JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 183 of 1973

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. v. CECIL BAILEY

Mrs. M. McIntosh for the Applicant.

Mr. Chester Orr Q.C., for the Crown.

14th November, 1974
7th February, 1975

EDUN, J.A.:

The applicant was charged with the murder of Mary Grindley. He was convicted of manslaughter and sentenced to 12 years' imprisonment at hard labour. Against that conviction and sentence, he has applied for leave to appeal.

The case for the Crown depended partly on circumstantial evidence and partly on a statement made by the applicant. The facts can be summarised thus:-

1. The husband of the deceased and the deceased were living together in their home at Passage Fort, Gregory Park, in the Parish of St. Catherine. On March 7, he left home about 8 p.m. to look after his coal kiln. The deceased was at home dressed for bed, in a red frock and white tie-head. When the husband returned home later that night, he did not find his wife in the home.

2. After alarm and search, he with some others followed a drag mark on loose, loamy soil from the back gate of the house to about five chains away. They found the dead body of Mary Grindley in a piece of bush at Passage Fort; she was in half-slip, in no panty - the panty was found nearby in some grass root. There was a piece of white cloth around her neck and "her tongue was longing out." A basket that was kept in the house was at the back gate; the bed sheet on the bed in the house was pulled up. The husband claimed that his wife's wedding ring

and his radio were missing.

3. A witness for the Crown said that the husband, himself and four others after discovering the dead body drove in a car towards Gregory Park Police Station when along the road they saw the applicant pushing a bicycle. His clothes were dirty, his trousers front open, the back of both his hands were dirty, and there was grass in his hair.

4. The applicant was asked where he was coming from and he replied: "I just go and check a daughter and the daughter is cold and I am going back." They took the applicant to Gregory Park Police Station. District constable Henry said that while he was on duty at the police station, he heard a noise; he went up and came upon a group of about 25 persons with the applicant among them. That was about 10.15 p.m. and Henry said he received a report. He then asked the applicant where he was coming from and he gave this statement in evidence as the applicant's reply:

> "He said he went to check a daughter over Passage Fort and when he went there he asked the daughter to accompany him to a piece of bush to have sex and while there having sex he is calling the daughter and she did not answer. After the daughter did not answer he took up his bicycle and was coming out and then he saw some men who said they were policemen. They stopped him ....."

5. Constable Gause arrived at the police station later, received the report, he took one of the applicant's shoes and in evidence he said that he matched it along the drag mark with shoe prints in the sand up to the point where the deceased's body was found. He did not take the applicant with him. He said he returned to the police station and told the applicant that his shoe matched marks on the spot. The applicant made no statement.

6. Dr. Richard Marlins performed a post-mortem examination on the body about 10.30 a.m., on March 8. He found that death was due to strangulation presumably by the cloth found around the deceased's neck. The only signs of violence on the body was the cloth drawn tightly around the neck. He saw no bruises or scratches around the body and there was nothing on the body to indicate that the deceased was sexually assaulted. In his view death could have occurred about ten to fourteen hours before he examined the body.

7. In his defence at the trial, the applicant made an unsworn statement saying that he was a fisherman and he was having trouble with Busha Crooks concerning his rights to fish in the river. On Wednesday, March 7, they took some of his fish pots and he made two fish pots to replace some of those he had lost. He worked until 7 to 7.30., and he was in the area where he was found because he had gone to look after his fish pots. The persons in the car accosted him. He knew nothing about killing any woman.

Towards the end of his summing-up, the trial judge told the jury that if the applicant's intention was to rape the deceased but he did not intend to kill her and he put the piece of cloth around her neck as part of the process to lead her out of the house but she died as a result, it was an unlawful act on his part involving at least an assault - that would be manslaughter and not murder. That if they were left in doubt as to whether it was murder or manslaughter, they should say it was manslaughter.

The applicant filed several grounds of appeal but only one of them merits consideration. That is, ground 2 which reads, thus:-

> "The Crown relied on evidence which was partly circumstantial and partly based on statements which were allegedly made by the appellant and on the totality of this evidence did not raise the case beyond the realm of conjecture. In addition the learned trial judge did not adequately direct the jury how these portions of evidence ought to have been dealt with."

We have considered the facts and circumstances of the case and are of opinion that there was a prima facie case to go to the jury. However, the trial judge did not direct the jury along the lines of the time-honoured formula used in reference to circumstantial evidence. That is:-

> "They (the jury) must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion, for it is only on this last hypothesis that they can safely convict the accused ..."
> Taylor on Evidence. 11th Edn.(1920) Volume 1 p.174, following the "rule" in Hodge's case (1838) 2 Lewin C.C. p.227.

Attorney for the Crown submitted that the recent decision in the House of Lords in McGreevy vs. D.P.P. (1973) 1 A.E.R. 503 states that in a criminal trial it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they were satisfied beyond reasonable doubt of the guilt of the accused. Further, that there is no rule of law that the judge must as a matter of law give a further direction that a jury must not convict unless they are satisfied that the facts proved were not only consistent with the guilt of the accused, but were also such as to be inconsistent with any other reasonable conclusion. He submitted that in the instant case, the trial judge did make it quite clear to the jury the particular features of the case and directed them not to convict unless they were satisfied of his guilt beyond reasonable doubt.

Attorney for the applicant replied that even in that case of McGreevy, Lord Morris said at p.510, thus:-

> "If, having regard to the facts and circumstances of a particular case, a summing-up is held to have been inadequate and to have failed to set the jury on their proper line of approach or to give them proper guidance a conviction might be held to be unsafe and unsatisfactory. But I am averse from laying down more rules binding on judges than are shown to be necessary."

