pregnancy with Robert (Jnr.) the deceased and the applicant separated. For six months prior to her death, the deceased occupied a room in a house at Doctor Rock District, Santa Cruz. Dorothy Borth occupied the other two rooms in the house. At the time of her death, both the deceased's sons were living with her. Robert (Jnr.) was then four months old and Ojay three years.

Dorothy Borth last saw the deceased, Miss Turner, alive at about 8:00 p.m. on Saturday, April 6, 1996, seated on a log under a tree to the front of their yard. Someone was sitting beside her, but Miss Borth was not able to say if it was a man or woman, since it was dark. She had seen the children earlier on in the afternoon. She spent most of the following day away from home. On returning home at about 5:00 p.m., she went towards Miss Turner's room. The door was closed, but it swung open as she touched it. She discovered the dead body of Miss Turner lying on her back in bed, clad in a skirt and blouse. The children were not there. The following day she went to premises on Beadle's Boulevard, about half mile from her home, and in thick bushes, she saw the bodies of Robert (Jnr.) and Ojay. Robert (Jnr.) had been decapitated.

Loral Powell, the deceased's sister, knew of the relationship between her sister and the applicant, and she testified that the relationship continued

after they had separated and up to the time of the tragedy. However, Miss Borth said she did not know the applicant and the first time she had seen him was in court. She had heard a male voice in the deceased's room on some Friday nights, but she had never seen the person.

Detective Sergeant Michael Scott testified that on Sunday, the 7th April, the applicant attended the Santa Cruz Police Station and said to him:

"Officer, I hear that mi baby-mother is dead and the two children are missing and I come to find out if was true."

The evidence did not disclose what time it was that the applicant spoke to Detective Sergeant Scott. The applicant was not detained. The police received the report of Miss Turner's death at about 5:30 p.m. and went to the home where she lived. Bloodstains were on the bed where the body lay. The following morning at about 8:00 a.m. Detective Deputy Superintendent Douglas Lawrence visited the home of the applicant on Beadle's Boulevard, Santa Cruz. The applicant had told the Superintendent on the Sunday that he spent the time between Saturday afternoon and Sunday mid-day at his mother's home. The Superintendent, having received information, confronted the applicant by asking him why he had told him that he had gone to his mother's home. The applicant's reply was, "A mek a slip officer." The Superintendent took the applicant to the Santa Cruz Police Station.

At about 2:00 p.m. that same day, Monday the 8th, the Superintendent said he went to premises on Beadle's Boulevard and "in some bushes,

behind a wall, I saw two bodies of two small children." The younger one had no head, and the head was not seen anywhere. The other child had a white baby diaper tied around his neck. The bodies were later removed and apparently, the missing head was subsequently found.

At about 5:30 p.m. that day, Detective Sergeant Scott said that the applicant was brought to his office, and in the course of questioning, the applicant said, "Officer, a ganja mek mi kill dem. Mi a go tell you how it go." Detective Sergeant Scott cautioned the applicant at that stage. A Justice of the Peace was summoned, and in his presence, the applicant dictated a statement under caution, which Detective Sergeant Scott recorded. Certain questions were asked of the applicant after he gave the statement, and those questions and the answers were also recorded by Detective Sergeant Scott. The prosecution relied substantially on that statement and the questions and answers in proof of the case against the applicant. The defence objected to its admission in evidence, but after a trial on the voir dire, in which the defence exercised the right to call no evidence, the learned trial judge admitted the statement in evidence. There could be no doubt that the confession, contained in the statement and the answers to the questions, was voluntarily given and admissible. The salient sections of the statement read as follows pages 83-88):

"Robert Smalling states:

'I get a spliff from a guy and wen I burn it till it finish. So when I finish burn it a go up di house and go inside di house and lie on di bed. And

wen a lie on di bed, she sey she was going outside. So she go outside and she come back in and tell me sey she have a boyfriend outside. So when she tell mi sey she have a boyfriend outside and she going back outside and I asked her why she going back outside and she say she want her boyfriend fi stay with her so mi must go wey. Mi tell her say mi not going. When mi tell her say mi not going away, mi just close the door. When a close the door the weed say mi fi hold her and squeeze her, an mi hold her in a her throat an squeeze her till she strangle an den her little 2 year old boy started to call her, and when him call her, mi say the weed tell mi fi strangle him to and mi strangle him same like how mi strangle him mother, Maud Turner, and mi tie a piece of white cloth around his neck and den a took him up and put him a di doorway, and then a took up the small youth wey a fi mi baby and the weed say mi fi tie him mouth and carry him home. Meanwhile carrying him home, I sey to mi self, a don't know wey mi a go do with him, and the weed say mi fi carry him over di wall and him mouth was tied same way. So when mi carry him over di wall, I throw away the first one, and him a di 2 year old one and mi did carry him same time with fi mi baby, and then a sit over the wall with him. Dat a my baby, and den a say mi nuh know wey mi a go do wid him, and if a carry him home im a go cry. After a say, if a carry him home him a go cry down the whole place. So, it come inna mi mind fi kill him to, and den a never ave no tool pon mi, so when a si say mi never have nuh tool pon mi, a did have a piece of three quarter machete, and a tek it and cut his throat same time and den a tek him and throw 'im over di wall same place, which part mi throw the next youth, and just throw the machete wey, an den a lef and went home.'

