[2012] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 34/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

RAPHAEL MASTERS v R

Lambert Johnson for the applicant

Jeremy Taylor and Mrs Lori-Anne Cole-Montaque for the Crown

16 May and 15 June 2012

PANTON P

[1] At the completion of the hearing of this application for leave to appeal, we refused the application and ordered that the sentence is to commence as of 8 May 2010. These are the reasons for our decision.

[2] The applicant was convicted by a jury on 8 February 2010 and sentenced on 25 February 2010 for the murder of Donald Muirhead on 13 June 2005 in the parish of Westmoreland. The learned trial judge sentenced the applicant to what he described as "a mere thirty years at hard labour".

[3] A single judge of this court refused leave to appeal. However, the applicant renewed his application before us. We commend Mr Lambert Johnson for the valiant effort made to persuade us that there was merit in the application. In the end, as indicated above, we refused the application.

[4] The prosecution called four witnesses, including Dr Murari Sarangi, a consultant forensic pathologist, who performed a post mortem examination on the body of the deceased on 20 June 2005 at the Pye River cemetery in St James. Dr Sarangi said that the body was "showing advanced degree of decomposition with exposure of skull and bones around the right shoulder, right forearm and right hand". However, he was able to identify four incised wounds as follows:

> (i) 8cm long, 2 cm wide deep into the cranium located obliquely on the top of the head at its centre with linear fractures extending from the back of the head to the forehead;
>
> (ii) 6cm long, .5cm wide deep into the skull bone, cutting both the inner and outer tables of the skull bone, from the right temple up;
>
> (iii) 3cm long, 2cm wide, slicing off the outer skull table on the centre of the forehead; and
>
> (iv) 2cm long, 1.5cm wide, deep into muscles located obliquely on the base of the left thumb.

It was Dr Sarangi's opinion that very great force was used in the infliction of these injuries. He concluded that death was due to cranio cerebral damage consequent upon sharp force injuries to the head, accompanied by blood loss.

[5] Miss Donnaree Muirhead, a youth empowerment officer, was present at the post mortem examination and identified the body of the deceased as being that of her father. In making the identification, she was assisted by Miss Monica Phipps, her aunt. Miss Muirhead had last seen her father alive on Friday, 10 June 2005 and he went missing on 13 June 2005. Miss Muirhead subsequently saw her father's Caldina motor car on Saturday, 18 June on the premises of the Cambridge Primary School, St James, and his body on the evening of Sunday, 19 June 2005 in the Lamb's River area of Westmoreland. She said that other family members were present at the time she saw the body. On that occasion, a ring that was usually worn by her father was removed from his hand in her presence and given to her.

[6] Det Sergeant Elvena Salmon-Johnson was stationed at the Cambridge Police Station in St James at the time of this unfortunate occurrence. She received information on Saturday, 18 June 2005, which led her, along with other police officers, to the playing field at what is recorded in her evidence as Ducketts Primary School. There she saw the car owned by the deceased. She gave instructions for it to be transported to the Montego Bay Police Station. On the next day at about 4 pm, after receiving information on the telephone, she and other officers proceeded along Ducketts Road Westmoreland, where she saw the partially decomposed body of the deceased hanging between branches over a cliff.

The applicant's confession

[7] On 20 June 2005, Det Sergeant Millard Davidson (an inspector at the time of trial) was assigned to conduct investigations into the death of the deceased. During his investigations, he went to the district of Ducketts in Westmoreland. To be precise, he visited a banana plantation which, it seems, was the place where the body was discovered. He also received some statements from the St James police. One of the statements was from one Kadian, the girlfriend of the applicant. That statement implicated the applicant in the killing of the deceased.

[8] On 2 July 2005, the applicant was taken to Sgt Davidson at the Savanna-la-mar Police Station. Sgt Davidson told him that he was investigating the death of Donald Muirhead and that he had information that he, the applicant, was in a position to assist in the investigations. Thereupon, Sgt Davidson cautioned the applicant, who responded thus:

> "Weh Kadian seh in har statement a lie. A she get mi involved, and a mi chop the man. Stafford, weh she call Harry, and Denton neva down weh mi chop di man."

Sgt Davidson showed the applicant Kadian's statement and cautioned him again. The applicant said he wished to give a written statement. He did not have an attorney-at-law, so Sgt Davidson contacted Mr Rupert McDonald, attorney-at-law, who served as "duty counsel" on behalf of the state for persons in custody and in need of representation. Mr McDonald duly arrived at the station and received instructions from the applicant who then proceeded to give a statement that was witnessed by Mr

McDonald. By the time of the trial Mr McDonald had died. The details of the statement formed the basis of the prosecution's case and the resulting conviction.

