IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CRIMINAL APPEAL 4/15
IND 75/13
C06850/13

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Leonard Antonio Ebanks

Appellant

BEFORE:

The Rt Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Appearances: Courtenay Griffiths QC instructed by Amelia Fosuhene (Brady Law) for appellant and Simon Russell Flint QC instructed by Elisabeth Lees for DPP

JUDGMENT

Revised from transcript of oral judgment 3 March 2017 and Approved Released 13 April 2017

GOLDRING, PRESIDENT:

1. On the 11th of November, 2014, on an indictment which charged a single count of murder, the appellant was convicted by a jury in the Grand Court of the Cayman Islands of being an accessory after the fact of that murder. On the sixth of February of 2015, the trial judge, the Honourable Justice Quin, sentenced him to 20 years' imprisonment. The appellant appeals both against conviction and sentence.

The unchallenged facts

2. At around 7:00 a.m. on the morning of the eighth of February, 2008, the body of Frederick Bise, a 40-year old banker with two children, was found in the boot of his car in the driveway to 2 Avoca Lane where he lived. His trousers were around his thighs. He had no shoes or socks on. Mr. Bise was a homosexual. There was evidence of sexual activity immediately before his death. He had been beaten with great savagery. The bones on the right side of the base of his skull were fractured, so were the bones around his mouth and eyes. He had been struck on

the neck or strangled, causing the bones in his throat to break. There was a blanket wrapped around his body. An attempt had been made to set the car alight with petrol, in an obvious attempt to destroy evidence. Petrol was present in the car and on Mr. Bise's body. He had been stripped of his belongings; his watch, rings, bracelet, neck chain and bankcard were missing.

3. The appellant was originally jointly indicted on a count of murder with a man called Chad Anglin. The indictment was severed. Chad Anglin was tried first. On the 20th of May 2014 he was convicted of murder.

The prosecution case

4. Mr. Bise was described as a "fun-loving person." Having unsuccessfully sought to meet a man called Chet Oswald Ebanks, who was an occasional sexual partner, Mr. Bise, in what must have been shortly before his murder, went to "Kelly's Bar" in West Bay. By now it was the early hours of the morning. Anglin was at the bar. They could be seen together on the CCTV. At shortly before 1:00 a.m. Mr. Bise drove off in his car with Anglin in the passenger seat. At between 1:00 a.m. and 7:00 a.m., Mr. Bise was murdered. It is not clear where. The evidence suggested, submitted the Crown, that the killing had not taken place at Mr. Bise's home. The injuries would have resulted in profuse bleeding. There was no blood or evidence of blood in or around the house.

5. When Mr. Bise's body was examined, there were fragments of sticks, vegetation and grass-like material surrounding it. Having regard to that evidence, and also the fact his trousers were down, his shoes and socks were off and that his anal sphincter dilated, the Crown submitted the killing took place somewhere else, and in the context of a sexual encounter. Moreover, Mr. Bise's car was not parked in the position where he would normally park it. The blanket covering him, however, had been taken from the house. Wherever the killing took place, a number of things were clear. Mr. Bise was dead by the time his body was placed into the car. No smoke had been inhaled. There were no defence injuries. One man could not have placed the body into the boot of the car. At least two were required.

6. Dr. Heidingsfelder, the pathologist, said the injuries, apart from those on the neck, were consistent with the use of a heavy object, such as, a cinder block used in construction work. The bruising to the face was consistent with that too.

Such blocks were present in the grounds of 2 Avoca Lane. They were however common throughout the island.

7. As we have said, the body was wrapped in a blanket taken from within the house. There was no sign of forced entry. Mr. Bise's keys were in the house in an unusual place. Some property was taken from within. Not surprisingly, the Crown's case was that Mr. Bise having been killed, his keys and other possessions were taken from him and the keys used to gain entry.

8. It is not necessary to go into further detail of what was found in and around the house, other than to say that cigarette butts with Anglin's DNA were found around the house. Neither is it necessary to summarise further evidence implicating Anglin.

9. The evidence implicating the appellant came from two witnesses. Neither knew the other or, on the evidence, had contact with the other. Each said the appellant had admitted to being implicated in the death.

