JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 108/98

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

R. V. COURTNEY VASSELL

Oswest Senior-Smith for Appellant

Brian Sykes with Rochelle Cameron for the Crown

June 5, 6 & July 31, 2001

FORTE, P:

The appellant was convicted in the St. Ann Circuit Court on the 21st October 1998 for the murder of Rudolph Welsh committed on either the 22nd or 23rd September 1996. He was sentenced to life imprisonment, and an order made that he should not become eligible for parole until he has served a period of eighteen years imprisonment. Having heard arguments, over a period of two days, on the 6th June 2001, we granted leave to appeal, treated the hearing of the application as the hearing of the appeal, dismissed the appeal, and affirmed the conviction and sentence. We now put in writing, our reasons for so doing.

The murder took place on the premises of Nembhard's Trucking in Salem in the parish of St. Ann. The deceased worked on those premises as a watchman. Mr. Sydney McKenzie, a mechanic, worked with that business enterprise and had been doing so on and off for a period of five to eight years up to the time of trial. In keeping with his custom, Mr. McKenzie arrived at those premises at 6:30 a.m. on the 23rd September 1996. The deceased, Rudolph Welsh, otherwise call "Dada" was accustomed to meeting Mr. McKenzie at the gate to let him into the premises, but on this morning he was absent. Mr. McKenzie knocked loudly on the "metal sheeting gate" but there was no response. He washed his vehicle and knocked again, without success. He cleaned the inside of the van, and knocked again. On this occasion, the appellant who is also employed to Nembhard's Trucking comes to the gate. The gate was closed. Mr. McKenzie asks him for "Dada" and the appellant said "Dada" was in his room. Mr. McKenzie then proceeds to the room of the deceased, and discovers the door and louvre window closed. He knocks, and not getting a response he "prised up" the louvre window. Looking through the window, he sees "Dada." He was partly on the bed. His feet and his head were on the ground. McKenzie calls to the appellant saying "How you inside here and mek di man dead inside here, and you know him sick with asthma." The appellant ignored him, and continued on his way. Mr. McKenzie went to Mr. Noris Nembhard, his boss, and made a report to him. Mr. Nembhard returned with him to the premises. Mr. Nembhard, on seeing the appellant asked him "What happen? Where were you?" The appellant replied that he was sleeping in the truck, and that when he came in on Sunday night he saw "Dada" sitting on a stool at the doorway and he talked to him and turned off and left to the truck.

Later that day, Mr. Oliver Dyer, a tractor driver employed to Nembhard's Trucking, arrives on the scene, and after discussion with his colleagues he went to the rear of the building where there is a "soakaway" pit. The water in the pit was discoloured

black, as it is a receptacle for the waste water from the washing of the trucks. Mr. Dyer, using a long piece of iron pipe, "fished" in the pit and took therefrom a pair of blue jeans partly burnt with belt, and a shirt. He handed over these items to the police. Those items were identified by Mr. McKenzie and Mr. Dyer as belonging to the appellant. He had last been seen wearing them on the Friday before the Monday morning when Mr. Welsh was found dead.

Sgt. Henry received a report that same morning and went to the premises, where in the room he saw the dead body of the deceased. There were puncture wounds to the chest, wounds to the face and a large wound to the left side of the head. There was blood in the room. There was a truck on the premises. Sgt. Henry on making observations in the truck saw what appeared to be blood on the seat – "just one spot" about three inches long and about half an inch wide. Before this the Sergeant had spoken to the appellant, asking him where he was on the previous night. The appellant replied that he had slept in the truck. On seeing the blood on the seat, he asked the appellant how blood came to be on the seat. The appellant replied "a mi teeth when deh bleed." Later that day Sgt. Henry returned to the area and in an open lot in front of Nembhard's Trucking, he found an ice-pick.

On the 24th of September, both McKenzie and Dyer attended the Run-a-way Bay Police Station, and in the presence of the appellant identified the pants, the shirt, belt and the ice-pick as belonging to the appellant. When the articles of clothing were identified by McKenzie the appellant admitted that they were his. On identification of the ice-pick, the appellant said "Mi Trelawny." Mr. McKenzie gave evidence that he had seen when the appellant was making the ice-pick. McKenzie who is called Trelawny, testified that the appellant used some electrical welding wire in making the ice-pick. He also made the handle. When Dyer identified the articles, the appellant said "a fi mi the pants and shirt but mi nuh know the rest a things dem."

