1976/20

IN THE PRIVY COUNCIL 40 OF 1975

ON APPEAL

FROM THE COURT OF APPEAL, JAMAICA

BETWEEN:

DONALD PARKES — Appellant

- and -

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment and order of the Court of Appeal of Jamaica (Luckhoo, Ag.P., Swaby J.A., and Robinson, Ag.J.A.) given and made the 12th July, 1974 refusing to grant leave to the Appellant to appeal against his conviction. The Appellant was charged with murdering one Daphne Graham on the 14th September, 1971. He was tried in the Circuit Court for the parish of Kingston, Supreme Court for Jamaica (Smith, C.J., and a jury), on the 21st January, 1974, was convicted, and was sentenced to death. pp.72-78 p. 1 p.69

2. Evidence was given for the prosecution, inter alia, as follows :-

a) Ralston Jarrett said that, in September 1971, he was living at Bowens Road, the home of Minna Graham. The deceased, who was Minna Graham's daughter, also lived there. He knew the Appellant. At about 7 a.m. on the 11th September, 1971, he (the witness) was at his room at the back of the yard of p.4 l.3 p.4 l.26

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the property. The deceased's room as at the front of the yard. As a result of something
p.5 l.6 he heard he went round to the front of the yard where he saw the deceased holding her left breast and crying. She was bleeding from a cut over her breast. He helped the deceased to her bed and then going round to the back of the house, saw Minna Graham,
p.6 l.18 who was holding the Appellant. The Appellant
p.6 l.27 had an open ratchet knife in his hand. He heard Minna Graham say to the Appellant that he had stabbed her daughter and she was
p.7 l.3 holding him until the police came. The Appellant did not say anything when Minna Graham spoke. He (the Appellant) was trying to get away from Minna Graham. The knife cut Minna's finger. The witness went to
p.7 l.20 the Appellant and asked what had happened but the Appellant did not reply. He took the knife from the Appellant and went to get a car to take the deceased to a doctor. Shown a ratchet knife in Court he said it was like the Appellant's knife but he could not positively identify it as the Appellant's.
p.9 l.10 At no time did he see anyone else in the yard with a knife. In cross-examination he said he did not see anyone wound the deceased
p.11 l.5 and he did not know how she got the wound.

p.14 l.14 b) Minna Graham said she owned 10 Bowens Road and lived there with her daughter, the deceased, who was 32 years old when she died. There were two houses on the plot. She
p.15 l.30 occupied one, her daughter had a room in the front of the second house, which was tenanted. The Appellant lived with his aunt, Gwendolin
p.16 l.3 Lewis in the tenanted house. The witness left
p.15 l.24 the premises at about 7.30 a.m. on the 11th September. Upon leaving she noticed that her daughter was standing at the door of her room. The Appellant was standing on the verandah of her daughter's room with both hands behind his back. The deceased was then alright. She, the witness, had just left the premises when she heard something which made her turn back. Her daughter was standing in her room with a stab wound in the left breast. A tenant, Dorothy Lynch (who had since left) was with the deceased. Her daughter spoke to her and she went up to the back of the yard, where she saw the Appellant. He had a closed

ratchet knife in his hand. She asked the Appellant twice: "What did she do to you, why did you stab her?" He did not reply. She hit the Appellant twice, held on to his trousers, and told him she was not going to let him go until the police came. He opened the knife which, she notices, was bloodstained, and had a sharp point, and he aimed for her face, but she put up her left hand and it was cut. Five stitches had to be inserted. She identified the knife in Court as the Appellant's knife. She called Ralston Jarrett who came over and asked for and was handed the knife. She took her daughter to hospital and last saw her alive on the 14th September. About a week before the stabbing there had been a dispute between the Appellant and the deceased. In cross-examination the witness agreed she did not see the stabbing. When she returned to the house she did not see the Appellant.