10. In April 2008 a woman called Juliette Facey, who had an on/off sexual relationship with the appellant, contacted the police. In a series of statements, by no means consistent one with the other, she said the appellant made certain admissions to her. When giving evidence Miss Facey did not say the appellant admitted striking any blows. He had admitted, she said, being present when the fatal attack took place and immediately after it, helping Anglin to dispose of the body.

11. The second witness was Arlene White. From around 2010 she came to know Mr. Ebanks. In October 2010 Miss White said the appellant had confessed to involvement in the killing. She told the jury, she had, in September 2010, implicated the appellant in another murder in respect of which he has been subsequently convicted. When giving evidence Miss White said the appellant admitted directly being involved in the attack on Mr. Bise. In the circumstances, for reasons which will become apparent, it is not necessary to refer to Miss White's evidence in any detail. We shall refer to Miss Facey's evidence in more detail when dealing with the grounds of appeal.

12. The trial on the count of murder proceeded in the ordinary way. The two witnesses implicating the appellant gave evidence. The appellant himself gave evidence. He denied making any admission to either woman. As to the early hours of the morning of the 8th of February, he said he had no recollection of what he did due to his drug taking at the time. He said he did not participate in any way in the killing of Mr. Bise. He said both witnesses referred to were telling lies. He gave reasons as to why they had done so. The suggestion in respect of Miss Facey was in short, that she was a "woman scorned". He called two witnesses into whose evidence we need not go.

The addition of the allegation of being an accessory after the fact

13. Section 59 (1) of the relevant Criminal Procedure Code, namely the 2007 revision, provided that:

> "On an indictment for murder, a person found not guilty of murder may be found guilty of
>
> a) manslaughter or causing grievous bodily harm.
> b) being an accessory after the fact.
> c) an attempt to commit murder..."

14. It does not require, as is plain from the wording, that such an allegation be pleaded in terms. That contrasts with section 59 (2) which provides that:

> "Where on the trial of a person on indictment for any offence, except treason or murder, the Court finds him not guilty of the offence specifically preferred but the allegations in the indictment amount to, or include expressly or by implication, an allegation of another offence falling within the jurisdiction of the Court, the Court may find him guilty of that other offence or an offence of which he could be found guilty on the facts to be proved on an indictment specifically preferring that other offence."

15. It was during submissions prior to final speeches that the topic of being an accessory after the fact was first raised. In his submissions to the judge, Mr.

Griffiths, QC, who represented the defendant at trial and before us, said (transcript page 14/30):

> "In all of her initial accounts, the confession said to be made to Miss Facey put the defendant in the position of an accessory after the fact, and in fact Superintendent Bodden told the jury he had suggested such a charge, and it had been rejected by the DPP. Now it seems to us the jury must be told that because there is count two on the indictment charging that lesser offence, if they come to the view that whatever was said to Miss Facey suggested the defendant came on to the scene after Mr. Bise had been killed, then if that is their conclusion so far as that confession is concerned, he cannot be guilty of murder."

16. After a short interchange with the judge, Mr. Russell Flint, QC on behalf of the prosecution intervened. He drew Mr Griffith's attention to the relevant provision in the Criminal Procedure Code. It was plain neither Mr Flint nor Mr Griffiths were aware of it until then. There was then a further discussion. At the time Mr. Griffiths` objections to any addition of the alternative lesser allegations were more muted than his present submissions to us. There was further discussion the next day. The judge said (page 32/2):

> "After the directions on murder...if the jury find that the Crown have not made out the case so that they are sure the defendant is guilty of murder, it is open for them to consider the offence of accessory after the fact, and I would propose to deal with that...subsequent to the joint responsibility of joint-enterprise direction. Is that all right?".

Mr. Russell Flint agreed. Mr. Griffiths said, "It's an alternative". The matter was then left.

17. As we read it, at no stage did Mr. Griffiths suggest any unfairness or that he would have approached the case differently had he known of the additional allegation. It would not be surprising if he saw some advantage to his client in the less serious alternative charge, although Mr. Griffiths does not so submit to us. It was, of course, in respect of that allegation that the appellant was convicted.

