JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 98/2004

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A

DELROY STEWART

V. REGINA

Dwight Reece for the Appellant.

Mrs. Simone Wolfe-Reece and Jeremy Taylor for the Crown.

April 5, 2006 and July 31, 2006

COOKE, J.A.

1. This was a horrific murder. At about 7:45 a.m. on the 24th August 2001 Natasha McKenzie sent her twelve year old sister Kimone Lewis on an errand. She (Kimone) was to go to the home of Dorothy Wilks, apparently to collect some money for McKenzie. Kimone set off on foot from home. It was estimated that Wilks lived some three quarters of a mile from McKenzie's home and the expectation was that Kimone should have returned in half an hour. She did not.

As time passed and Kimone did not return, anxiety gripped the McKenzie household. An alarm was raised in the Rose Hall District in St. Catherine where the parties lived. A search was launched for Kimone. Members of the community participated in the search. It was a fruitless search until after 11:00 p.m. that night when Kimone's lifeless body was found in the bushes in the vicinity of the community centre in Rose Hall. (Kimone's errand would have taken her past this community centre.) McKenzie related that the dead body of Kimone was nude and her head was stripped.

2. Dr. Seshaiah, a Consultant Forensic Pathologist, on the 30th August 2001 conducted a post-mortem examination on the body of Kimone. He said there were two injuries. There was an -

> "Incise wound with sharp margins, and stripping of the soft tissues in an area of 30, by 22 centimeters involving frontal, parietal, right temporal and right side of face, exposing the underlying bones".

There was also a stab wound that penetrated the underlying tissues and entered the left side of the neck cutting the 5th and 6th cervical vertebrae. As a result the left internal carotid artery was cut resulting in haemorrhage into the left internal thoracic cavity. It was his conclusion that death was due to the injuries to the head and neck. Dr. Seshaiah was adamant that those injuries could not have been inflicted by a broken bottle. The injuries in his opinion were consistent with "a cut by a sharp instrument". Dr. Seshaiah also gave evidence of a "two by one centimeters *(sic)* tear present in the posterior vaginal wall of

Kimone. This he said was a recent tear which could have been caused by the "forcible introduction of an erect male organ". He collected a blood sample, nail clippings, vaginal swabs and samples of pubic hair from Kimone's body and handed them over to the police.

3. The appellant, Delroy Stewart was convicted of capital murder of Kimone Lewis on the 29th April 2004 in the St. Catherine Circuit Court. The jury determined that he had murdered Kimone in the course or furtherance of rape. He has now appealed. Before the grounds of appeal are examined the essence of the evidence presented on behalf of the prosecution will be rehearsed.

4. At approximately 1:00 a.m. on the 25th August 2001 Detective Sgt. Ottie Williams, having visited the scene of the murder returned to the Linstead Police Station. There he saw the appellant in the guardroom and he informed the appellant that he had received information that he (the appellant) was involved in the killing of Kimone Lewis and of his intention to interview him. Sgt. Williams took from the appellant a shirt, blue jeans pants and the shoes he was wearing. The appellant was transferred to the Bog Walk Police Station. Sgt. Williams said that on the 29th August 2001 the appellant at that police station intimated that he wanted "to tell me how Kimone Lewis was murdered". He made the necessary arrangements for the taking of the statement. On the 30th August 2001 the appellant gave two statements under caution. At the time

he gave these statements there was an attorney-at-law present representing him. There is no issue as to the voluntariness of these two statements. It appears that the second statement was recorded immediately after the first statement was concluded.

5. A synopsis of the first statement is as follows. The appellant was by his coal kiln on the morning when the deceased passed. The coal kiln was on the premises of the appellant's home which was in the vicinity of the community centre. The deceased called to him "because I know her". Later that morning one "Satan" told him of the missing Kimone. He was aware that a search for Kimone was taking place. That night a neigbhour of his, a "Miss Nicey", told him that "dem find the little girl and her throat cut". His house was attacked by a "portion of man" led by a policeman named Roger who was a family member of Kimone. Stones were rained on his house. Persons rushed into his yard armed with machetes. They ran down his brother threatening to kill him because "dem say the two a wi know bout the murder". He told the attackers "mi nuh know what dem really talking, mi no kill nobody". He ran to the police station "for my life". He said "I don't kill nobody, nobody never see when I kill anybody. That's it."