Dr Cruickshank, Director of the Government Police Forensic Laboratory visited the scene on the 24th September. She testified that the room of the deceased appeared to have been washed but blood was present in brown drops and spray (tiny droplets) on the northern wall approximately eight centimeters from the floor. On subsequent analysis, the expert found that the blood in the room was in the Group O classification. In the same truck referred to by the police officer, Dr. Cruickshank found what she described as a pale brown stain on the driver's seat which on analysis proved to be human blood; but in her opinion, this blood could not have come from a bleeding tooth as it was a very small drop of blood, and if it had come from a human tooth she would have expected to see a mixture of saliva, and there was none. A sample of blood was taken from the deceased, and this was classified as Group O blood. On examination of the pants taken from the pit, which was handed over to her by the police, she found human blood – the grouping of which was O.

A postmortem examination performed on the body of the deceased revealed the following:

(i) multiple lacerations and cut

(ii) bleeding from the nose and mouth.

There were at least thirteen (13) puncture wounds all over the chest, all of which would be consistent with being caused or inflicted by an ice-pick. The doctor was of the opinion that these wounds could have been inflicted by the ice-pick that was identified as belonging to the appellant.

(iii) there was haemorrhaging which was like clot, deep to the scalp, the occipital bone.

(iv) There was bruising in the right occipital zone – the same area as the haemorrhaging.

In the doctor's opinion death was caused by a blunt trauma to the head – a blow to the head; which could have been inflicted by an object like a two-by- four piece of wood. A fall from the bed could not cause the injuries.

In his defence the appellant gave an unsworn statement, in which he said he was at work on the Sunday night (22nd September) at Nembhard's Trucking, and after he went outside to the bar where he saw Dada and others. After they had exchanged drinks, he left and went to a club. This club was not lively so he left. On the 23rd September when he heard the knocking at the gate he went to the gate and opened it. He saw McKenzie who asked him for the watchman (Dada –the deceased). He told him he didn't know as he hadn't seen him since waking up. Mr. McKenzie went to the deceased's window and called him and then he saw "Dada" lying down in bed. Mr. McKenzie went to make a report to the police. The police came, told him to pack up his clothes and come with them. He was taken "from one police station to another" and finally he was arrested.

Before us Mr. Oswest Senior-Smith argued four grounds of appeal, three of which go to the question of the sufficiency of the evidence as it related to the proof of the Crown's case on the basis of circumstantial evidence. That the case relied on circumstantial evidence is unarguably so. The Crown relied on the following:

> (1) The opportunity that the appellant would have had for committing the crime, as he was on the premises behind a locked gate during the period in which the deceased would have been killed. They were the only two authorized persons present there, and there was no sign of any intruder on the property.
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> (2) The denim pants and other articles that were found buried in the watery pit were identified as being those of the appellant. The pants were burnt and had on it human blood of the same grouping of that of the deceased. Blood stains were found in eight (8) areas of the pants.
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> (3) An ice-pick identified as belonging to the appellant and indeed one which he made himself, was found

> obviously discarded in an open lot opposite the premises on which the death occurred. The doctor though placing the cause of death to be the head injury, opined that the ice-pick could have inflicted the injuries which she saw to the chest of the deceased. Blood was present in brown stains on the handle of the knife, though no grouping could be done.
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> (4) Human blood, albeit a drop of blood was found on the seat of the truck where the appellant stated that he had slept at the relevant time.
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> (5) The appellant's explanation of the reason for the blood on the seat was in the doctor's opinion not so, as there was no mixture of saliva.
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> (6) The shirt (red and gray) taken from the pit also had human blood on it – in approximately twenty-five (25) areas – but no grouping could be done.

In our view, this was ample evidence upon which, the learned trial judge was justified in ruling against a no case submission and calling upon the appellant to answer. However, Mr. Senior-Smith also attacked the treatment by the learned trial judge of the principles applicable in circumstantial , evidence, in his directions to the jury. This complaint is contained in ground 2 which reads:

> "That the Learned Trial Judge did not adequately assist the Jury in his directions on circumstantial evidence; that the directions did not sufficiently guide the jury in regard to properly relating the law on circumstantial evidence to the facts emerging from the trial. Wherefore it is submitted respectfully that the Jury were not appropriately directed whereby the Applicant/Appellant's chances of acquittal were severely impaired."