Suspect Robert Smalling,
Date: 8/4/96.

Witness W. G. Nembhard,
Justice of the Peace
Date: 8/4/96.

...

- A. '8/4/96, 7:50 p.m. at the Santa Cruz Police Station in the parish of St. Elizabeth. Present, suspect Robert Smalling, Wilfred Nembhard, Justice of the Peace, and Detective Corporal Dawes.

I wish to put some questions to you for the offence of murder for which you may be charged. You are not obliged to answer any of these questions, but if you do, the questions answer (sic) answers will be recorded and may be given in evidence. Signed.

Suspect: Robert Smalling
Date: 8/4/96

Witness: W. G. Nembhard, Justice of
the Peace
Date: 8/4/96.

Q. 1: What is your name?

A. Robert Smalling.

Q. 2: What is your age?

A. 27 years old.

Q. 3: What is your date of birth?

A. 22nd January, 1969.

Q. 4: Where were you born?

A. Southfield, Corby District, St. Elizabeth.

Q. 5: What is your mother's name?

A. Rita Smalling.

Q. 6: Where is she presently living?

A. Same place in Corby District.

Q. 7: Do you know Maud Turner?

A. Yes, sir.

Q. 8: What relation is she to you?

A. My baby mother.

Suspect: Robert Smalling

Date: 8/4/96

Witness: W. G. Nembhard

Date: 8/4/96.

Q. 9: Where is she living?

A. Doctor Rock District, St. Elizabeth.

Q. 10: Then how many children she has for you?

A. One.

Q. 11: What type of child does she have for you?

A. Boy.

Q. 12: Where did you get the spliff from this man you mention?

A. In the town of Santa Cruz.

Q. 13: In which parish do you find Santa Cruz?

A. St. Elizabeth.

Q. 14: When did you go to Maud Turner's home?

A. On Saturday, the 6th of April, 1996.

Q. 15: What time did you go there?

A. About 8:30 in the night.

Q. 16: How did you get to Maud's house?

A. I reached there by walking.

Q. 17: What time did you leave Maud's house?

A. 1 o'clock in the night.

Q. 18: How did you leave there?

A. I leave there on foot.

Q. 19: How did you take the children from Maud's house?

A. I carry them in mi hand.

Q. 20: Where did you take these children?

A. To the back of Beadle's Boulevard.

Q. 21: Where's Beadle's Boulevard?

A. In Santa Cruz.

Q. 22: Where are you living?

A. Beadle's Boulevard.

Suspect: Robert Smalling

Date: 8/4/96

Witness: W. Nembhard

Justice of the Peace

Date: 8/4/96'."

If the jury accepted that the statement was made by the applicant, and that it was freely and voluntarily made, then it was for them to say whether or

not they believed it and to determine what it meant and what weight and value they could attach to it. This was fully explained to the jury by the learned trial judge in a very careful summing up. However, the defence contended that the applicant had been threatened before the Justice of the Peace arrived. This they said was done by another police officer, in the presence of Detective Sergeant Scott, who held a gun to the head of the applicant telling him that if he did not give the statement as he was told to, he was either going "to shoot him or clamp him, clamp his balls." It was suggested that the applicant was told to say that he cut off the baby's head with a machete. Detective Sergeant Scott denied all that.

On the following day, the 9th April, Detective Superintendent Lawrence testified that, based on the statement, he asked the applicant to take him to where he had cut off the baby's head and where he threw the machete. The applicant directed him to Beadle's Boulevard and told him to stop at a place opposite the premises where the bodies of the children had been discovered. The applicant then led the way to the rear of a house where there is a step and he pointed to the ground and said, "This is where I hold down the child." The Superintendent said he noticed what appeared to be bloodstains on the grass. The applicant showed him an area where he said he had thrown the machete, and a thorough search was made, but it was not found. Later that day he arrested and charged the applicant on three counts of murder.

It is of some importance to note the causes of death, having regard to the confession of the applicant. The post-mortem examination was performed by a registered medical practitioner, who described herself by saying, "I am not a pathologist. I am an ordinary doctor who fills out and does post-mortems." The post-mortem examinations were performed on the 10th April, 1996. Externally, Maud Turner had a three centimetre laceration to her left forehead. Her eyes were bulging and her tongue was blue or cyanosed and sticking out of her mouth. Her neck was puffy and darker than the surrounding skin. Internally, her lungs were bloodshot and collapsed and there was bloody fluid surrounding the lungs. Death resulted from lack of oxygen due to strangulation. The broad area of redness and swelling around the neck suggested that the strangulation was consistent with someone using their hands to do it.

Ojay Brown had "a birdseye nappy tied, in a very tight knot, around his neck." Maggots infested his nose and ears. An internal examination revealed that the lungs were collapsed and bloodshot and bloody fluid was in the cavity surrounding the lungs. Death resulted from lack of oxygen due to the tying of the nappy around the neck.