In the instant case, attorney for the applicant urged that the trial judge failed to give proper guidance to the jury. She submitted that all he did was to tell the jury that there were five points in favour of the applicant and five points which could be regarded as facts tending to be against him. If the jury believed those points against him and were satisfied beyond reasonable doubt, the applicant would be guilty of murder or manslaughter, depending upon the intent with which he committed the act. That, she said was a serious misdirection and should result in this court setting aside the verdict.

In the report of R. v. Clarice Elliott (1952) 6 J.L.R., 173, the head-note states that a jury may convict on purely circumstantial evidence, but they should be satisfied, not only that the circumstances are consistent with the prisoner having committed the act alleged, but

also that the facts are such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. "Where, therefore, the evidence against the appellant was purely circumstantial, and the trial judge did not give the jury any direction as to the necessity of their applying this rule as to circumstantial evidence, the verdict of the jury cannot be allowed to stand and the conviction must be set aside." In that case, the judge did not give any direction as to the necessity of their applying the above rule as established by the authorities. In considering whether the Court of Appeal should order a re-trial, O'Connor C.J., at p.175 said: "The evidence in the case established nothing but a very high degree of suspicion and no reasonable jury, properly directed, and approaching the matter with an open mind, could convict upon it. It would, therefore, have been improper and unjust to send the case back for a re-trial." In R. v. Elijah Murray (1952) 6 J.L.R. 256, the appellant was convicted of murder upon purely circumstantial evidence but in that case the trial judge gave direction as to the rule to be applied to cases depending upon purely circumstantial evidence. The Court of Appeal dismissed the appeal because they were not prepared to interfere with the finding of a jury, properly directed, where there was evidence on which the jury could reasonably reach their verdict. Those two cases were considered and followed in R. v. Burns and Holgate (1967) 11 W.I.R. 110.

It cannot be disputed that in Jamaica the rule in Hodge's case has become settled that such a special direction as to the way in which purely circumstantial evidence is to be viewed should be given to the jury. But whether the failure of a trial judge to assist the jury in giving such direction as to purely circumstantial evidence would of necessity result in the conviction being quashed is not free from doubt. What, if in the case of R. v. Clarice Elliott (supra) the judge failed to give the proper direction according to the rule but there was sufficient evidence on which an impartial jury despite lack of assistance could reasonably arrive at a verdict of guilty. In such circumstances, we are of the view that though the point raised in the appeal might be decided in favour of the appellant, no miscarriage of

justice would occur in dismissing the appeal. We are also of the view that the rule in Hodge's case has in Jamaica become a settled rule of practice and it is incumbent upon a trial judge to assist the jury in their proper line of approach having regard to the facts and circumstances of the particular case. But a judge's failure to do so may not necessarily in every case result in the quashing of a conviction.

In the instant case, the trial judge has failed to give the jury assistance upon the rule in Hodge's case. However, the facts in this case are not purely circumstantial, they consist partly of circumstantial evidence and partly of the statements the applicant made to the police. The first question to be considered, therefore, is whether or not the trial judge in his failure to deal with the rule in Hodge's case had in fact misdirected the jury. The evidence of Constable Gause matching one of the applicant's shoes with prints in the sandy, loamy soil was purely circumstantial. The facts were that several persons were in the area where the dead body was found. We are not aware of how many persons had on shoes of sizes similar or dissimilar to the applicant's. No plaster cast was made of the prints nor was the shoe with any casts tendered to the jury so that they and not the constable were to be judges of fact as to whether the shoe matched the print. Further, the applicant was not taken to witness the investigation so that he might instruct his attorney as to the circumstances of the matching exercise. If the jury had been guided by the trial judge on their proper line of approach on that feature of the case, no doubt they would reasonably have had to discard from their consideration the evidence of the "matching shoe" - it being not consistent with guilt.

However, if that were the kind of evidence which placed the applicant on the scene of the crime, the verdict of guilty by the jury would certainly have been unreasonable. In our view, the statement which the applicant made to Constable Henry has established that it was the applicant and no one else who was last in company with the deceased, if the jury believed (as they did) the statement was made and it was true. Thus:-

1 the husband of the deceased left his home after 8 p.m. of March 7; Mary Grindley then being alive and well;

2 Constable Henry received his report at about 10.15 p.m. the said night; Mary Grindley was then dead - death being caused by violence;

3 the applicant stated that he was in the area of Passage Fort, where he said "he went to check a daughter .... he asked the daughter to accompany him to a piece of bush to have sex and while there having sex he is calling the daughter and she did not answer. After the daughter did not answer he took up his bicycle and was coming out ...;"

4 the jury, having regard to the medical evidence may well have believed that Mary Grindley's assailant did not succeed in having sex but it was not unreasonable for them to hold from the totality of the facts and, in particular from his statement, that:-

(a) the applicant was in Passage Fort where in fact the dead body of Mary Grindley was found,
(b) the applicant knew of the death of Mary Grindley and was the last person with her, and
(c) having regard also to the condition in which the applicant was found, so near to and so soon after Mary Grindley was dead, no one but the applicant was responsible for her death.

In those circumstances, it was sufficient, having regard to the particular features of the case, for the trial judge to deal with the evidence and to make it clear to the jury that they must not convict the applicant unless they felt sure of his guilt. We see no misdirection by the trial judge in that respect and so we need not go on to consider the effect of a point raised in the appeal which might be decided in favour of the applicant. We see no other points worthy of consideration.

For the reasons given, the application for leave to appeal is refused.