



JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 44/75

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (AG.)

R. v. SYDNEY CAMPBELL

B. Macaulay, Q.C., and K. St. Bernard for the applicant.
Chester Orr, Q.C., and M. A. Reckord for the Crown.

November 6, 7, 10, 11, 12, 13,
17, 18, 19, 20, 24, 25;

December 16, 1975

Graham-Perkins, J.A.: The applicant was, on March 27, 1975, convicted by a jury, before Melville J., in the Home Circuit Court, of the murder, on May 18, 1974, of Richard Mills and sentenced to death. From this conviction he sought leave to appeal on some ten grounds. The hearing of his application accounted for some twelve days at the end of which we reserved our judgment. Having regard, however, to the conclusion at which we have arrived, namely, that the application be treated as the appeal and that the appeal be allowed and that, in the interests of justice a new trial be had, we do not find it necessary to deal with more than two of the applicant's complaints and the submissions relating thereto. Nor do we think it necessary, or desirable, to dwell on the evidence adduced at the trial at any greater length than is essential for the purpose of our decision.

The case advanced by the prosecution was to the following effect. The deceased, Richard Mills, lived with his wife, Celestina, at 46 Woodhaven Avenue in St. Andrew. They employed a helper, Ivy Fraser, who also lived at those premises. The deceased and his wife carried on the business of a restaurant at 7 Constant Spring Road. During the latter part of 1972 the applicant became a customer at this restaurant. In the early part of 1973 he became "a family friend" of the Mills and assisted in the operation of the restaurant. During the summer of 1973 the applicant and Mrs. Mills became "very close friends," and this with the knowledge of the deceased. The applicant visited Mrs. Mills at her home and she in turn would pay visits to his home at 8 Renfrew Road. Mrs. Mills and the applicant sometimes dined out and visited various clubs. On some of these occasions they were accompanied by the deceased. Towards the end of the summer of 1973 the deceased began to take objection to the relationship which had developed between his wife and the applicant. One result of these objections was that the applicant ceased visiting the Mills' home. Nevertheless he continued assisting in the business of the restaurant and taking out Mrs. Mills. On at least one occasion, at about 3.00 on a Sunday morning in February 1974 Mrs. Mills went to the applicant's home after they had spent the previous evening together, thinking as they did that the deceased had left Jamaica two or three days before on a visit to the U.S.A. The deceased, who had certainly led his wife to think that he was proceeding to the U.S., surprised his wife and the applicant at the latter's home. Later that morning the applicant took Mrs. Mills to her home and the deceased expressed his dissatisfaction with the continuance of the

close relationship between his wife and the applicant. Eventually Mrs. Mills told the applicant that they "could no longer continue the relationship as it had previously been." There had been, it appears, some suggestion by the deceased that he would seek a divorce from his wife. Mrs. Mills, however, left Jamaica for a holiday in the U.S. On her return to the Island the relationship with her husband appears to have improved to the point where she felt it necessary to tell the applicant that they would not see each other again. This was during the course of the week ending on the night of the deceased's death.

Sometime during the evening of May 18 Ivy Fraser retired to her room leaving the deceased in his living room watching a television programme. Sometime later Fraser heard "a terrible scream" coming from the living room. She was able to identify the voice as that of the deceased. She went to the living room but did not see the deceased. She went next to the deceased's bedroom where she saw him "stretch out at the bedside on the floor." She enquired of the deceased what had happened but received no response. Thereupon Fraser returned to her room and locked her door. She called to Mrs. Christine Mitchell - the most vital witness in this case - who lived next door at No. 44 Woodhaven Avenue. She saw Mrs. Mitchell come over a low wall on to the lawn of No. 46. She spoke to Mrs. Mitchell when the latter had reached the lawn of the Mills' residence and when Mrs. Mitchell had returned to the front of her yard. From the moment Fraser called Mrs. Mitchell to the time when Mrs. Mitchell returned to her yard Fraser did not leave her room. It is clear, too, that Mrs. Mitchell did not, at any time, tell Fraser that she had seen anything happen while she was on the Mills' lawn.

