Privy Council Appeal No. 51 of 1970

Rupert Anderson – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DATED THE 13TH JULY 1971

Present at the Hearing:

LORD GUEST
LORD WILBERFORCE
LORD CROSS OF CHELSEA

[*Delivered by* LORD GUEST]

Their Lordships have already advised Her Majesty that the appeal should be dismissed and they now give their reasons.

The appellant was convicted of the murder of Huie Foster in the Port Antonio Circuit Court, Jamaica (Robotham J. sitting with a jury) on 3rd July 1969 when he was sentenced to death. The appellant was charged with the murder on either 23rd or 24th December 1968 of Huie Foster. The appellant appealed to the Court of Appeal of Jamaica and the Court unanimously dismissed his appeal. There were a number of grounds of appeal but the only ground which they considered of substance was a misdirection of the jury by the trial judge. They however applied the proviso and refused to interfere with the conviction, and dismissed the appeal.

The case for the prosecution consisted chiefly of circumstantial evidence.

At 8 o'clock on the evening of 23rd December 1968 the accused was seen at a gas station where the deceased worked talking to him. They were friends. He obtained a lift to his home in Highgate and he returned by bus to Port Maria arriving about 9.45 p.m. at the hospital gate. There was some dispute as to whether it was 9.20 or 9.45. But this was quite immaterial. The hospital gate lies on the road between Port Maria and Highgate. On the opposite side of the road to the hospital gate there is a bar known as McKella's Bar about 40 yards distant. In the opposite direction and on the same side of the road at approximately the same distance there is a house where lived Andrea Walker, a witness to be referred to later. At the hospital entrance there is a porter's lodge with kitchen attached standing a little distance back from the road in front of which are croton bushes. Constable Fairweather was drinking in the bar referred to from 9 o'clock till about midnight

when he left and proceeded on his way home towards the hospital entrance. He heard a shout of " murder, murder ". He went back to the bar for assistance, no one was around. He returned towards the hospital entrance and from that side of the road he heard a voice coming from the direction of the porter's lodge saying " You fucker you ", which he recognised as the voice of the accused with whose voice he was familiar. He saw someone between the road and the porter's lodge behind the croton bushes holding in his left hand a penlight with a red rim. The right hand of this person was moving up in a chopping motion. He was unable to see any more of this person. He then went home without making any report.

At about the same time Andrea Walker (aged 15) a schoolgirl, came to the house already referred to and she saw the deceased on a bicycle at the hospital gate: she also saw a gentleman coming from the hospital direction. The deceased left his bicycle at the porter's lodge, went up towards the hospital and the gentleman followed him. She heard moaning as if from a human being, she saw a lady coming from the hospital running. A gentleman—she could not see whether it was the same as the gentleman she had seen previously—walked towards the lady and " cut across her ". She did not see Constable Fairweather there.

The deceased's body was discovered at 7 a.m. the next day, 24th December, lying on the Highgate side of the porter's lodge near to the kitchen premises. The deceased had severe wounds which might have been caused by a machete.

Magnus Watson the accused's uncle with whom he lived said that the accused came home about midnight on 23rd/24th December. He saw the accused at 6 a.m. on 24th December and the accused told him he had heard a man had been killed at Port Maria and that he knew the man.

On the same day between 9 a.m. and 10 a.m. Ivan Wilson a motor driver saw the accused between the gas station and the hospital gate. Ivan Wilson said " Man, what a way dem kill off our good fren " the accused replied " What is not yours mus' leave it alone. Like brute you live, like brute you shall also die, because it is a lesson to man to teach man not to fool around the next man woman ". The accused also told him that he had seen Huie in McKella's Bar drinking the night before.

Cleveland Wilson was also drinking in McKella's Bar on the evening of 23rd December. He there saw the deceased who kept looking more than once towards the hospital gates. The deceased left about 11.30 p.m. in the direction of the hospital gate and he said that he was going to meet someone at the hospital gates.

There was some evidence of an association with a witness Carmen Walden who had been intimate once with the deceased and had only spoken to the accused once. Carmen Walden said that she was at the hospital gate on 23rd December. It was suggested by the prosecution that the motive for the murder was the jealousy of the accused over the deceased's association with Carmen. Their Lordships do not think that any such motive was satisfactorily established.

The accused made a statement not upon oath denying the charge and putting forward a defence of alibi.