The invalidity of this complaint can readily be seen when one examines the directions of the learned trial judge which without apologies I set out in full hereunder:

> "Now, the Crown is relying on circumstantial evidence. I am now going to tell you the directions in law about circumstantial evidence and I am going to be giving it to you so that you have a legal framework in which to view the narrative which I am going to remind you about. Later on in the summing-up, when I proceed to analyze, help you to analyze the evidence, because these directions on

> circumstantial evidence are so important, I'm going to be repeating these directions to you.
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> So, here is the first time. It is not always that a charge can be proved by evidence of eye-witnesses, and there is no eye-witness evidence in this case. The fact that there are no eye-witnesses to the commission of the offence does not mean that the offence cannot be legally proved. Where there are no eye-witnesses, a charge may be proved by inference from surrounding circumstances. This is called circumstantial evidence. Guilt can only be inferred where all the surrounding circumstances relied on point in one direction and one direction only and that must be the guilt of the accused. In other words, the circumstances which you find proved must be consistent with the guilt of the accused and inconsistent with any other rational conclusion. Your approach should be to examine each such circumstance to see whether you accept that circumstance as proved and then you put all the circumstances that you find proved together and then decide whether, in your judgment, whether your judgment is compelled to one conclusion, the guilt of the accused. It is then and only then that you would be entitled to return a verdict of guilty. Now, that is the legal framework."

As promised the learned trial judge returned to this subject, once more and directed the jury in exactly the same terms as he had stated earlier.

He then continued in an effort to analyze and put before the jury all the evidence that in his view, could be considered as circumstantial:

> "Let us now, Mr. Foreman and members of the jury, pay some close attention to the circumstances. I'm going to put some questions to you for you to answer. Did the jeans pants, the ganzie, the belt, and the ice-pick belong to the accused? Where were the pants and the ganzie recovered from? Was it from the pit? If so, who put them there and why? Did the ice-pick belong to the accused? If your answer is yes, how did it reach across the premises? Did all these items, the ice-pick, the pants, the ganzie, have blood on them? If the answer is yes, where did that blood come from? How did the blood get there? And does this blood have anything to do with the blood of the deceased.
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> At this point, let me tell you that the blood grouping of the deceased was O. The blood found in the room of 'Dada' was O and the blood found on the pants was O. But

remember, Mr. Foreman and members of the jury, one in every two people have Group O, remember that.

Was the pants being burnt? Is there sign of burning on it? Was the shirt being burnt? Was the belt being burnt? You saw it. What you saw, do you accept that as burning or as being burnt? If so, why the burning and who did the burning? Mr. Hibbert has given you an interpretation. It is for you to say whether it is nonsense or not. And his interpretation was that the accused man set out to destroy by burning, but he couldn't do it in time. That's why he went and put it in the soakaway pit. If it is nonsense, you throw it away. If you think it makes sense, well, it is a matter for you.

To come back to the blood, how did the blood get on these articles? The accused man, in his statement, hasn't said how and Mr. Henry, in addressing you said, 'Honestly,' which were his words which I wrote down, 'I can't tell you, members of the jury, how the blood got there.'

Then, let us look at the evidence of McKenzie, if you accept him. McKenzie's evidence was that the accused was walking around the back, to the rear, and he called and spoke to him about 'Dada' being dead from asthma and, according to McKenzie, he showed an indifference. Your colleague is inside dead, no, someone tells you he is dead, Mr. Hibbert's argument is that the normal behaviour would be to run come and see if it is true you are talking. But the accused doesn't do that.

Then, there is the blood in the ERF. How did it get there? And what did you make of the accused man's account that it is, if you accept Henry, that it is from a bad tooth, a bleeding tooth? When you put that against the evidence of Dr. Cruickshank, who is the expert – but let me warn you, not because she is an expert does it mean that you must accept what she says, you know, but of course, you listen to it carefully because she has a lot of letters behind her name and she has been in the business a long time, but that doesn't mean you have to accept it. She said it wasn't any blood from any tooth.

Then, another factor you have to take into consideration, there is no ill will between them. So, why should the accused man kill this man? That's a factor that has been put before you and I remind you about it.

I will also remind you that the crown has not led any evidence to say that it was only the two persons that were there that night. And the evidence of the height of the wall,

> according to what you accept, persons could have climbed over the wall and come in. So these are all the circumstances that I can recall. If there are any more which I have not mentioned you take them into consideration. But these are all of them."

In those passages the learned trial judge was at pains to remind the jury of all the evidence that could be considered as circumstantial given the legal principles as he had previously outlined them to the jury. He was careful to point out not only evidence that may have been considered adverse to the appellant, but also these bits of evidence and indeed arguments by the appellant's counsel which were favourable to the appellant. In our judgment, the learned trial judge directed the jury adequately in this area of the case, and we can find nothing which would lead us to interfere with the conviction based on this ground.

The appellant also argued the following ground of appeal:

> "That the Learned Trial Judge erred in not directing the Jury on the law relating to lies told by the Applicant/Appellant (if they so found) in respect of exhibits purportedly connecting the Applicant/Appellant to the murder alleged. That this omission to direct was a non-direction herein and was fatal to the Applicant/Appellant's prospects for acquittal."