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p.18 l.10
p.19 l.3
p.19 l.25
p.25 l.10

c) Detective Sergeant Milton Pusey said he received a report from Minna Graham on the 15th September and thereupon commenced investigations. He received a ratchet knife (which he identified) from Ralston Jarrett. He arrested the Appellant by the seaside on the 29th September 1971. The Appellant did not make a statement.

p.31 l.19

d) Dr. Eric De Pass said he was a pathologist at the Government Laboratory and conducted a post mortem on the deceased on the 22nd September 1971. There were two non-surgical wounds, one a gaping wound one a quarter inches long and four to four and a half inches deep, in the second left interspace, the other a gaping one inch wide wound in the sixth left intercostal space (in the left side of the deceased). The exhibited knife could have caused both wounds. The first described wound was the cause of death. The instrument used had penetrated, downwards and medially. There were about 500 ccs blood in the left chest cavity and the left lung was largely collapsed. The left main branch of the pulmonary arteries had been punctured. The pericardial sace (which covers the heart) contained about

p.34 l.33
p.35 l.32

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400 ccs blood. Death was due to shock and haemorrhage. The wound was consistent with
p.37 l.31 having been struck by a right-handed person standing directly in front of the deceased. In cross-examination the witness said the wounds were stab wounds. It was possible, but unlikely, that either was self-inflicted.

3. The Appellant called no witnesses but made an unsworn statement. He said that on the 11th September he had gone outside to wash his face, and was going to his pocket for his towel, when Minna Graham came up, seized
p.42 l.25 the waist of his trousers and asked what her daughter had done that he should stab her.
p.42 l.27 He did not answer because he did not know what she was talking about. Minna Graham said she would not let go until the police came. Then she started to search his pocket to see if he had any weapon and she found a
p.42 l.41 penknife. She opened it and said she was going to stab him because he had stabbed her daughter. He struck the knife from her
p.43 l.4 hand, saying it was his. She grabbed at the knife and cut her finger. Then she let go and went to the front of the yard. Later Minna Graham came to him and told him he must leave the yard immediately, because he had stabbed her daughter. He moved out of the premises. He was arrested on the 27th September and had been in custody ever since.

pp.44-67 4. The Chief Justice then summed up to the jury, first giving directions as to the law and then turning to the evidence. He said it had been pointed out, for the defence, that no-one had seen the Appellant wound the deceased, and he went on to discuss the significance of circumstantial evidence. The jury had been told that a prosecution witness could not be found, but was not for them to speculate upon what an absent witness would have said. To convict, they must be satisfied, on the circumstances of the case, that there was no reasonable way or manner of accounting for those circumstances except that the Appellant had inflicted injury on the deceased. If the jury believed Minna Graham then the deceased was at her door, and the Appellant on the deceased's balcony, with his hands behind him,
p.54 l.23 when she (Minna) left the premises. Almost immediately, Minna returned, and found the

deceased wounded. His Lordship then discussed what Minna had said she said to the Appellant and what he had said she said. The jury were not to take her statement: "What did she do to you, why did you stab her?" as evidence that the Appellant stabbed the deceased, but they could have regard to the reaction of the Appellant to such a statement made to him. What would be evidence would be any admission by the Appellant that he had stabbed. An admission could arise by conduct as well as by the spoken word. In this case the Appellant had been silent - all the witnesses were agreed on this - and he had explained why he was silent. It was for the jury to consider whether if in the circumstances, his silence was reasonable or normal. If they felt it was unreasonable then it was a matter they could take into consideration (it would not be sufficient on its own) in deciding whether or no the Appellant had stabbed the deceased. But, there was evidence that the Appellant's reaction had been more than mere silence. If they believed Minna Graham's evidence as to the Appellant stabbing at her - and on this she was contradicted by Ralston Jarrett - they would have to consider whether the Appellant had so stabbed at her because he had been accused or because she had struck him. Another matter to be considered, as part of the Appellant's reaction, was Jarrett's evidence that, when he asked the Appellant what had happened, the latter had not replied. His Lordship then turned to consider various discrepancies in the evidence; then the evidence as to the condition of the knife; and then the question of whether the wounds were self-inflicted.