Mrs. Mitchell, a nurse, testified that at about 10.30 p.m. on May 18 she went out to her carporte in answer to Fraser's call. Fraser spoke to her from her room and in consequence of what Fraser said she went back into her house, got a flashlight and smelling salts, and proceeded to the lawn at the front of the Mills' premises. She expected to meet Fraser on the verandah. Fraser was not there. She was about to go on to the verandah when she saw the applicant emerging from the living room on to the verandah carrying the deceased in his arms. She asked the applicant what was wrong with the deceased and the applicant replied: "He is sick and I am taking him to the hospital." The applicant took the deceased to a car parked in the driveway of the Mills' premises and placed him on the front passenger seat. She followed him to the car and he said to her: "You are Mrs. Mitchell." She replied: "Yes, I am Mrs. Mitchell, but I am here because Ivy (Fraser) called me saying that Mr. Mills is sick and I am a nurse." The applicant then went inside the Mills' house. The bedroom light was turned off. The applicant returned to the car. She asked if she could help. He said: "No." She asked him if Mrs. Mills knew that her husband was ill. He said that she did not and that she was at work. By the aid of her flashlight she saw the deceased in the car. He appeared to be dead. The applicant asked her to open the gate. She did so. He could not find the ignition key. She left the applicant at the car and returned to her yard. Before entering her house she heard Fraser calling from her room. She spoke to Fraser but did not tell her anything about what she had seen while on the lawn of the Mills' premises. Her reason for not telling Fraser what she had seen was because Fraser had not met her on the verandah as she had promised.

Back in her house she phoned her husband who was then in Montego Bay. She did not call the police. Sometime after speaking to her husband Mr. Clarence Walker, an attorney-at-law, and a Corporal Fuller arrived at her house. She told Walker and Fuller everything she had seen while she was on the Mills' front lawn. After speaking to them Walker and Fuller left her and went over to the Mills' premises. About an hour after Walker and Corporal Fuller left her home Mrs. Mills came to her home to use her phone. She gave Mrs. Mills a telephone directory but had no conversation with her. She did not tell Mrs. Mills that she had seen the applicant place her husband's body in a car or that he appeared to be dead.

Mrs. Mitchell, also gave evidence to the effect that Mrs. Mills had introduced her to the applicant in November 1973 on an occasion when she went to the Mills' home to use the phone. Thereafter, and up to the early part of February 1974 she had seen the applicant on some 50 occasions or more at the Mills' home. She was in the habit of going to the Mills' home "almost every day" between November 1973 and February 1974 to use their phone. She was in no doubt that the man she had seen taking the deceased to the car was the applicant.

Corporal Fuller was not called as a witness. Walker, however, testified to the effect that he was a friend of the Mills and the Mitchells. The deceased was his cousin. At about 1.00 a.m. on May 19, 1974, in consequence of certain information he received, he went to Mrs. Mitchell's home. Mrs. Mitchell related a story to him and as a result he left her to go to the Mills' home. On his way there he was joined by Corporal Fuller. They both entered the Mills' home where they spoke with Ivy Fraser. They

searched the bedroom on the floor of which Fraser had seen the deceased lying a few hours before. They were searching that bedroom for the deceased. Neither he nor Fuller went to the car in which Mrs. Mitchell said she had seen the applicant place the body of the deceased. That car, a Ford Escort, was still parked in the Mills' driveway when he and Fuller went to the Mills' house via the front lawn. Mrs. Mills who had been out arrived home at about 2.00 a.m. He and Fuller were then in the deceased's bedroom. Shortly after he accompanied Mrs. Mills to Mrs. Mitchell's home, where Mrs. Mills made some phone calls in an effort to ascertain the whereabouts of the deceased. Thereafter he left Mrs. Mitchell's home and went to the street where he saw several policemen. They entered the Mills' premises through the front gate. As one of these policemen passed the Ford Escort he said something and Walker looked into the car and saw the body of the deceased. He had not told Mrs. Mills anything about her husband. Walker said that he did not go to the Ford Escort when he left Mrs. Mitchell's home to go over to the Mills' home because he had formed the impression that the deceased's body had been taken away and dumped somewhere. In spite of this impression he and Fuller insisted on searching the deceased's bedroom for his body.