Mr. Senior-Smith relied on the case of ***R. v. Goodway*** [1993] 4 All E.R. 894 at 895 in which it was held as follows:

> "Since the lies told by the appellant when interviewed by the police were relied upon by the Crown to support the identification evidence the judge should have directed the jury that the appellant's lies had to be deliberate and had to relate to a material issue and that they had to be satisfied that there was no innocent motive for the lies before the lies were relied on to support the identification evidence, and his failure to give such a direction in his summing up was a material misdirection. The appeal would therefore be allowed and a retrial ordered (see p 900 e to j, post); ***R. v. Lucas*** [1981] 2 All ER 1008 applied."

As the headnote states, this case followed the principles adumbrated in the ***Lucas*** case. The directions re lies are required in such cases where the Crown relies on the lies in proof of its case. In the ***Goodway*** case, the Crown relied on lies told by the defendant in interviews he had with investigating officers. In three passages, the learned judge, in that case, referred to those assertions in the interviews which the prosecution relied upon as lies. However, he gave no directions as to how the jury should approach lies told by an accused. It is in that context that the English Court of Appeal concluded that the ***Lucas*** direction (supra) should have been given.

In ***Broadhurst v R*** [1964] 1 All ER 111 Lord Devlin, in his opinion in the Privy Council said at 119-120:

> "It is very important that a jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness. That is the sort of direction which it is at least desirable to give to a jury."

This passage was cited with approval in the New Zealand case of ***R. v. Dehar*** [1969] NZLR 763 at 765 by North P as follows:

> "We think that it follows from the cases which we have cited, that where lies constitute an important element in the chain of proof put forward by the Crown a clear direction from the trial Judge is necessary. We do not say that in every case in which lies are put forward in aid of the Crown's case to reinforce the other evidence it is always necessary for the trial judge to give any specific form of direction. How far a direction is necessary will depend

> upon circumstances. There may be ... cases where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic."

These cases establish that the underpinning for the requirement of the ***Lucas*** direction is a dependence by the Crown for proof of its case, on the lies told by the defendant. In our judgment, the direction would not be required where the lies are only relied upon by the Crown merely to attack the credibility of the defendant.

In the instant case, the appellant submitted that the Crown relied on the following lies in proof of its case –

(i) the denial of ownership of the denim pants

(ii) the appellant's denial of ownership of the ice-pick

(iii) the issue as to the "bleeding tooth," against the background of the evidence of the forensic analyst that the blood on the seat of the truck could not have come from a "bleeding tooth".

The learned trial judge, however did not leave these matters with the jury as lies. A perusal of the directions of the learned trial judge, the relevant part of which is set out earlier in this judgment will reveal that at no time did the learned trial judge invite the jury to determine whether those denials and his assertion that the blood on the seat of the truck came from his bleeding tooth were lies. Nor did he direct the jury that if they found them to be lies then that would assist the prosecution in proof of its case. He put them to the jury as issues in the case which they had to decide. In other words, they went to the credibility of the prosecution's case as also that of the appellant's. The prosecution's case did not depend on the assertions of the appellant. It depended on the positive evidence of its witnesses who established by their evidence, the pieces of evidence necessary to create a whole picture of the circumstantial evidence needed to satisfy the jury as to the necessary standard of proof. Its case relied on the accurate and proper identification of and the connection of the appellant to the clothing taken from the pit, the

blood stains found on them, the identification of the ownership of the ice-pick found also with blood stains, the proof of blood stains on some items of the accused's clothing being in the same blood grouping of the deceased's blood, and bloodstains found on the seat of the truck on which the appellant admitted he had slept on the relevant night.

The fact that the appellant denied ownership of the clothing, and the ice-pick, and his explanation of the blood-stain on the truck seat, cannot place this case in the category of cases in which it could be said that there were lies spoken by the appellant upon which the Crown relied in proof of its case. Instead, the appellant's reaction to those matters in our judgment, did nothing more than challenge the credibility of the Crown's case, and put in issue the validity of the evidence by which the Crown sought to establish his ownership of the clothing and the ice-pick. The evidence of the analyst challenging his assertion as to the origin of the blood on the seat of the truck, did nothing more than to establish the unlikelihood of the truth of that statement. That is not to say that the Crown relied on the fact that he told a lie in that regard, but used the evidence to support its own theory that the blood found at the place where the appellant admitted that he had slept that night had some relevance to its case. This did no more than create an issue as to the appellant's credibility in his assertion that the blood came from his tooth.

For these reasons, we found that this ground, though worthy of argument, and consideration, is also without merit. The appeal was therefore dismissed, and the conviction and sentence affirmed.