J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 29 of 1974

BEFORE: The Hon. Mr. Justice Luckhoo, Ag.P. (Presiding)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, Ag. J.A.

DONALD PARKES v. R.

B. Macaulay, Q.C. and K. St. Bernard for the applicant.

Chester Orr, Q.C. and N. Sang for the Crown.

May 29; July 12, 1974

LUCKHOO, Ag.P.:

On January 21, 1974, the applicant Donald Parkes was convicted in the Home Circuit before the Chief Justice and a jury on an indictment charging him with the murder on September 14, 1971, of Daphne Graham, and was sentenced to death. He now applies for leave to appeal against conviction.

The case for the prosecution rested entirely on circumstantial evidence. The deceased who was 32 years of age at the time of her death resided in one of the rooms on premises situate at 10, Boynes Road in the parish of St. Andrew. Her mother Minna Graham resided in another house on the same premises. Minna Graham testified that she saw the applicant on the morning of September 11, 1971 standing on the verandah onto which the deceased's room door opened. He had both hands behind his back. At about 7.30 a.m. when she left the premises for work the deceased was standing at her room door. When she got to the road one of the tenants on the premises presumably, one Dorothy Lynch, called out to her. She thereupon went to the deceased's room. Dorothy Lynch was present. The deceased was standing and holding

the left breast. She was bleeding. She then collapsed. Minna Graham said that she spoke with the deceased and then left for the back of the premises. On getting there she saw the applicant. He had a rachet knife in the hand. It was closed. She asked him "What she do you why you stab her?" He did not reply. She repeated the question. Again he did not reply. She then slapped him twice across the face, held him by the waist and tore his shirt telling him that she would not let him go until the police came. He thereupon opened the rachet knife the blade of which appeared to be blood stained. He made as if to cut her face. She raised her left hand to avoid the blow and received a cut on a finger which later took five stitches. She called out for one Jarrett, the applicant's uncle-in-law who came up. The applicant handed over the knife to Jarrett. The deceased was taken to the Kingston Public Hospital where she was admitted a patient and underwent surgery. She succumbed to her injuries on September 14, 1971.

The medical testimony disclosed that the deceased received two stab wounds to the chest, one of which penetrated into the pericardial sac. The cause of death was shock and haemorrhage resulting from the penetrating stab wound which, in the doctor's opinion, could have been caused by the knife taken from the applicant. Jarrett testified that he was at the back of the yard when his attention was attracted by someone. As a result he went to the front of the premise and saw the deceased standing on her verandah crying and holding the left breast. She was bleeding. He spoke to the deceased but she did not reply. He then put her to sit down and on drawing away her dress saw a cut just over the left breast. He attempted to leave her in a sitting position but she over-balanced and he put her to lie upon her bed. He then went towards the back of the premises where he saw Minna Graham holding on to the applicant. Minna Graham was saying that the applicant had stabbed her daughter and that she would hold him until the police came. The applicant was trying to get away from Minna Graham's grasp and Minna Graham showed him (Jarrett) a cut she had

got on the finger. The finger was bleeding. Jarrett said that he asked the applicant what had happened but the applicant did not reply. He took away the knife from the applicant but did not notice anything about the blade. He then left to get a car to take the deceased to hospital. He later handed the knife to the police.

According to Minna Graham the applicant and the deceased had had a fuss about a week before the deceased received the fatal injuries. Dorothy Lynch did not testify at the trial apparently her whereabouts were then unknown.

The applicant in an unsworn statement from the dock denied inflicting any injury on the deceased. He said that on the morning of September 11, 1971, on awakening he came outside and washed his face and was about taking his towel to dry his face when he saw Minna Graham. She approached him and held him by the pants waist and asked him what her daughter did for him to stab her. He did not reply. Because he did not know what she was speaking about he was unable to answer her. She began to tear off his shirt. He asked what he had done her for her to be going on like that and she replied that she heard that he was the one who stabbed her daughter and she would hold him until the police came. She searched his pocket and found a penknife. She opened it and said she was going to stab him because he was the one who stabbed her daughter. He struck the knife from her hands and told her that it was his knife. He picked up the knife and she grabbed at it and got cut between the finger. Then she let him go and went to the front of the yard.