Counsel for the appellant made several criticisms of the summing up of the trial judge. These may be grouped under four heads. First that the trial judge failed to direct the jury on the way they should evaluate the evidence and he failed to relate the evidence to the issues in the case. A special point was made in regard to the identification

evidence. The complaint was that the trial judge had not adequately directed the jury on the importance of the identification evidence and the difficulty of identification by voice.

At an early stage in his summing up the trial judge referred to the identification of the accused's voice by Fairweather. Later he stressed the importance of Fairweather's evidence as the only witness who positively identified the accused, and told the jury to consider the evidence very carefully. Their Lordships have carefully considered the summing up and having regard to what the trial judge said at the outset in regard to the critical nature of the identification evidence they are satisfied that there is no substance in the complaint on this or any other point referred to above.

Secondly, it was contended that the trial judge had not stressed the inconsistencies and contradictions in the evidence for the prosecution. A particular point was taken in relation to the evidence of Constable Fairweather and Andrea Walker which conflicted in some respects. The evidence of Andrea was fairly vague and it is not certain whether this evidence related to an episode which occurred before or after Constable Fairweather's observations. In any case it does not in their Lordship's view detract from the value of the Constable's evidence. The other conflicts and inconsistencies were of a minor and unimportant character.

Thirdly there was a complaint in regard to the trial judge's summing up on the question of the penlight. The witness Constable Fairweather had said that he saw the person whose voice he recognised as the accused's saying "you fucker you" holding a penlight with a red rim in his left hand. When Detective Constable Dwyer searched the accused's room on 27th December a pen flash light with a red reflection was found. This was produced in evidence. The judge in his summing up when describing the evidence of Constable Fairweather said—". . . when he returned he saw a man with a penlight in his left hand and he observed like it had a red rim around the top of it. Well, you saw the penlight. It was taken from the accused's home. It is a penlight with a red rim around it." The complaint is that the judge was inviting the jury to hold that the penlight produced and found in the accused's home was the penlight which Fairweather said he saw on the night in question. In fact Fairweather was never asked to identify the penlight produced and it might have been better if the judge had told the jury this. But even if Fairweather had been asked to identify the penlight he could probably only have said that it was similar. Their Lordships are doubtful from reading the transcript whether the judge was really inviting the jury to say that the penlight had been identified by Fairweather. In any event their Lordships do not consider that this was a misdirection by the trial judge. Finally complaint was made about certain mis-statements in the summing up. These were of a minor character.

The Board's jurisdiction in regard to criminal appeals is well known and was referred to in *Re Dillet* 12 Appeal Cases 459 where Lord Watson said at p. 467—

> "Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

Having regard to this and other authorities their Lordships do not consider that any of the above complaints by Counsel for the appellant would justify them in interfering with the decision of the Court of Appeal who carefully considered all these matters.

The complaint which formed the basis of the Court of Appeal's judgment related to the trial judge's summing up in regard to the condition of the accused's boots. It should be explained that when the accused was arrested on 25th December his water boots were found and also a piece of cardboard from inside the boots. He admitted wearing the boots on the night of 23rd December. Mr. Garriques a forensic expert examined the water boots and the cardboard on 28th December. He found no human blood on the water boots. In his summing up the trial judge referred to the water boots in this way—

> " He [Mr. Garriques] says there was no blood on the shoes—well, that is merely his opinion, Members of the Jury, you are not bound to accept it because he happens to be an expert in this particular field. An expert is brought before you merely to guide and assist you in evaluating evidence of a particular nature, he being trained in that particular field therefor. You will weigh well what an expert has said before you discard his evidence because neither you nor I is trained in that particular field in the same way that Mr. Garriques would weigh well what I would have to say in the field of law because he is not trained in that particular field. But you are still judges of the facts and you may accept or reject evidence of the expert."

The Court of Appeal considered that this was a serious misdirection because the judge was inviting the jury to disregard the evidence of the expert to the effect that there was no blood on the boots and form their own opinion as to whether there was blood upon the boots.

So far as the piece of cardboard is concerned this was found by Detective Constable Dwyer on his visit to the accused's home on 25th December. It was in the right foot of the water boots which the accused said he was wearing on 23rd December. It had brown marks resembling blood stains. Mr. Garriques said that on his examination on 28th December he found that those marks were human blood stains. The stains must have been about two weeks old but they could have been there before two weeks. In his opinion it was not more recent than two weeks. It might have been older.