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p.56 l.30

p.57 l.6

p.57 l.20

p.57 l.50

p.60 l.6

5. The judgment of the Court of Appeal was given by Luckhoo, Ag.P. His Lordship said that the case for the prosecution rested entirely on circumstantial evidence. The evidence disclosed possible motive and opportunity. The Appellant was seen a short distance from the scene of the crime soon after it was committed. He was holding a closed knife which, when opened, appeared to be blood-stained. There was the further circumstance that, when he was accused, twice, by the deceased's mother, and asked

pp.73-78

p.75 l.10

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why he had stabbed the deceased, he had remained silent. The learned trial judge had
p.75 l.22 directed the jury that, if they were of the view that the accusation called for some response, the silence could be regarded as an item in the chain of circumstantial evidence, although it could not, on its own, be regarded as an admission of guilt. It had
p.75 l.38 been urged for the Appellant that this was a misdirection, in that, on the authority of Hall v. The Queen, it was not competent for the jury to draw any adverse inference from the Appellant's silence. That was a case in which a police officer had told Hall that a third person had accused him. The Privy Council, while approving the statement in Archbold, 37th Edition, paragraph 1126, had pointed out that silence was a right, and not something from which an adverse inference could be drawn, and that it made no difference to the right that a caution had not been uttered.

6. In the view of the learned acting President, the present case was covered by the proposition in Archbold that had thus been approved by
p.77 l.15 the Privy Council: it was not covered by Hall's Case. His Lordship referred to R. v. Mitchell (1892) 17 Cox C.C. 503, emphasising the reference in that case to accuser and accused meeting on equal terms. It was open to the jury to conclude that the Appellant's silence in the face of the deceased's mother's accusation was conduct, albeit of a negative kind, or demeanour, which amounted to acceptance of it. The direction of the learned trial Judge that silence could not by itself be regarded as an admission of guilt but could be regarded as one of the circumstances in the chain of circumstantial evidence was, in the view of the Court, more favourable to the
p.77 l.33 Appellant than it need have been. The evidence adduced by the Crown was sufficient to discharge the onus of proof placed on it. The application for leave must be refused.

7. It is respectfully submitted that there was, and the Court of Appeal were correct in so saying, evidence adduced by the Crown which, if believed by the jury (as it clearly was) was sufficient to discharge the onus of proof on the Crown. It is further submitted, respectfully, that the directions given to the

jury by the learned trial judge were, save for the direction which the Court of Appeal correctly said was unduly favourable to the Appellant, wholly correct, both generally and, in particular, as to the value attachable to the totality of the incident in which Minna Graham confronted the Appellant. The evidence as to what Minna Graham said and did to the Appellant was properly admissible. So also was the evidence as to the Appellant's reaction to Minna Graham.

8. It is further respectfully submitted that, assuming without in any way conceding that if Hall v. The Queen was correctly decided, then the Court of Appeal were correct in distinguishing that case from the present one. In the present case the accusation was, on the evidence, met with a reaction that was substantially more than mere silence; made by a person who met the Appellant on equal terms; was not made for the purpose of discovering whether the Appellant had committed a criminal offence; and did not constitute telling the Appellant that someone else had accused him. The learned trial Judge, it is submitted, recognised the distinction. In his careful directions to the jury he clearly indicated that the limited evidential worth of the "silence of an accused" depended, in each case, upon what other evidence they accepted and what other facts they found to be established.

9. It is respectfully submitted that this appeal should be dismissed and the decision of the Court of Appeal upheld for the following, among other

R E A S O N S

(1) BECAUSE there was evidence sufficient to found a conviction

(2) BECAUSE the learned trial judge did not misdirect the jury unfavourably towards the Appellant

(3) BECAUSE the decision of the Court of Appeal was right and ought to be affirmed.

J.S. KERR
GERALD DAVIES

[redacted]

40 OF 1975

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BETWEEN:

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- and -

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.
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