IN THE COURT OF APPEAL

Montserrat

Criminal Appeals
Nos. 1 & 2 of 1973

Between (1) JOSEPH BUFFONGE) Appellants
(2) GEORGE LEE)

and
THE QUEEN Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice Peterkin (Ag.)
The Honourable Mr. Justice Renwick (Ag.)

C. Francis for the appellant Buffonge
K. Allen for the appellant Lee
D. Christian (Legal Assistant) for the Crown

October 22, 23 and December 5, 1973

CECIL LEWIS, C.J.(Ag.) delivered the judgment of the Court:

These two appeals were heard together by consent.

At the conclusion of the hearing on October 23 the Court announced its decision on each appeal and intimated that it would give its reasons in writing at a later date. This the Court now proceeds to do.

The appellants were jointly indicted for the murder of Sarah Meade at some date between the 25th and 27th days of September 1972. They were convicted on July 24th 1973 and sentenced to death. Each now appeals against his conviction.

Sarah Meade who is also called "Mon", a young girl 16 years of age, lived at Victoria Village with her mother Sarah Dyett and her mother's husband John Dyett. Some three months or so before her death Sarah Meade was in the habit of leaving her parents home around 6 p.m. to go to sleep at the home of her great aunt, Charlotte Lynch and her great grandmother, Christiana Barzey in George Street, Plymouth.

On Sunday 24th September, 1971, Sarah Meade dressed and left to go to choir practice at the Roman Catholic Church in George Street with the intention of going to her great grandmother's place as usual to sleep after the practice. She took with her a plastic bag containing her

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night clothes. Her great grandmother Christiana Barzey said she came to her home that night to sleep and arrived at about 6 p.m. She did not leave the house that night. She said however that she saw her leave the house next morning when "the morning was open". She slso said in answer to a question by counsel for the appellant Buffonge "that she left when it was bright morning".

Joseph Wyke who lives in George Street, Plymouth and who knew Sarah Meade said that he was in the habit of seeing "her in the morning hours about 5.15 a.m." walking along George Street, and on Monday 25th September, 1972 he saw her around 5.15 a.m. on the Northern side of George Street walking in a westerly direction. She had a paper parcel under her arm. Sarah Meade was never seen alive again after this time.

When her stepfather John Dyett awoke on Monday September 25, Sarah Meade was not at home. He went off to his work and at about 4 p.m. when he came down from the mountain Sarah was still not at home. He made inquiries for her, and as he could get no information about her whereabouts he made a report to the Plymouth Police Station between 6 and 7 p.m. that day.

Some time in the morning of the 27th September a girl called Glendora King came to John Dyett's house and spoke to him. As a result of this conversation he went to the junction of Wall and Osborne Streets where he saw one of the shoes which Sarah Meade was wearing when she left his home. He took up the shoe carried it to the police station and made a report. A little later the police came to him and he went and showed them where he had found the shoe. A search was instituted in this vicinity and in a bushy area between the Coconut Hill Hotel and the premises of one Mr. Wall a body was found which he identified as being that of his step-daughter, Sarah Meade.

About 10.30 a.m. the same day Dr. Bailey was called to the spot where the body was found. He observed the body of a young girl lying in a clump of bushes. It was clothed in a mini dress but there was no covering on the lower half of the body. Her stepfather also said when he saw Sarah's body that her panties were missing.

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Dr. Bailey observed that the body was lying on its back with the legs parted and slightly flexed. The arms were apart and flexed and the whole position being that assumed during sexual intercourse. The body was then in a state of putrefaction. It was removed to the Glendon Hospital where he performed a postmortem examination at about 1 p.m. On examination he found that the body and the clothing were much soiled with dirt, grass and bush. A clump of grass was found in her mouth which had pushed the tongue to one side. The whole surface of the body was seething with maggots and grubs upon and beneath the skin. The face was completely smashed in across the eyes and the bridge of the nose. A broad groove ran across the face, and the left eye in particular was grossly disorganized, i.e. the normal relationship of the eye to the eye socket had been disturbed and this was as a result of the fracture of the bone in this region causing displacement of the eyeball. There were cuts over the nose and left side which showed broken bone splinters beneath. A one and a half inch cut of the scalp over the right parietal region showed fracture of the skull. In view of the position of the body Dr. Bailey carried out a particular examination of the external sexual parts but on account of the advanced state of putrefaction it was impossible to observe any injury which might have resulted from sexual engagement. Similarly, the state of putrefaction made it impossible to identify bruises or surface scratches on the rest of the body. Internal examination revealed the organs such as the lungs, the heart, the bowels and liver were normal although putrescent. The skull showed multiple fractures of the facial bones particularly over the left eye and nose. There were similar fractures of the vault of the cranium in both temporal and the right parietal bones. The brain tissue had been destroyed and consumed by maggots.