The grounds of appeal against conviction

Ground one

18. It is submitted that the appellant's trial was not fair in that it breached his rights under section 7 (b)(c) and (e) of the Cayman Islands Constitution (2003) in that:

    1. He was not informed that he would be tried for the offence for which he was convicted.
    2. He was not given the opportunity to properly prepare and present his defence to that charge.
    3. He was denied the opportunity to properly consider his plea to that charge.

    It is further said that he was deprived the right to "examine" witnesses called to prove the charge against him.

19. We shall try and encapsulate Mr. Griffiths` submissions. The allegation was made very late. The appellant was deprived of several points he could have raised had it been made earlier. He might have argued abuse of process in respect of the lesser count, given the history to which we shall shortly refer. He might have entered a plea to the lesser offence. There might have been a submission of no case to answer in the light of the inconsistencies between Miss Facey and Miss White.

20. It was upon the basis of Miss Facey's evidence the jury convicted as they did. Mr. Griffiths makes a number of points about that evidence. Her account was from the outset capable of the interpretation the appellant was only guilty of a lesser offence. There were a number of opportunities for the lesser count to be preferred. The DPP rejected such a course. The count could have been added after Miss Facey gave evidence. Cross-examination going to her account of the appellant assisting Anglin would have been more detailed. Evidence might have been called which was not. He gave an example of evidence concerning a mobile phone.

21. In our judgment, however cogently and well made were Mr. Griffiths' submissions, they were misconceived. First, section 59 (1)(b) sets out the legal position in the Cayman Islands. The fact the appellant, and indeed both prosecution and defence counsel, did not know that until late in the day, cannot make the failure specifically to mention it at the outset amount to a breach of Cayman Islands law. For the matter to be left to the jury in such circumstances cannot of alone be unfair. It cannot amount to a material irregularity. We would not go so far, however, as did Mr. Russell Flint in his submissions to the judge, as to say the judge had no discretion about leaving the alternative count. If, in particular circumstances, to do so would result in unfairness to a defendant which the trial process itself cannot remedy, the judge would be bound not to leave the alternative allegation. That was not this case.

22. Second, we cannot accept there was unfairness on the facts of the present case. The defence case was that the appellant was never at Mr. Bise's house or involved with Mr. Bise's death at all, although he could not remember where he was. His case amounted to a complete denial of any involvement, whether as a principal or accessory. That was the account he was advancing as the truth. We cannot see how leaving the lesser alternative count could properly, materially have changed that account, or prevented him from advancing an account which accepted that he was. Either his account was truthful or it was not. The truth is not a movable feast, which may change depending upon the allegation made. The reality is that from the moment he was first asked about these matters on the 13th of May, 2013, he denied any involvement in Mr. Bise's death, whether as a principal or accessory. We cannot accept cross-examination would have been materially different, had there been a specific allegation from the outset. As will shortly become apparent, the cross-examination of both witnesses amounted to an all-out attack on their truthfulness. It seems to us fanciful now to suggest there would have been further or more detailed questions asked or evidence adduced which would materially have affected the jury's decision.

23. What view a police officer or the Director of Public Prosecutions may have formed, seems to us irrelevant. We see no prospect at all of any abuse of process application being successfully raised in respect of delay as Mr. Griffiths submitted to us. Neither do we see any submission of no case to answer being successfully advanced. The judge would have been bound to leave to the jury the issue of Miss Facey's credibility.

24. Finally, on this aspect, we would point out what was, in our view, a model direction given by the judge upon this aspect. He said (page 43/4):

"I come now to accessory after the fact. If you should find the defendant not guilty of murder you must then examine the evidence to find out whether you find him guilty or not guilty of being an accessory after the fact to murder…A person who becomes an accessory after the fact to murder commits an offence…So accessory after the fact…is a person who with the full knowledge of the crime assisted the principal. If you find that the defendant is not guilty of murder, go on to consider whether he is guilty of being an accessory after the fact by you being made sure that one of the following occurred..:

a) The defendant assisted Chad Anglin in lifting the deceased's body and putting it in the boot of the Mitsubishi Outlander.
b) The defendant assisted Chad Anglin in setting fire to the Mitsubishi Outlander in an attempt to burn the body of the deceased.
c) The defendant smashed a cylinder block or destroyed such other weapon which was used to kill Frederick Bise in order to destroy the evidence. If you find in your review of all the evidence before you that you are sure that the defendant took all or any of the above steps, then he would be guilty of being an accessory after the fact. If you are not sure that he performed any of the above acts, then you would find him not guilty of being an accessory after the fact".