6. The second statement is now reproduced in full:

> "After I was deh by mi coal kiln, the said youth Orville the deportee youth, him start to boost up things pon

mi now. Mi a goh tell the truth, after mi was deh a mi coal kiln, mi si the deportee youth. Him sey si the informer girl just pass a while ago. Him sey fi walk and mi walk goh a di orange tree fi pick two orange. The little girl was passing and him jook her with a nine, that is a gun. Mi start peg the two orange. After me start peg the two orange, Orville walk come out deh, and call mi. After him call mi now, mi ask him what happen. Him jook me wid a nine, gun. So after him jook mi the little girl was coming back. Him use his gun and lick the little girl in her neckback. After him lick the little girl, put her out with his gun, him told me to lift her up an I ask him for what reason. Him sey, nobody gi mi noh talking. Because yuh idiot. An they give away a friend gun mi mek him friend have to escape from prison. So mi tell him sey mi noh know if a the girl gi wey di gun, mi will not tek up noh man task pon mi head. Him hold him gun an sey mi must bring her into the bushes, and him a boots an burst the boots and him put on the boots on his private. Him then put the burst boots in his pocket and put on two gloves on his hand. After him put on the gloves now, mi was there and him was sexing off the little girl. Then after him done, sex off the little girl, the little girl was getting up and him use the gun and box her and tell her to stop the noise. After him done that him still hold him gun on mi same way. After him hold the gun on mi, him take out a broken bottle, from him pocket an stab the little girl. After him done that now, him sey walk in front an look if anybody a come. Yuh run yuh two eyes an jump out. And him sey if it come to the test that police hold mi, I should not call his name because him will kill off all my family. I was really feeling scared after him told me that. Him sey if it come to the test, test and name fi call, must call mi brother name. Because they can't do him anything. If they don't find anything they have to let him go. Yes, that is how it goh".

7. On the 4th September 2001 in the presence of an attorney-at-law

acting on his behalf, the appellant was interviewed. The questions he was asked and his responses were recorded. Essentially his answers to the questions asked were consistent with the account given by him in his second statement of the 30th August 2001 *(supra).* In these questions and answers the surname of the Orville mentioned in the second caution statement is given as Buchanan. Orville Buchanan lived in the Rose Hall District. There were two reactions to questions which the learned trial judge in his summing up considered as significant. In answer to the question as to how Kimone was dressed the appellant said "sir I don't have any more questions to answer". When asked "what type of clothes did Orville have on that morning?" The record indicates (accused refused to answer).

8. On the 30th August 2001 Sgt. Ottie Williams having read the caution statements given by the appellant, went to the Rose Hall District where he "picked up" one Orville Buchanan whom he had not previously known. Sgt. Williams said he interviewed Buchanan and "carried out further investigations". It was his opinion that following his interview and his further investigation Orville Buchanan could not assist in the investigation into the murder of Kimone Lewis. It should be noted that Sgt. Williams did not reveal to the court why he came to that conclusion.

9. It will be readily observed that the only information in the possession of the prosecution as to how Kimone was murdered came from the lips of the appellant in his second statement of the 30th August 2001. The critical question is whether that information could be translated into evidence adverse to the appellant - evidence which is capable of satisfying the requisite criminal standard. The prosecution also relied on the fact that the appellant took no part in the search for Kimone although this search was a community effort.

10. The first ground of appeal as amended was worded as follows:

> "1. The learned Trial Judge erred in failing to uphold a submission of No Case to Answer made on behalf of the Appellant on the basis that the only evidence against the Appellant was the Cautioned Statement in evidence; and this statement was entirely exculpatory".

This ground is drafted inelegantly in that "exculpatory" evidence can hardly be said to be against the appellant. However, this ground is understood to mean that because of the insufficiency of evidence as presented by the prosecution a prima facie case had not been established against the appellant. At the trial counsel for the appellant, Mr. Campbell made a no case submission. The burden of that submission was expressed thus:

> "M' lord, I will ask you not to call on Mr. Stewart to answer the charge which the Crown has brought against him, for the reason that the Crown's case put at its highest is no more than that which is contained in a cautioned statement from Mr. Stewart, and in that statement he says, he points to another person who committed the act, that is the act which resulted

> in the death of Kimone Lewis. The Crown has done absolutely nothing to negative that position. So it remains solely what Mr. Stewart said. "I did not do it. Somebody else did". (emphasis mine)

There were exchanges between the learned trial judge and counsel pertaining to the second caution statement as to the probative value of that which was regarded as "a mixed statement". The transcript reveals the culmination of these exchanges.