[9] The statement of the applicant, which was admitted in evidence, reads thus:

> "Mi nuh remember the date or so, but it was on a Monday in June mi and mi brother, Denton, and mi girlfriend, Kadian, was on mi father's farm in Westmoreland. Mi girlfriend get a phone call and mi hear her a direct somebody fi come at the farm. She left go down a di road go meet di person and bring the person inna di farm. … And den she and the person stand up an a talk. Before this day Kadian tell me seh her father is a drugs man, and a man a work fi him father and a drive her father car, and di person a leak some information 'bout her father, and her father want the person dead. Her father tell her fi kill the person. Mi tell her not to do it. She ask mi fi kill di person, and mi tell her no. Kadian stop talking to di man on di farm and walked over to mi, and seh, 'please go do it now'. Go kill the man. I said, 'no' she seh, 'memba seh yu and yu family can get kill'. Mi stand up and she left mi go back up to di man, an a talk to him. Di man turn him back to mi, and she gi mi a signal fi come. Mi did have mi machete an mi walk up behind di man and chop him inna him head. Him drop and the girl hole him down. … And di girl hold him nose. And di girl hold him nose and him mouth and then mi si him nah move or nothing and mi go back and chop him inna him head and after that di girl search him pocket and tek out one key. She start to pull him and seh mi fi help her pull him from down a one banana root, up pon di hill top, and then she roll him over one gully. Him nuh go far and she go put some bush over him. And, then she mek a call on her phone, and seh it finish now. Mi nuh know a who she call. We go down a di car and mi drive it out a mi house. Denton come inna the car, and after wi out deh, Kadian left go Montego Bay, when she come back,

> she ask mi fi drive her inna the car go a Cambridge and mi carry her. And, from that, anytime she wan go a Cambridge, mi carry her. The Saturday mi left go a Salem and mi hear seh police pick up mi mother. Mi go back a Cambridge and hear weh a gwaan, seh dem find the car back a school, and sen mi sister go call the police. Before the police come, Kadian tell mi seh she wi tek the blame fi everything. The police dem come and mi go wid dem. Kadian tell the police lie in her statement. A mi chop di man, Denton nevah down weh mi chop the man, him and harry nuh know nutten. She just wan blame other people and a she a di cause fi everything. A just that mi haffi seh."

The applicant's statement at trial

[10] In a very brief unsworn statement to the jury, this is what the applicant said:

> "My name is Raphael Masters. I live in Cambridge, St. James. And I work at Chung's wholesale, in Montego Bay. I don't know nothing about what they are talking about."

[11] After the summation by the learned trial judge, the jury retired for approximately 15 minutes and returned a verdict of guilty.

The grounds of appeal and submissions

[12] The grounds of appeal filed by the applicant alleged "unfair trial" and a lack of sufficient evidence to ground the conviction. No submissions were advanced in respect of the allegation of unfairness and so we assumed that that ground was abandoned, rightly so, as there was nothing on the record that could have substantiated the allegation. However, Mr Johnson, for the applicant, elaborated on the issue of the

insufficiency of the evidence. He said that, in the absence of forensic evidence, and given the state of decomposition, the question for this court to decide was whether the prosecution had met the requisite standard of proof in establishing that it was the body of Donald Muirhead that had been found. Mr Johnson pointed to the following factors which he regarded as shortcomings in the evidence purporting to identify the deceased:

1. the absence of photographs;

2. the lack of evidence as to the clothing in which the deceased was last seen, and the clothing in which his body was found;

3. the lack of evidence that the items of clothing that the body was found in were known to belong to the deceased;

4. the lack of evidence as to the dental records of the deceased for the purpose of comparison; and

5. the lack of evidence from family members as to the "build, height and complexion" of the deceased.

The prosecution, through Mr Jeremy Taylor and Mrs Lori-Anne Cole-Montaque, in response, conceded that "forensic evidence is always a useful and helpful tool when it is available for trial purposes". However, they submitted that in the instant case the lack of such evidence was not fatal as there was "cogent circumstantial evidence" for the jury to consider.

[13] As regards the statement made by the applicant to the police, Mr Johnson criticized it for lacking evidence of identification of the deceased. There was reference, he said, to 'di man' or 'di person', without an indication of the individual's identity.

Further, he said, the statement refers to two chops having been inflicted by the applicant on the deceased whereas the doctor gave evidence as to four injuries, including a defensive wound to the left thumb.