The deceased, in the opinion of Dr. Marsh, the pathologist who performed the post mortem examination, came to his death as a result of asphyxiation caused by garrotting effected by a cord-like object.

The foregoing was, in outline, the evidence on which the Crown relied in support of the indictment against the applicant for murder.

The applicant, in sworn evidence, denied that he was at the Mills' home on the night of May 18, 1974, and that

he had killed the deceased. He swore that Mrs. Mitchell could not have seen him place the deceased's body in a car on the Mills' driveway as he was, at the material time, at his home.

To describe the behaviour of the principal actors in the drama unfolded by the evidence in this case as strange is to make a grave understatement. Fraser sees the body of her employer on the floor of his bedroom in circumstances which compel her to seek the aid of Mrs. Mitchell, a neighbour and friend. Thereafter she remains locked in her room and refuses to budge until Walker and Fuller arrive. Mrs. Mitchell sees the apparently dead body of Mr. Mills dumped in a car but says nothing to Fraser nor does she call the police. Nor does she say a word to Mrs. Mills when she sees her three hours later. She tells Walker and Fuller all that she had seen while she was on the Mills' lawn but Walker and Fuller insist on searching the Mills' house for Mr. Mills and make no move toward the Escort which they have seen in the Mills' driveway.

This behaviour was described, quite rightly in our view, as "abnormal" by the applicant's attorney at the trial. Mrs. Mitchell's story was described as demonstrably improbable, and it was suggested to her that she had concocted her evidence and that she was attempting to protect someone. As already noted, the applicant's defence was an alibi. It followed, Mr. Macaulay argued, from the applicant's sworn assertion that he was not at the Mills' home on May 18, that Mrs. Mitchell could not have seen him in the circumstances she described and that, therefore, if, indeed, she saw anyone carrying the deceased from his home to a car that person could not have been the applicant. This was not a case of mistaken identity which assumed the acceptance of Mrs. Mitchell's

evidence. Rather it was a case of a story so palpably improbable as to be incapable of belief and to merit the label of a concoction. This was the context in which the suggestion was put to Mrs. Mitchell that her evidence was a concoction. In dealing with this aspect of the case the learned trial judge said:

"Then it was at this stage that you heard the suggestion that she was concocting the story to protect somebody. Now you have heard all the evidence in the case, members of the jury, indeed the accused man has, if I may say so, expressly denied anything like this; he says I don't know Mrs. Mitchell, I don't know if she knows any of my friends, I don't know her and I don't know her friends. So who is she protecting? Is this a wild accusation being made by counsel? What evidence is there before you to support it? Concocting. It is bad enough, members of the jury, when you say to a witness when he is up there under cross-examination, you are not speaking the truth, it is a little worse when you say you are a deliberate liar, but when you go to the extent of saying you are concocting, you know what concocting means.- you get an idea and you fix up things, knocking heads together to tell deliberate falsehoods; and it doesn't stop there - you are not only concocting, you are concocting to protect somebody. Who? You ask yourselves who. You heard Crown Counsel's comment on it. Unfortunately Mr. Macaulay isn't here so I won't say anything, I leave it to you, members of the jury. Do you see any reason at all why this