Robert Smalling (Jnr.) had been decapitated. The doctor said, "The head was separate from the neck, clean to the joint, that is, at the root of the neck, and the skin torn from the shoulders and the front of the chest. When you put the head and neck together, they fitted." An internal examination

revealed that there was very little blood in the body. Death resulted from "shock or loss of blood due to the taking off of the head, decapitation." The doctor said it appeared as if the head was wrung off, because of the tearing of the skin in the front especially, there was no sharp edges to suggest a cut, and the fact that the separation went straight through the joint.

The applicant exercised his right to make a statement from the dock. In the salient part of that statement, he denied the voluntariness of the statement, admitted in evidence. He said that the police took him to the police station on the Monday morning. Then he continued:

"In the afternoon, they said they want me to make a statement about Maud Turner and her two child. In the afternoon, in the meantime, there were three police officers in the room that I were taken to. Two of them are not here at this time. So, they put a gun at my ears and sey that I must sey I took a cocaine spliff to kill my girlfriend. They put a gun at my ears and sey that I must sey I took a cocaine spliff ...to kill my girlfriend and two kids, and said if I don't say so, dem gonna shot me in my head and clamp my balls. After that, they tell me that they are gonna get a J.P. After that, they tell me that they are gonna get a J.P. and when the J.P. come, I am gonna told them what I told them and after that I would sign and then the J.P. would sign. After those things happen, after they took those statement what they said they took, they put me back into the cell. The following day, which was the Tuesday, four officers took me to where they say they found the bodies of the two child and bring me to where they said the child was thrown, where they find the blood-spot on the ground. ...After they took me (to) that place and show me where they said they find the bodies, they said I must bring them where the neck were cut off. I tell them I know nothing about it and they bring me to a spot and said that is dog dem take

and sniff it and find it. After that, they took me back to the station and say they charge me for Maud Turner and her two kids."

All aspects of his defence were carefully left to the jury.

In his attempt to obtain leave to appeal, Mr. Morgan was quite unable to advance any convincing argument in support of the grounds that he filed. He attempted to show that the prosecution did not adduce evidence capable of rebutting an alibi that arose on the prosecution case. The alibi, he said, arose from the evidence of the Superintendent that the applicant had told him that he had spent the time between Saturday afternoon and Sunday mid-day at his mother's home. But the applicant did not rely on a defence of alibi, neither in cross-examination nor in his defence. When the Superintendent later asked him in effect why he had told him an untruth he said, "A mek a slip officer." The learned trial judge, nevertheless, no doubt out of an abundance of caution, gave the jury full and accurate directions on the issue of alibi. Mr. Morgan readily withdrew this ground in the light of that evidence, and the judge's directions to the jury.

The second ground put forward by Mr. Morgan was this:

"2. That the learned trial Judge fell in error in not directing the jury in clear and concise terms as to how they should treat the conflict arising on the evidence as between the testimony of Dr. Wright (vide Post-Mortem), and the caution statement relied on by the prosecution as to how Robert Jnr's head was severed; especially in regards to the Appellant's assertion that the statement and contents were manufactured by the Police."

This was based on what it was alleged that the applicant said in the caution statement that he had used a machete to sever the head of his son, Robert (Jnr.), and what the doctor opined, that the head had been wrung off. The learned trial judge gave the general directions on how discrepancies and inconsistencies in the evidence should be treated. In dealing with this issue that counsel raised, the learned judge directed the jury as follows:

“...and the case for the prosecution also is that he severed the neck, severed the head of his own four month old child, decapitated him. There is some discrepancy as to whether it was by a weapon or by hands, but whatever the position, this child, the child's head, whatever was used, was severed from the body.”

Further on, he gave the jury full directions on how they should view the evidence of the doctor, who was called as an expert. We are of the opinion that the directions were adequate, and there is no merit in this ground.

The only other ground that Mr. Morgan sought to urge touched on the admissibility of the confession. He submitted that there was no evidence that the applicant decided to give a statement to the police before the arrival of the Justice of the Peace. But that was overlooking the plain evidence of Detective Sergeant Scott that the applicant said to him, “Officer, a ganja mek mi kill them, me a go tell you how it go.” There is no evidence that the applicant objected to giving the statement. The suggestion put to the witness was to the effect that the statement was given after the applicant was threatened, but that was strongly denied. The issue of the voluntariness of

the confession was properly left to the jury by the learned trial judge, and no complaint was made of that.

In the event, Mr. Morgan frankly conceded that he could find no reasonable ground to support the application for leave to appeal. We had carefully read the transcript of the evidence and the learned judge's summing up. We noticed that the learned judge did not give specific directions to the jury that the evidence in support of each count of the indictment should be considered separately. However, the jury were alerted to the fact that there were three separate counts. In our view, the prosecution's case, based on the confession as it did, was such that the only verdict open to the jury would be guilty of murder on all three counts or not guilty on all three counts. In the circumstances, the failure of the learned judge to give the usual specific instructions did not result in a miscarriage of justice. The live issue turned on the voluntariness of the confession, and the learned judge's summation in that regard was impeccable.

In the result, the application for leave to appeal against conviction is refused.