The doctor concluded that death had occurred as a result of multiple injuries to the face and skull which were probably the result of blows delivered with a blunt instrument, possibly the edge angle of a stone or a bar. The state of undress and the attitude of the body suggested that sexual interference had occurred and in the doctor's opinion

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"the attitude of the body was that present at the time of death" which he estimated to have occurred some 48 hours previously; certainly more than 24 hours and probably within 72 hours of discovery. The doctor also stated that the body would be preserved in the position in which it was found if death had been caused suddenly or under violent circumstances and that the muscles of the body would fix the attitude of the body after death.

In cross-examination the doctor stated that it would be difficult to say if the injuries which he saw on the body were made before or after death but he found no reasons for the cause of death other than the injuries on the body.

Sergeant Winfield Griffith who was present when the body was found said that he observed a depression in the ground about 5 feet 2 inches from the body from whicha stone appeared to have been removed. He saw a large stone about 3 feet 8 inches away from the depression and he examined it and he observed what appeared to be blood and human hair on the stone. He took the stone and placed it into the depression and it fitted. This stone was afterwards handed to Gerald Popplewell, a Chemist who testified that on examining it he found bundles of hair adhering to it at three points. This hair was human hair of negro origin.

Case against appellant Buffonge:

The case for the prosecution in relation to the appellant Buffonge rests mainly on the evidence of the witness Joseph Buffonge, the prisoners Peter Ryan, George Cooper and Gabriel Paul to whom this appellant made statements while in prison on remand, and to a lesser degree on that of the witnesses Joseph Meade, Matilda Gage and Henry Ryan who all said that they saw and heard the appellant call out to Sarah Meade on different occasions when she passed along the Fort Barrington Road. The evidence of these witnesses will now be considered in detail.

A rather important witness for the Crown was a man called Joseph Buffonge who was a first cousin of the appellant Buffonge and has the same Christian name. His evidence is to the effect that on Monday of the 25th September, 1972 he was in his boat on the northern part of the pier when the appellant Lee who was on the pier called out to him and told

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him that his family Midda (i.e. the accused Buffonge) was in difficulty and wanted to see him. He asked him where was the appellant Buffonge and he told him to come with him. The witness Buffonge tied up his boat and walked along the pier and when he got to the middle of the pier he met the appellant Buffonge and his father Joe Joe Buffonge walking along the pier. The appellant told him he was the man he was looking for and pushing his hand in the pocket of the witness, said "that is only a tip for you". The witness Buffonge put his hand in the same pocket and pulled out a $50 American bill which the appellant Buffonge had placed there. He kept this money. He said he asked the appellant Buffonge where were they going and he told him that "he had a dead home and he wanted me to help him". At this time four of them were present namely, the appellant Buffonge's father, the appellant Lee, the appellant Buffonge and himself. They went towards the house where the appellant Buffonge lived and as they were doing so the appellant told them to "scatter". They eventually met at the house of the appellant Buffonge and what happened there may best be described in the witness's own words:

> "Then the accused Buffonge told me that he and the accused Lee were here playing games and he sent his girl friend child with a $20 note by Twist Mouth Mack to buy a pack of cigarettes. He said I was looking for the girl and I can't see her come and when she come she don't bring no cigarettes and no fucking money back. He told me that it appear to him as if the girl is dead. He was beating her and it appears as if she dead.
>
> I asked him if it is that he brought me up here for. I asked him, so what he wanted me to do now. He told me he wanted me to take the dead out in the sea in my boat, and dump it for him.
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> Joe Joe Buffonge turned to me and told me it is no joke.
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> The four of us were together all the time in the house. This includes the accused Lee.
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> Joe Joe Buffonge told me to come & follow him. He took me into his bedroom, & pulled out a drawer near to his bed head showed me something & spoke to me.
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> Then we came out of the room, and I did not meet the accused Buffonge where I had left him. But I met the accused Lee still there.
> Then the accused Buffonge came out from another room, and in his hand he had a 25 pistol revolver. It had a white handle & black nozzle. Accused Buffonge said to me, come let me show you something. I walked towards the bathroom with him. All four of us went together.
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> When I went in the bathroom I saw something wrapped up in a grey coloured blanket. The accused Buffonge told me to open the blanket. I opened the blanket & I saw a negro young girl,