Ground two

25. The submission is that the judge failed to adequately sum up the inconsistencies in the evidence. Mr. Griffiths drew our attention, by reference to the transcript, to many significant inconsistencies in Miss Facey's evidence. He said they were examples. We need not now set them out. As he put it, when one examines Miss Facey's evidence, it is replete with inconsistency. The submission, as he put it, was that the late addition of the allegation would have been 'heightened' in the minds of the jury. In those circumstances it was incumbent upon the judge to summarise the evidence in great detail. There was a special duty to refocus the jury's mind on the new allegation in order to compensate for the absence of that allegation during the course of the evidence. The summing up was deficient in that regard. The Court should focus on the sheer volume of Miss Facey's inconsistencies.

It seems to us that there is nothing in this ground.

26. First, the judge could hardly have been clearer in what he said to the jury at the outset; the facts were for them (summing up page 31). He repeated it (summing up page 45). He made it plain how heavily the Crown's case depended on the alleged admissions. He proceeded to give what, in our judgment, were careful and fair directions regarding it. He said (page 68/14):

> "The defence case is that the defendant never made these confessions either to Miss Facey or to Miss White and both Miss Facey and Miss White have fabricated their evidence. In deciding whether you can safely rely upon the confessions you must consider them separately. You ask yourself:
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> ...Did the defendant make the confession to Juliette Facey ... If you are not sure that he made these confessions, then you should ignore them. If you are sure, then you ask yourself are you sure that the confession to Miss Facey is true ... and in deciding this, consider whether there are any circumstances which cast doubt upon the reliability of the confessions.
>
> The defence say that Miss Facey is a woman scorned. The defendant walked out on her and she's in the pocket of the police. They say she is a liar and well known for making malicious complaints ...
>
> So, members of the jury it is for you to decide what weight should be given to the confessions. If you are not sure that the confessions are true you must disregard them. If, on the other hand, you are sure they are true you may rely on them ..."

27. He then summarised what Miss Facey had to say. He later said (page 72/22 and following):

> "Now the defence say Miss Facey is lying out of revenge on the defendant for going back to his wife and therefore Miss Facey has fabricated this story ....
>
> Now members of the jury there are a number of inconsistencies and I may not mention each and every one but you are obviously to take them into account and probably now is as good a time as any to give you a direction on inconsistent statements...
>
> As I say, I will refer to some of the inconsistencies. I may not refer to each and every inconsistency but it is something you must take into account".

28. Although it is not necessary to set all the judge then said, he referred to examples of inconsistency in Miss Facey's witness statements (pages 76 and 78). The jury had extracts of the statements containing the inconsistencies and no doubt heavily relied upon by Mr. Griffiths.

29. Finally, on this aspect, in summarising the appellant's account, his case in respect of Miss Facey's evidence was repeated. The suggested motive for her lies was repeated.

30. It is not, as it seems to us, incumbent upon the judge to set out, whether in such a situation as the present, or at all, each and every inconsistency for the jury. It suffices to highlight that there were significant inconsistencies, to illustrate some of the more significant ones and to leave the matter to the good sense of the jury. It seems to us, there is nothing in that second ground of the appeal against conviction.

We therefore dismiss the appeal against conviction.

The appeal against sentence

31. We turn now to the question of the appeal against sentence. As we have said, the judge sentenced the appellant to 20 years' imprisonment. He did so following lengthy and detailed submissions by both Mr. Russell Flint and Mr. Griffiths.

32. Mr. Russell Flint submitted that the judge was entitled to sentence on the basis indicated in our summary of the prosecution. He submitted, in short, that Mr. Bise was not killed at his home. On the jury's verdict, the appellant must have been at or gone to the scene of the killing. He helped lift the body into the boot of the car. He must have been with Anglin thereafter, and, as he told Miss Facey, he must have destroyed one of the weapons. He must have been involved in seeking to destroy the other evidence. The judge was bound, it was submitted, to sentence the appellant on the basis he had full knowledge of the murder. He must have been aware of the savagery of the attack with its sexual overtones from the sight of the body and during all of his actions thereafter, which included the attempted incineration of the car with the body in the boot.