[14] The prosecution submitted that the evidence in the case was to the effect that Miss Muirhead, the daughter of the deceased, identified the body to the doctor in the presence of the police, and that the doctor performed a post mortem examination on the said body. In addition, Miss Muirhead had received a ring taken from the deceased and she was able to demonstrate familiarity with that ring by describing its features. In any event, the prosecution submitted, there was no issue at trial as regards identification of the deceased and there was no suggestion put to any witness that the body was not that of the deceased.

Decision

[15] In considering the concerns expressed by Mr Johnson as regards the absence of satisfactory evidence of identification of the body, we noted that in a case of murder there may be a proper conviction although the body of the deceased has not been found. The law is clearly stated in the headnote of the report of the case ***R v Onufrejczyk*** (1995) 39 Cr App R 1, which reads:

> "On a charge of murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the prisoner has made no confession of any participation in the crime. Before the prisoner can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable

> doubt. The circumstantial evidence should be so cogent and compelling as to convince a jury that on no rational hypothesis other than murder can the facts be accounted for."

[16] In the instant case, there is no doubt that Donald Muirhead had died. The evidence presented to the jury was that Mr Donald Muirhead had been in contact with his daughter Donnaree on 10 June 2005 and was last seen alive by other family members on 13 June 2005. His car was found abandoned on 18 June 2005 and his body was found on 19 June 2005. Mr Donald Muirhead's daughter and sister identified the body to the police and the pathologist. After this identification, Sgt Millard Davidson "was recruited by Inspector Simms to conduct investigation into the death of Donald Muirhead" (p. 5 lines 15-17 transcript). With this mandate, Sgt Davidson on 2 July 2005 interviewed the applicant who had been taken to the Savanna-la-mar Police Station and handed over to him. Sgt Davidson told the applicant that he was investigating the death of Donald Muirhead and that he had been told that he (the applicant) was in a position to assist in the investigations. Thereafter, the applicant made the statement quoted earlier.

[17] The applicant's statement has to be viewed in the context in which it was given. The applicant gave his statement in response to what Det Sgt Davidson had said to him. There was therefore no need for the prosecution to present any other evidence as to the identity of the deceased. It is unreasonable and illogical for it to be thought that the applicant's story related to some other person (as yet unidentified) whom he had

killed. The jury had sufficient evidence to conclude that the person who had been killed by the applicant was the person whose death Sgt Davidson was investigating.

[18] In ***R v Thomas Joseph Davidson*** (1934-36) 25 Cr App R 21, a case in which the appellant was convicted and sentenced to death for the murder of his son, whose body was not found, the conviction was upheld. The evidence presented by the prosecution was in the form of "a series of confessions" (page 25). There were three confessions in all. The first was in a letter to an inspector of police saying that his son was dead and he was the cause of it, and that that had accounted for the fact that nobody had been able to find his son, but he thought it was best for him "to make a clean sweep of things now and get them squared up". The second was a long statement to the police saying he and his son had jumped into a canal and he had drowned. The final confession was to his estranged wife to whom he wrote a letter reiterating what he had previously said. These confessions were made in July 1934, and came after the appellant had given conflicting stories as to the whereabouts of his son. Between 22 and 24 December 1933, the appellant had told three persons on separate occasions that his son had been killed by a lorry, and on two other occasions during the said period he had said to two different persons that his son had died by drowning. As if to make the picture more confusing, the appellant gave evidence retracting the confessions.

[19] The English Court of Appeal, (Hewart LCJ, Avory J, du Parcq J) in dismissing the appeal, said:

> "... in our opinion it was perfectly open to the jury, upon the evidence which was given, to hold that the boy was dead, and, after hearing the evidence of the appellant, to disbelieve the retraction of his confessions which he made, and to accept the statement which he had previously made, namely, that he was the cause of his boy's death. As Mr. Eustace Fulton has said, all his conduct was inconsistent with the view that this child had come by his death in a way not involving guilt upon the part of the appellant".

In the instant case, given the evidence set out earlier, the jury was entitled to conclude that the applicant had killed Donald Muirhead in the manner described in the statement to the police.

[20] Finally, Mr Johnson complained that there was a discrepancy between the number of chops inflicted on the deceased, according to the statement, and the number of wounds seen by the doctor. In our view, that discrepancy was a minor one and could not have had any impact on the outcome of the trial. The detailed account of the killing narrated by the applicant made such a discrepancy pale into insignificance.

[21] In the circumstances, we were satisfied that there was a sufficiency of evidence to make the jury sure that the applicant had committed the murder charged.