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she two arms were open, she two leg were spread apart and wire grass was in her mouth. A gent's pocket handkerchief was also in her mouth. The girl was dead. I knew her as Mon who would be around one Miss Alma.

The four of us came back out the bathroom into the sitting room. The accused Joseph Buffonge told me that the accused Lee will take away the dead body on the first trip in the garbage truck to Jumbie Hole, and I could go there & I would meet the accused Buffonge there. And then the accused Buffonge said he would go to sea with me to dump the body.

The accused Lee took two dice from his pocket & said, its no joke, see the two dice we were playing with. I turned to the accused Buffonge and said "Boy its late now. I told him people stirring on the road all now. I told him let us make arrangements. Put the body somewhere, for 9.0 to 9.30 p.m. tonight, call me at the Shamrock Cinema, and both the three of us will take the body out & dump it. The three would be the two accused and myself.

Accused Lee said Boy Asia listen, we looking for you at the 'rival time.

Then we left each other. I left the house by myself alone. The dead body was still in the house when I left."

The witness Buffonge did not go to the Shamrock cinema that night and the following morning when the appellant Buffonge met him around 7 o'clock he upbraided him for not turning up. He told him however "we got it (i.e. the body) at a spot now - the police done search there already" He asked him where was this spot and he said "by the prison ground between some winy winy and banana trees". The witness Buffonge made it clear that it was still dark when he went to the appellant Buffonge's home. He estimated it to be some minutes to 5 a.m.

The witnesses Mary Cabey and her boy friend John Martin gave evidence that one Sonday night in September the appellant Buffonge came to their home to borrow her boyfriend's truck. He told Martin that he wanted to hire the truck in the morning but Martin informed him that the truck was not working and he went away.

On the day when the body of the girl Sarah Meade was found Sgt. Winfield Griffith saw the accused Buffonge at police headquarters at about 3.15 p.m. and asked him to account for his whereabouts between the 24th and 27th days of September. The appellant said he had gone to the liquor shop of Franklin Charles on the night of 24th September where he had played dominoes until 10.30 p.m. He then went home and slept till 10 o'clock the next day when he aroused by the appellant Lee. He also

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said that he had gone over to the Kinsale Primary School where he borrowed a book from the headmistress, that he returned to Charles Franklin's shop on the night of the 25th September where he played dominoes until midnight and then returned home where he slept until 6 o'clock next morning when he was awakened by his father. He was asked by the sergeant if he had passed on Peebles Street on 25th September, 1972. Peebles Street is the street above the Coconut Hill Hotel in the vicinity of which the body of the girl was found. The appellant Buffonge said he had not passed this street that morning and had in fact not passed there since returning from St. Croix six weeks before. The sergeant asked the appellant Buffonge if he knew the girl Sarah Meade and he said he did not and he did not know anybody called Mon but the witness said that later on in the interview the appellant admitted that he knew Sarah Meade when she was a little girl. On September 28, 1972 the appellant Buffonge was at Police Headquarters, and there Inspector Charles showed him a photograph of Sarah Meade taken in what appeared to be her school uniform. He asked the appellant if he knew the girl and he replied: "who me, me ain't know she". Sergeant Griffith made further enquiries and on the 2nd October, 1972, he arrested and charged the appellant Buffonge with the murder of Sarah Meade. After he had cautioned him he gave him a copy of the charge and the appellant said 'Oh God'.