> "His Lordship: A jury can accept an inculpatory part and reject the exculpatory part, simply because the belief is that a person might tell lies to exculpate himself, but would hardly likely to tell lies to inculpate himself, and for that reason a Jury can accept the inculpatory part and reject the exculpatory part.
>
> Mr. Campbell: In this particular case, m' lord, if we were to take out the exculpatory part, what is left, m' lord?
>
> His Lordship: All right, we have a situation where he was present, where a little girl was murdered, where she was raped. He was the one who took the little girl to where this occurred. He was present throughout, then he left. He told the police that he didn't know anything about it. All of this can be considered by the Jury. He also told the police in his statement, if we accept that he gave the statement, that it was a broken bottle which was used. The doctor have *(sic)* said it could not have been a broken bottle. He also mentioned certain things. He never mentioned the removal of the tissue from the face and all of that would have taken place. He left apparently at the same time that he said the person did it. It would be open for a Jury, or it might be open for a Jury to say, I don't think that anybody else was there from the circumstances, how the whole set of circumstances, and that he lied to the police for a particular reason. All of these things can be

> considered by a Jury in order for them to determine what they make of it.
>
> Mr. Campbell: Very well, m' lord.
>
> His Lordship: And if it can properly be considered by a Jury, then it must be left to the Jury if it can be properly considered by them.
>
> Mr. Campbell: But, m' lord, may I just go back to my original point, m' lord. In the circumstances where the Crown has not done anything to negative the fact of Mr. Stewart doing the act which he is alleged to have done and the statement put, I would say that is, m' lord, the real fulcrum of this case, and in those circumstances, m' lord, m' lord ought not to call upon the accused to answer the charge. May it please you, m' lord".

11. In the learned trial judge's view, expressed in the excerpted passage of the transcript he considered the following factors as sufficient to establish a prima facie case against the appellant:

(i) He was present "where a little girl was murdered, where she was raped".

(ii) He "took the little girl to where this occurred".

(iii) He "was present throughout, then he left".

(iv) "He told the police that he didn't know anything about it".

(v) "He told the police it was a broken bottle which was used. The doctor have (sic) said it could not have been a broken bottle".

(vi) "He never mentioned the removal of the tissue from the face and all that would have taken place".

(vii) "He left apparently at the same time that he said the person did it".

(viii) From the above factors "it would be open for a Jury, or it might be open for a Jury to say, that anybody was there from the circumstances".

(ix) "He lied to the police for a particular reason".

12. It should be immediately noted that none of the factors set out above which the learned trial judge considered to be of probative, culminative value pertained to evidence capable of excluding Orville Buchanan as the murderer. It is the absence of such evidence which Mr. Campbell described as "the real fulcrum of this case". The force of Mr. Campbell's characterization should be readily recognised when put in the context that there is an onerous and inescapable burden on the prosecution to adduce evidence to adversely connect an accused to the crime charged. It is undoubtedly true that it would be open to a jury to infer the existence of a fact in issue from facts which they found proved. The fact in issue here, is whether or not the appellant was the murderer. It would seem impossible that a jury properly directed could draw any such reasonable inference. The jury would have to be told, in no uncertain manner, that an essential piece of the puzzle was missing, namely, that there was no evidence capable of excluding Orville Buchanan as the murderer.

13. The case as presented by the prosecution was that the appellant alone was responsible for the murder of Kimone. There will now be some comments

on the factors set out in para. 10 *(supra).* Factors (i) (ii) and (iii) establish the presence of the appellant at the scene of the crime. Factor (v) reveals a conflict between what the appellant said was the instrument which inflicted the fatal injuries and the opinion of the pathologist. This conflict is not probative as to whether or not Orville was the murderer. Factor (vi) does not assist in making a decision of whether or not Orville Buchanan was the murderer. This also applies to factor (vii). Factors (iv) and (viii) can be considered together. They concern the fact that in his first statement the appellant dissociated himself from any knowledge of Kimone's murder. Accordingly he lied to the police. At least at first. These two factors bring into focus the evidential value of lies in the presentation of the case for the prosecution. In ***Strudwick and Merry (1994)*** 99 Cr App. R. 326 the English Court of Appeal at p 331 said:

> "Lies, if they are proved to have been told through a consciousness of guilt, may support a prosecution case, but on their own do not make a positive case of manslaughter or indeed any other crime". (emphasis supplied)

This passage just quoted has received approval by this court - see **Eaton Douglas v. The Queen** SCCA No. 100/99 (unreported) delivered October 8, 2001 at p. 28. It therefore follows that there must be evidence connecting an accused with the crime charged before the issue of proven lies, becomes relevant if at all. In this case this was not so.