33. On the other hand Mr. Griffiths submitted, as he has to us, that there were many uncertainties in the evidence. It was impossible to approach sentencing in the way submitted by Mr. Russell Flint. Again, he relied upon the many inconsistencies in the accounts given by Miss Facey.

The judge's sentencing remarks

34. It is plain that the judge approached the question of sentencing with very great care. He summarised the Crown's submissions and the defence submissions in detail. He set out his conclusions in the following way (page 14/36 and following):

> "The jury's verdict shows it has accepted, in part, the evidence of Miss Facey and Miss White in that based on the defendant's separate confessions of his assistance to the killer, Chad Anglin, the defendant was guilty of being an accessory after the fact."

Mr. Griffiths rightly submits that the reference to Miss White is incorrect. The judge continued:

> "The evidence from the pathologist is compelling when he submits that the body of the deceased could only have been carried into the car by two or more persons. It is my view that the jury accepted the Crown's evidence that the defendant assisted Chad Anglin in lifting the body of the deceased and placing it in the boot of the Mitsubishi Outlander. It is clear this must have happened before the Mitsubishi Outlander and the deceased's body was set on fire. Since the defendant assisted in lifting the deceased's body into the boot of the Mitsubishi, it is quite open for the jury to find that the defendant assisted Chad Anglin in setting fire to the vehicle in an attempt to burn the body of the deceased".

35. The judge referred to the English Court of Appeal of *Yates* (2010) 2 Cr. App. R. Sentencing 11. We shall come to that authority. He said:

> "Accordingly, this Court must consider:
>
> a) The nature and extent of the criminality of Chad Anglin, to whom assistance was provided by the defendant.
> b) The nature and extent of the assistance actually provided by the defendant to Chad Anglin.

c) The extent to which the defendant's efforts in assisting Mr. Bise's killer damaged the interests of justice. Regrettably the Cayman Islands have seen a dramatic increase in murders and this murder is as callous and brutal a killing as one can imagine. Mr. Bise's death was caused by an attack on his body of such ferocity and violence that he received multiple injuries and fractures to his face, head and throat. The reason for the killing was apparently a debt owed by the deceased to his killer, Chad Anglin. The evidence suggests that Mr. Bise's death followed shortly after sexual intercourse had been perpetrated on him. The deceased was a vulnerable victim who apparently was unable to and did not put up any fight. In addition, the deceased was robbed of his possessions. The defendant has been convicted with full knowledge of the crime of assisting Chad Anglin.

36. The Crown's case, which has been accepted by the jury, is that this defendant assisted by destroying the weapon in order to conceal any connection between the killing and Chad Anglin, assisted with the lifting of the dead body into the car and assisted with concealing the body with a blanket taken from the [deceased's] house. It is clear that the burning of the car and the attempted burning of the body took place after the lifting of the body into the boot of the car. The defendant was present when Chad Anglin attempted to burn the body. There was also evidence adduced by the Crown that the defendant assisted Chad Anglin in burning Chad Anglin's clothes. There was a further attempt to destroy any forensic links and evidence that might exist between the deceased, the killer and the defendant. The former wife of the deceased has provided the Court with a statement, which confirms that she and the children of the deceased have suffered considerable uncertainty and prolonged time of grief since the murder. The former wife and children had to reside in a small community knowing her husband's killer and his accessory remained at large. The consequential uncertainty and fear for her and the children must have been enormous. Mrs. Bise said:

> 'At the time of Fredericks's death the two daughters were seven and 12. Both girls were very close to their father. It has had an absolutely devastating effect on our two daughters…No person should have to go through this, but for such a young person [as her daughter] to have to go through has been absolutely heart breaking for us as a family'..."

The judge went on to say (paragraph 45 of the sentencing remarks):

"I agree with leading counsel that but for the destruction of evidence by this defendant, an admittedly forensically-aware individual, the likelihood of the obtaining of the necessary evidence linking Chad Anglin to the murder would have been greatly enhanced. This could have led, following his arrest on the 14th of February 2008, to a successful investigation and prosecution some seven

years earlier. It is not an over-statement to say that the damage to justice has been extreme."