There is evidence from several witnesses that the appellant Buffonge knew the girl Sarah Meade. The witness Henry Ryan said in August last year he met the appellant Buffonge on the Fort Barrington Road. At the same time Sarah Meade was walking down the road and the appellant called out to her but she ignored him and continued on her way. Matilda Cage a domestic who lives at Fort Barrington said that Joseph Meade was at her house one day in September last year when the appellant Buffonge came up and started a conversation with Joseph Meade. While this conversation was going on Sarah Meade passed going in the direction of the town. When she passed back Joseph Meade spoke to her but she did not stop. Then the appellant Buffonge called out to Sarah Meade but she did not answer him. Joseph Meade a civil servant who lives at Fort Barrington said

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that he knows the appellant Buffonge and on 18th September, about 1.15 p.m he was in front the home of one Matilda Gage on Peebles Street when the appellant Buffonge called him and told him he had something to ask him, Matilda Gage was present when the appellant spoke to him. A few minutes later Sarah Meade came along the road and he Joseph Meade called out to her and she waved to him. When she stopped he spoke to her. The appellant Buffonge was then four feet away from Sarah Meade and the witness Joseph Meade. As she was turning away Joseph Meade said the appellant Buffonge called out to her but she ignored him. He called out "Mon" three times and then the witness said that the appellant Buffonge made this remark to Sarah Meade. "Hi gel, you have some nice tits when you all playing pret up, you can take you all out of the way and give you all some good seeding". Matilda Gage then got up from where she was sitting and spoke to the appellant Buffonge and told him that Sarah Meade was a school child, she was not looking for a man. She further told the appellant "all like you so is infant takers". The accused Buffonge replied "all like she could take it". This conversation took place some minutes after 2 p.m. At about 7.30 to 8 that same evening the witness Joseph Meade was again on Peebles Street on his way to the Sun Strip Bar when he saw the appellant Buffonge leaning against the side of Matilda Gage's house. At the same time Sarah Meade and Rachael Dyett were passing and the appellant Buffonge asked Sarah Meade what she doing out so late and remarked that she should be at home sleeping. Matilda Gage who was in her yard told the appellant Buffonge that the girl Sarah Meade does not sleep up here but she sleeps in town by Miss Alma. The appellant then left and walked in a southern direction. If the evidence of these witnesses is accepted it would establish that the appellant Buffonge not only knew Sarah Meade but that he had some lascivious intentions towards her.

When the appellant Buffonge was detained in the prison pending the hearing of the preliminary inquiry he is alleged to have made certain statements to a few of the prisoners who were in the prison at the same time. One George Cooper said that he was in prison on the 26th of December, 1972 when he met the appellant Buffonge who was in prison on remand and he

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asked him about Sarah Meade's death. He told him that this was a thing which could be avoided and he was sorry that he got himself involved in it. It was his friend George Fowl (the appellant Lee) who "make them catch him up"; that his father had paid to George Fowl a $50 bill to take the dead body away from his father's home but George Fowl did not turn up at the appointed time during the night; that where the dead body was found was not where Sarah Meade was killed, and that about 3 a.m.that morning he the appellant Buffonge had put the dead body on his shoulder and had placed it where it was found. The witness George Cooper gave a statement to the police after he came out of prison of what the appellant Buffonge had told him.

Another witness Gabriel Paul stated that he knew the appellant Buffonge for about 20 years, that in December last year he was in prison and the appellant Buffonge was also there during that month. He said that one day while they were in custody himself and Buffonge had a conversation and he asked him how he got himself mixed up in this thing. Buffonge replied that it was through George Fowl "who run his mouth why he is down here". He said that George Fowl went and told Red Pole that he the appellant Buffonge had offered George Fowl $500 to do a job. He asked the appellant what kind of job and he said George Fowl told Red Pole it was to throw away a dead body. The witness stated that the appellant said he had really offered George Fowl a job but he did not tell him what kind of job it was; that he had advanced George Fowl $200 on the job and that George Fowl after drinking up his rum by Bill "bang off his mouth to Mussolini". (This is a reference to the witness whose name is Henry Cabey). The witness then said:

"Midda you really do the act? I meant to ask him if he really kill the child. He said to me me no say me do it, and me no ah say me ain't do it, but if me get way somebody will pay for it". This conversation was reported to the police.