It was definitely not a fresh stain.

The trial judge in his summing up to the jury when dealing with Mr. Garriques' evidence said that the witness found human blood " In his opinion they were then about two weeks old."

There is no doubt that in the summing up a confusion might have arisen in the jury's mind as to whether blood on the cardboard could have been of more recent origin than two weeks. Their Lordships are prepared to accept following the Court of Appeal that there were misdirections by the trial judge in regard to the boots and in regard to the cardboard.

Their Lordships do not agree with Counsel for the respondent that these were subsidiary matters. These were serious misdirections as the Court of Appeal have held. There was no evidence of blood on the boots or the cardboard that could have implicated the accused.

This brings their Lordships to the consideration of the proviso which is to be found in The Judicature (Appellate Jurisdiction) Law, 1962 section 13—

> " 13—(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the

ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The test which an Appeal Court is to apply to the proviso was recently referred to by Viscount Dilhorne in *Chung Kum Moey v. Public Prosecutor for Singapore* [1967] 2 A.C. 173 at p. 185 quoting the classic passage by Lord Sankey in *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462 whether " if the jury had been properly directed they would inevitably have come to the same conclusion ". Viscount Dilhorne also referred to *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 where Lord Simon said that the provision assumed " a situation where a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict ".

In the judgment of the Court of Appeal a reference was made in relation to the proviso as to whether the relevant evidence would have " tipped the scales in favour of the prosecution ". Their Lordships are not satisfied that this is the appropriate test to apply and they prefer those above referred to. The question is therefore " whether a jury being properly directed as to the presence of blood on the water boots or cardboard would inevitably have come to the same conclusion ". Their Lordships agreeing with the Court of Appeal consider that the prosecution presented a very strong case of circumstantial evidence. Their Lordships regard it as not unimportant that the Court of Appeal themselves applied the proviso and refused to interfere with the conviction. But apart from this consideration their Lordships' view is that the following facts would have inevitably led a jury properly directed to a conclusion of guilt. The accused was on his own admission in the vicinity of the crime at or about the time of its commission. The evidence of Constable Fairweather that he in fact recognised the accused's voice with which he was familiar. The evidence of the accused's uncle Magnus Watson that at 6 a.m. on the following day the accused spoke of a killing in Port Maria of a man he knew one hour before the body of the deceased had been found. The totality of this evidence presents a very strong case and their Lordships have no doubt that apart altogether from the evidence as to the condition of the boots and the cardboard, no reasonable jury could have failed to convict.

Counsel for the appellant contended that in a case of murder a special rule applied in regard to the proviso and he referred in particular to the observation of Lord Goddard C. J. in *Regina v. Dunbar* [1958] 1 Q.B. 1 at page 12 where he said " in a matter which makes a difference between a capital sentence and a sentence only of imprisonment we feel it would be undesirable for the court to consider applying the proviso ". Reference was also made to a passage in a judgment of Sachs L. J. in *Reg. v. Cooper (Anthony)* [1969] 1 W.L.R. 977 at p. 983 where on an appeal from a finding of a Court Martial his Lordship is reported as saying " that being the situation, and there having been improper admission of evidence and improper directions as raised in the notice of appeal, Mr. Lincoln in his usual persuasive manner sought the application by the Court of the proviso. On that matter it is sufficient to say that the proviso is very rarely applied in murder cases, and then only when there has in every other respect been nothing which can be criticised in the conduct of the trial or in the summing up. It is not applied where the summing up has imperfections such as those already related." The Court refused to

apply the proviso in that case. Their Lordships with respect consider that the statement by Sachs L. J. if it contains a principle is too widely expressed and should not be followed. It cannot be the case that the proviso is never applied in murder cases nor can it be the case that for the application of the proviso there cannot be any possible criticism of the summing up. Their Lordships realise that in cases of murder great care must be taken to see that there has been no miscarriage of justice. Further than that they do not consider it wise to lay down any principle.

On the whole matter their Lordships are satisfied that no miscarriage of justice did occur and that a jury properly directed would inevitably have convicted.

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In the Privy Council

RUPERT ANDERSON

v.

THE QUEEN

DELIVERED BY

LORD GUEST

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