JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 196/73

BEFORE: The Hon. Mr. Justice Luckhoo, J.A., Presiding.
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, J.A.

REGINA v. NEVILLE NEMBHARD

Mr. Neville Clarke for the appellant.

Mr. N. Sang for the Crown.

4th October, 1974

ROBINSON, J.A.:

The applicant was on December 5, 1973 convicted in the Clarendon Circuit Court holden at May Pen of having murdered Paul Nembhard on May 23 or 24, 1973; when he was sentenced to suffer death in the manner authorised by law.

The evidence adduced by the Crown disclosed, inter alia, that the applicant had a son, Paul, two years old. The applicant was not working for some time and had no visible means of support for his son or himself, nor any settled place of abode, but his brother Cyril Nembhard helped to maintain them and allowed them to remain at his home. There was a fuss between them and the applicant and his son went to stay at the home of one Franklyn Reid nearby, for a while, until the applicant could find other accommodation.

Whilst at Reid's, Reid's paramour, the applicant and Reid had a dispute about the applicant not making attempt to do any work to assist himself and Reid both by word and conduct told the applicant he would have to leave his home.

The evidence further disclosed that Reid and his paramour were kindly disposed to Paul. On Wednesday, May 23, 1973 at about noon Reid prepared a meal which was shared with Paul and the applicant. Later same day at about 7 p.m. the applicant prepared

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another meal using Reid's food and which partly resulted in the dispute previously mentioned.

At about 9 p.m. same day the applicant indicated that he proposed to leave the premises and go elsewhere, taking Paul with him. Reid's paramour asked him why he had not taken the child earlier in the day and instead was going with the child when it was so late at night. The applicant is said to have replied that the woman he was taking the child to worked in May Pen and would not be getting home until around midnight, and so it would have served no useful purpose for him to have taken Paul there earlier. Reid testified that he suggested that the applicant leave the child with him. However, the applicant gathered up Paul's clothes, put them in a paper bag and left the home with Paul clothed in a pair of short trousers and a pyjama jacket.

Next morning, May 24, 1973 about 6 a.m. Reid saw the applicant changing his clothes in Reid's home but they do not appear to have spoken to one another. The applicant made no report to Reid or to the May Pen Police that whilst carrying Paul in his arms the night before he had stumbled and fallen with him and that Paul had sustained a broken neck. The applicant was next seen on June 16, 1973 in Kingston.

On Thursday morning, May 24, 1973 consequent on a report made to the Police, they and Doctor Pyne, the Medical Officer went to the intersection of Rectory Road and Sevens Road, where they saw the body of a child, later identified to be that of Paul Nembhard, fully clothed in the garments he was wearing when he left Reid's home at 9 p.m. on May 23.

Dr. Pyne carried out an external examination on the body of the child. He saw that there were contusions on both cheeks and abrasions on the left side of the face. There was one deep indentation and abrasion all around the neck about a quarter of an inch deep. The neck was broken, and this in the Doctor's opinion was the cause of death. The Doctor made no dissection of the body and so he could not say for certain where the area of the fracture of the neck was in relation to the indentation

around the neck. He was of the opinion that pressure by a long, narrow object like fingers or a sash cord or something of that sort could cause the indentation; but that pressure could not cause the fracture of the neck he saw. It would need direct force to the neck to cause the fracture, for example, a twisting of the neck. The contusions to the cheeks could have been caused by a fall of some sort, a fall where a person would roll over; or direct blows to both cheeks. There was no injury to the head, elbows, hands or fingers, mouth or nose. The sides and front of the indentation were deeper than the back, and would have required a great deal of force if caused by a hand.

Under cross-examination the Doctor said that in all probability the fracture did not take place at the same time as the indentation. Pressure around the neck could not have caused the fracture; but the fracture could have been caused if the child fell from the height of a grown person like the applicant on to a hard surface and the grown person fell over the child. If there was this fracture, pressure to the neck could be applied by one hand, in fright but not extreme pressure. If pressure had been applied again and again after the neck was fractured that could have caused the indentation he saw around the neck.

The Doctor also gave it as his opinion that the indentation of the neck could have caused death by strangulation or asphyxiation; and that this indentation alone could have caused death; and that he would not rule out asphyxiation as one of the causes of death. This indentation could have occurred before as well as after fracture. He had not dissected the body and so he had not examined the lungs so as to be able to say whether the child had died from asphyxiation from having been choked to death. The Doctor agreed therefore that the child could have met his death by a fractured neck in the manner as alleged by the applicant, which was to the effect that whilst carrying the child in his arms on rough road he stumbled and fell to the ground with the child when his neck broke.

Had a dissection of the body been made the Doctor might have been able to ascertain with certainty whether or not the

deceased had been strangled before his neck was fractured. This unfortunately was not done. It is possible that the applicant may have deliberately caused the death of his child, but there is no proof beyond a reasonable doubt that this was so. The circumstances, in our view, give rise to no more than grave suspicion. There was no sufficient evidence in proof of his guilt to discharge the burden of proof required of the Crown.

In all the circumstances the Court finds that the evidence was insufficient to warrant a conviction and therefore holds that the verdict of the jury is unreasonable, as was contended for in the main by learned Counsel for the applicant. The application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal. The appeal is allowed. The conviction is quashed and the sentence is set aside.