"confounded suggestion should be made to Mrs. Mitchell? I leave it to you to decide. You say. Having regard to what the accused man has said this is something which counsel has taken upon himself, to make this suggestion. Of course counsel has a right and is entitled to put suggestions to the witnesses even although he might not have any evidence to support it, but it may be a reasonable inference that he can ask you to draw from the facts that have been given. Up to this stage did you hear anything at all that would suggest that, or even after that, because he knows a lot of what is going to come, they have the depositions. Do you see anything at all put in evidence before you that could have caused him to make that suggestion? I think, personally - expressing my own views on that - he went much too far, but as I say he is not on trial so please do not hold that against the accused man. Sometimes in the heat of battle, the cut and thrust, one might overstep the boundaries down there. Please look at it like that and not that I am castigating him. As I told you evidence can be called on behalf of the defence. You say, having heard her, and in view of the evidence that had gone before, her husband being in court, whether there was any justification for making this allegation of concoction, and concocting to protect somebody. You say, members of the jury. I don't see; you might see it, I don't.

"All I am saying is, whatever view you take of it, if you think that counsel did overstep his bounds there, please do not put it down on the accused man, he has nothing to do with it; don't hold it against him, don't throw it in the scale against him, he has nothing at all to do with it, as I say, but it did come out, unfortunately."

It is clear from the foregoing direction that Melville, J., was telling the jury that, in his view, it was not open to them, on the evidence as a whole, to draw any inference adverse to Mrs. Mitchell. The suggestion made to Mrs. Mitchell, far from being "confounded" as the learned trial judge told the jury, rested on the following, inter alia:

- (i) Her evidence that she spoke to Ivy Fraser on her return to her yard from the Mills' lawn and did not tell Fraser what she had seen, and that her reason therefor was Fraser's failure to meet her on the verandah as they had arranged.
- (ii) Her evidence that she did not tell Mrs. Mills what she had seen and heard.
- (iii) Her evidence that she told Walker and Fuller all that she had seen and heard on the Mills' lawn.
- (iv) Fraser's evidence that she spoke to Mitchell when Mitchell was on the lawn of the Mills' home.
- (v) Notwithstanding (iii) the evidence of Fraser and Walker that the search for the deceased was confined to the house.

(vi) The evidence of Mrs. Mills that she could not recall Mrs. Mitchell ever having been at her (Mrs. Mills') home on any occasion that the applicant was there.

(vii) The evidence of Ivy Fraser in cross-examination, in contradiction of her evidence in chief, to the effect that on none of the several occasions when Mrs. Mitchell visited the Mills' home was the applicant there.

In our view this most critical part of the case against the applicant cried out for a scrupulously fair and balanced direction. Mrs. Mitchell was the one witness who placed the applicant at the scene. Hers was the only evidence on which the entire case for the prosecution rested. It required the most searching examination. Her credit was, to say the very least, of the most crucial importance. In the view of this Court it was, in the particular circumstances of this case, the clear duty of the trial judge to put the foregoing matters fairly to the jury, and to focus their attention thereon by placing the evidence relating to those matters in one part of his summing-up. It would then have been for the jury to say whether they thought the suggestion put to Mrs. Mitchell was confounded or not. Instead the trial judge not only failed to give the jury any assistance whatever in this vital area of the case, but dealt with the evidence generally in bits and pieces and in a thoroughly disconnected manner. Indeed on one occasion he found it necessary to apologise to the jury for "skipping and jumping about" in his summing-up. But apart from the method adopted by the trial judge in his summing-up which must have made it not a little bit difficult for the jury to follow, he quite

clearly told the jury that the suggestion that Mrs. Mitchell had concocted her evidence did not emanate from the applicant but was attributable solely to his attorney. The truth is that the suggestion was founded on the applicant's defence of alibi and on what the applicant was seeking, as he was entitled to do, to persuade the jury to find, namely, the inherent improbability of Mrs. Mitchell's story judged on the background of the matters above-noted. In our opinion the passage in the summing-up quoted above involved a grave misdirection. It is true that the trial judge did leave it to the jury to say whether "there was any justification for making this allegation of concoction". Having regard, however, to the terms of the direction as a whole, we are of the firm view that there was a real danger of the jury remaining unmoved by an exhortation in that context. Indeed it is possible to take the view that they may have thought that Mr. Macaulay was in some way trying to deceive them. The foregoing complaint must also be looked at together with another complaint to the effect that in dealing with the applicant's evidence the trial judge on several occasions invited the jury to treat him as a witness unworthy of credit. It will suffice to cite two passages.