He quoted section 195 of the Penal Code which states that:

> "A person who becomes an accessory after the fact to murder commits an offence and is liable to imprisonment for life."

He went on to say (paragraph 48):

> "On the evidence before me, the defendant assisted the killer to destroy material evidence so that the killer and the defendant would avoid detection. For a man to kill a man is the most serious criminal offence and it is inappropriate to make any comparisons in relation to the crime of murder; however, this principal offence was a particularly brutal, gruesome and evil murder. Those who assist murders to avoid detection and apprehension will be met with appropriately harsh sentences".

37. The judge went on to refer to the fact, as was the case, that the appellant then was 44 with no less than 52 previous convictions. He referred to some involving violence. Finally he said (paragraph 50):

> "I find that the nature and circumstances of this murder are of the utmost seriousness and gravity. The jury has now found him guilty of being an accessory to murder. In the light of the facts and circumstances surrounding this murder and the defendant's previous convictions, I impose a sentence of 20 years' imprisonment."

In his succinct but able submissions to us Mr. Griffiths submitted that the sentence was manifestly excessive. He submitted the judge was not entitled to make the findings of fact he did. In effect the judge became a surrogate jury.

Our conclusion

38. The judge was throughout the trial. He heard the evidence. He was entitled when passing sentence to reflect the view that he formed, provided of course it was based upon the evidence heard during the trial. That, in our view, is what the judge in essence did. His careful and considered observations on sentence bear that out. Moreover, he approached the exercise of sentencing in the ways suggested by the Court of Appeal in *Yates* (supra).

39. *Yates* was an Attorney-General's reference in respect of concurrent sentences of seven years' detention imposed on a man aged 19 at the time of the offences, who was convicted of assisting an offender. The defendant had handed over a

gun which had been used in killing a young boy. He did all he could to assist the offender to avoid justice. He received the gun after the killing and knowing it had so been used.

40. The maximum sentence in England and Wales for assisting an offender is ten years. The Attorney-General's submission was that consecutive sentences of detention should have been imposed. The Court agreed. It substituted a total sentence of 11 years' detention. In the course of giving the judgment of the Court, Lord Judge, Chief Justice said (paragraph 34):

> "We do not intend to give detailed guidance on the sentences which would be appropriate for assisting an offender who has committed an offence. When assessing the sentence in such cases the first question to be addressed is the nature and extent of the criminality of the offender for whom assistance was provided. Here the killer had shot dead a young boy. The second is the nature and extent of the assistance actually provided. Here it was everything that the offender could do to the extent of the assisting in the washing down of the killer in petrol to remove all traces of evidence. The third is the extent to which the efforts of assisting the killer damaged the interests of justice. That requires that those who are guilty of serious crimes should be brought to justice, convicted and sentenced".

41. The Court's attention has also been drawn to a case of *Miller* (2011) 2 Cayman Islands Law Reports 812. That was a case in which the defendant assisted as the getaway driver when some armed robbers were shot. He pleaded guilty to being an accessory after the fact of robbery. Justice Quin said that on the facts of that case there was no distinction between being an accessory and being a principal. That, on the facts of that particular case, was plainly so. The case provides limited assistance.

42. In addition to the observations of Lord Judge, the judge in this case plainly had in mind several features not present in the case of *Yates.*

43. First, the starting point for the mandatory life sentence for murder in the Cayman Islands is 30 years. He no doubt sought to reflect that when sentencing in respect of an offence of being an accessory after the fact of murder.

    Second, this appellant had a quite appalling criminal record.

Third, he was assisting the murderer in the context of an increase in murders in Cayman.

44. This was, in our judgment, for the reasons set out by the judge, a very serious case. On the judge's findings, the appellant was very close to the killing, albeit not directly involved. It is plain that in all the circumstances a very substantial sentence was called for. We have concluded that while undoubtedly severe, we cannot say on the particular facts of this case that a sentence of 20 years was manifestly excessive.

We therefore dismiss the appellant against sentence.