14. Although the appellant's refusal to answer certain questions was not listed as a factor in the exchange between the learned trial judge and Mr. Campbell, it must have been in his consciousness for in the summing up he dealt with this aspect. His directions were as follows:

> "Now when you look at the question and answer document, you will find that some questions were not answered. You are entitled to look at this, Mr. Foreman and members of the Jury, to see what you make of it. And you may notice for instance one particular question like what was Mr. Buchanan wearing? You might say to yourselves, if he is saying that Mr. Buchanan is there, it is a simple answer to say what he was wearing. You might ask yourselves, looking at the answer given that he refused to answer, you might have to wonder why is this refusal. Is it that he can't remember? Well you might say to yourselves he could say I can't remember. Is it that there was no Mr. Buchanan there? This is what Crown Counsel is asking you to say. So you will have to look at that. Another question that you might have noticed is one where he was asked what Kimone was wearing and he refused to answer. You might well think Mr. Foreman and members of the jury, that these questions are quite obvious questions and don't implicate anybody. Anyway you might ask yourselves why is it that the accused man is refusing to answer these questions. You will have to take all of this into consideration when you look at the question and answer and look at the whole of the circumstances which existed on the 24th August, 2001".

The approach of the learned trial judge in the directions quoted above is incorrect. Guidance as to the proper approach was given by this court in ***Rupert Wallace et al*** **v. R.** SCCA Nos. 42, 33 and 40/03 (unreported) delivered on December 20, 2004. The impugned directions in that case bear

some resemblance to the directions in this case. In ***Wallace et al*** this court said:

> "In keeping with **R v Chandler** [1976] 3 All ER 105, where the accused – as in this case – had the benefit of the presence of an attorney-at-law, the learned judge ought to have directed the jury to consider whether the applicant's silence or refusal to answer amounted to an acceptance or admission of aspects of the prosecution's case. If the jury so found, the next question for them would have been whether guilt could reasonably be inferred from such acceptance or admission. The learned judge did not follow the path suggested by Chandler. In not having done so, he fell into error".

It is realised that the ***Wallace*** judgment was delivered after the trial of the appellant in the instant case. However, it may be that the error in the learned trial judge's erroneous conceptual approach to the appellant's refusal to answer certain questions influenced his decision to reject the no-case submission. In this case it cannot be said that the appellant's refusal to answer the questions singled out by the learned trial judge, amounted to an acceptance or admission of aspects of the prosecution's case. Therefore the next question of whether guilt could be inferred from such refusal does not arise. The refusal to answer those specific questions is of no evidential value.

15. At the end of the case for the prosecution there were the factors enumerated by the learned trial judge *(para. 10 supra).* There was the appellant's refusal to answer certain questions. There was also the fact that the appellant did not assist in the search for Kimone, albeit that the search was a

community effort. These factors have been dealt with, as has been the issue of the refusal of the appellant to answer certain questions. The non-participation of the appellant in the community search effort by itself is of no particular significance in excluding Orville Buchanan as the murderer. Before concluding this discussion on ground one of the appeal it is somewhat curious that there was no indication as to whether or not there was any forensic evidence. The pathologist gave various samples to the police. Clothing, etc. was taken from the appellant. It does not appear that any effort was made to procure D.N.A. evidence. If there was such effort, what was the result? It is only left to be said that ground one as understood by the court succeeds. There was an insufficiency of evidence presented by the prosecution which entitled the court to call upon the appellant to answer.

16. There were some five other grounds of appeal of which three were supplementary to ground one. It is unnecessary in view of the conclusion in respect of ground one to deal with the other two grounds. The appeal is allowed. The conviction is quashed and the sentence of death is set aside. A judgment and verdict of acquittal is entered.