The Crown has alleged that the motive which inspired the applicant to kill the deceased was the decision taken by Mrs. Mills and communicated by her to the applicant after her return from the United States, not to see him again. It was suggested to the applicant that he refused to accept this situation and, accordingly, decided to get the deceased out of the way. Dealing with this aspect of the case the trial judge said:

"Then he said he had a crush on her. She says she has a crush on him. What kind of crush

"is for you to decide, because he goes on,
"If Mrs. Mills were free to marry me I would marry her if she would have me." Well, I wasn't too clear what he meant by that, whether he had that feeling sometime ago during their relationship or that was his present feeling in the witness box at that moment. I was trying to clear up that. I really don't know what his answers are. You will have to say. What I have next, if that was in the deceased's life-time. "I never considered the question." Then he goes on that it was during the relationship with himself and Mrs. Mills is taking place, during the life-time of the deceased man, and yet he is saying in the next breath he didn't consider it during that period. So I don't know what you are going to make of it, members of the jury. He did say that he was prepared to marry Mrs. Mills if she would have him. Apparently he can't marry her in the life-time of Mr. Mills unless she and Mr. Mills were divorced. He wouldn't say at that time he was wishing to marry her, Mrs. Mills. Then he was being asked about whether he had serious intentions towards Mrs. Mills or he was really just using her. His answer was he was fond of her. I don't know what that means. Then he goes on, "we had a relationship and there was nothing considered serious or lasting about it. I didn't feel our relationship would last because she was married." Well, there you have it, members of the jury. He seems to be contradicting himself

right, left and centre. I don't know what you make of it, but as I say, no matter how much he lies you can't convict him on that account at all because he is not being tried for lying, he is being tried for murder."

An examination of the applicant's evidence does not reveal that he contradicted himself "right, left and centre". It was, therefore, a quite unwarranted observation on the part of the trial judge that the applicant had told them several lies. Clearly in a case in which the charge against the applicant depended entirely on the word of single witness an invitation by the trial judge to regard his evidence as unworthy must have operated to his great disadvantage.

In another passage dealing with the applicant's evidence as to certain aspects of his relationship with Mrs. Mills the trial judge said:

"According to him he is putting this relationship as getting very deep in late December, 1973. As I said before, earlier he is saying he actually started working at the restaurant in August.

He is saying, members of the jury, this relationship with Mrs. Mills was going on some time before. Now again, you remember when he is asked about dancing ---- I don't know, members of the jury, perhaps you will have to decide who is behaving abnormally here, because here it is when he is alone - goes out with Mrs. Mills to dinner or clubbing he doesn't dance with her on those occasions, he only dances with her when Mr. Mills and perhaps his friends go. You ever hear anything as stupid as that from the day you were born? I think he is insulting your intelligence."

Here again, as in other passages in his summing-up, the trial judge undisguisedly ridicules the applicant's evidence. The cumulative effect of these passages must certainly have been to leave the jury with the distinct impression that, in the view of the trial judge, the applicant's evidence, in answer to Mrs. Mitchell's assertion that she had seen him carrying the deceased's body to the Escort, was to be regarded as a tissue of lies and contradictions. It is the clear view of this Court that the applicant must have been very seriously prejudiced thereby. Especially would this have been the case when it is borne in mind that in reviewing Mrs. Mitchell's evidence the trial judge was at pains throughout to present her to the jury in a light most favourable to the prosecution's case, notwithstanding the material discrepancies in her evidence and the several areas of conflict between her evidence and that of Fraser, Mrs. Mills and Walker.

At the end of the day it cannot, in our view, be said that the accused had a fair trial and for this reason we allow the appeal, quash the conviction and set aside the sentence passed. We conclude, however, that in the interests of justice there should be a new trial during the next session of the Home Circuit Court and we so order.