On the case for the Crown there was evidence of a possible motive and opportunity for committing the crime as well as the circumstance of the applicant being seen a short distance from the scene of the crime soon after the fatal injury was inflicted on the deceased holding a knife, which was at that point of time closed but which on being opened revealed the blade which appeared to be blood-stained. There was the further circumstance that when twice accused by the deceased's mother of having stabbed her daughter and

asked the reason for his so doing the applicant remained silent. In this regard the learned trial judge directed the jury that if they were of the view that the mother's accusation was made in circumstances which called for some response on the part of the applicant his silence might be regarded by them as one of the circumstances in the chain of circumstantial evidence upon which the Crown relied in proof of the applicant's guilt though it could not be regarded by itself as an admission of guilt. One of the grounds of appeal strenuously argued on behalf of the applicant was that it was not competent for the jury to draw an inference adverse to the applicant in this regard as he was not obliged to say anything at all and that this was a right to which he was entitled under the common law regardless of whether or not the accusation was made by or in the presence of the police.

Mr. Macaulay submitted that the learned trial judge erred in giving the direction he did give in this regard. In support of his submission Mr. Macaulay referred us to the case of Hall v. R. (1971) 55 Cr. App. R. 108. In that case the Judicial Committee of the Privy Council held that there is no obligation upon a person to comment when he is informed that someone else has accused him of an offence, there being a clear and recognised principle of the common law that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he had committed a criminal offence. In that case during the course of a police search packets of ganja were found in a shopping bag in a woman's room. The woman said that the shopping bag had been brought there by the accused. The accused was not on the premises when the search was in progress but he was brought there by another police officer. He was told by the officer who had conducted the search that the woman had said that the ganja belonged to him. He remained silent. At the trial the accused remained silent and called no witness. He was convicted of unlawfully having ganja in his possession. His appeal to the Court of Appeal of Jamaica against conviction was dismissed. The Court of A Appeal held that the accused's silence when told of the accusation made

against him by the woman amounted to an acknowledgement by him of the truth of the statement which the woman had made. The Privy Council held that silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to the truth of the accusation and that was so whether or not he was cautioned. The Judicial Committee observed that it may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer. Mr. Macaulay contended that any inference adverse to the accused person can only be made where there is positive conduct, action or demeanour and not where there is mere silence. Mr. Macaulay further contended that although that case and such other reported cases as he has been able to discover in relation to similar questions concern accusations made by, to or in the presence of police officers, that does not provide any distinguishing feature for a private citizen making the accusation may thereafter cause the accused person to be arrested and charged with the offence in respect of which he was accused. Mr. Chester Orr on the other hand submitted that in the circumstances of the instant case the accusation by the deceased's mother called for a disclaimer from the applicant. He referred to the case of Reg. v. Mitchell (1892) 17 Cox C.C. at p. 508 where Cave, J. in his directions to the jury said:

> "Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly when persons are speaking on even terms and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

Stress was laid upon the fact that the Privy Council's opinion in Hall v. R. related to the accused's silence when informed that someone else had accused him of an offence and that it was not a case where there was an accusation made direct to the accused person. We are of the view that this is indeed a valid point of distinction between Hall v. R. and the instant case, and that this case falls within the ambit of the passage appearing in Archbold's Criminal Pleading, Evidence and Practice (37th Edition) paragraph 1126 cited with approval by the Privy Council in Hall v. R. It was open to the jury to conclude that the applicant's silence in the face of the deceased's mother accusation was conduct (albeit conduct of a negative kind) or demeanour which amounted to an acceptance of it. Indeed the learned trial judge in his directions to the jury said 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 upon which the Crown relied in proof of the applicant's guilt, if the applicant's explanation at the trial for his silence were rejected. Such a direction we think to be more favourable to the applicant than it need have been. We think that the submissions made on this ground fail.

It was further submitted that the learned trial judge misdirected the jury on the evidence given by the deceased's mother in respect of the point of time at which she observed the applicant on the verandah outside the deceased's room door and that this misdirection was so prejudicial to the applicant having regard to the nature of the evidence in the case that the conviction ought not to be allowed to stand. While it is true that in directing the jury on the evidence given by the deceased's mother the learned Chief Justice did not repeat the ipsissima verba of the witness we think that his recital of the evidence of that witness was substantially accurate and could have caused no improper prejudice to the applicant.

Finally, it was submitted by Mr. Macaulay that the verdict was unreasonable and could not be supported having regard to the evidence. We are of the view that the evidence adduced by the Crown was sufficient to discharge the onus of proof placed upon the Crown. In the result the application for leave to appeal is refused.