A third witness Peter Ryan who was serving a term of imprisonment in October last year gave evidence to the effect that he saw the appellant Buffonge at this time in the prison where he was on remand. He asked the

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appellant Buffonge "What they bring you here for"? Buffonge replied that the police were trying to frame him with this killing business. The witness asked him what did he mean by this killing business and he replied saying that he had heard that George Fowl had told the police that he Buffonge had killed the girl, but it was not he who had killed her. It was the two of them who had killed her. They had raped her and when they were finished they killed her. The witness Peter Ryan's evidence continues as follows· "Accused Buffonge turned to me and told me when you go out don't tell anybody what I told you..... the accused Buffonge told me that he went up by Rum Punch (i.e. John Martin) to borrow the dump truck to take the dead body by the dump heap, at the same time Rum Punch girl friend told me that Rum Punch was not in. We wrapped her up in a white sheet and we place her near a rubbish drum, near where Mr. Bisset lives by a sand box tree." This conversation was reported to the police.

The appellant Buffonge made an unsworn statement at the trial. Although it is a very long statement it did not touch on any of the essential points of the Crown's case against him, for exmaple it did not contain any reference to the evidence of the witness Joseph Buffonge, concerning the conversation this witness alleged took place at the home of the appellant Buffonge, nor does he say anything at all about the statements which he is alleged to have made to the three inmates at the prison Peter Ryan, Garriel Paul and George Cooper. In his statement the appellant Buffonge said that he was a navigation officer in the Merchant Marine Fleet and that he had arrived in Montserrat on the 14th August, 1972 on a special mission. Between August 14th and 27th he said he visited certain friends whom he had known before going to sea, that his normal practice was to go to Franklin Charles' place in the afternoons and from there he would go back to his home each night about 10.30. He had been appointed Selection Officer for the crew of his ship and had spoken to several persons in Montserrat (including the appellant George Lee)asking them if they were interested in sea going employment.

On September 27 around 8 o'clock in the morning Inspector Patrick Lee came

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to his father's home and told him he had an overseas telegram from St. Croix for him at the police station and he went with him to the station. On arriving at the station he observed that the Insepctor did not take him to his office but asked him to sit on a chair in the guard room. He was there till 10 o'clock when he saw Inspector Lee come back to the station and he asked him for the telegram. The Inspector told him someone in the C.I.D. had it and he would have to wait till the office was opened before he could get it. He waited there until 2.30 p.m. during which time he had not spoken to anyone except Inspector Lee. He was then taken to the C.I.D. where he met Sergeants Griffith and Aymer and other policemen. Sergeant Griffith brought him a paper and told him it is a warrant to search his father's house for the clothing of the dead child Sarah Meade. He asked him who is Sarah Meade and he told him Sarah Meade was the child he had fucked and killed. The appellant Buffonge took exception to this statement and told Sergeant Griffith that he understood he, the Sergeant, had left his wife at home and had wrestled with a woman police constable for sex and that he was not in that category, and the Sergeant told him he would have to pay for his mouth. They then left the station and went to his father's home where the policemen made a search. Nothing was found. The following day he was taken to Fort Barrington Road where Sergeant Griffith and others made a search at Matilda Gage's house and asked her for his clothes. Matilda Gage told them that the appellant did not live there. Nevertheless Sergeant Griffith took up some clothes which he insisted were the appellant's clothes but Matilda Gage told them they belonged to her boy friend. The policemen and the appellant next went to the house of one Mr. Meade which they searched. This house was rented from Mr. Meade by the appellant. After the search was completed he was taken back to the police station.

On the morning of 29th September around 3 o'clock he was taken from downstairs to the C.I.D. office where were about 18 policemen. He said Inspector Richard then began to question him about the dead child Sarah Meade. He said "I told Mr. Richards that I have known him as a man of great complicity and I was well aware of him for past years. And any conversation

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that he and I would have, I would not open without a tape recorder. He told me that that's a deal. He sent me back downstairs for approximately 45 minutes. He sent back for me, and when I went back I observed that a tape recorder was there on my return. P.C. Pompey tried out the tape recorder and the conversation goes on. I told him my whereabouts and also that I did not know Sarah Meade's the deceased, because I had not gone out much since I was at home, not even to a movie. I have a lot of work at home that drew my attention every day. I was not such an individual as he was referring to." The appellant said that he was then sent back downstairs and was later taken before the magistrate charged with murder and remanded in prison.

The case against the appellant Lee.

The Crown's case against the appellant Lee is contained (a) in the evidence of the witness Joseph Buffonge and (b) in the statements allegedly made by this appellant to his workmates Henry Cabey, Beresford Loving and Samuel Aymer. Joseph Buffong's evidence implicates the appellant Lee to this extent that he says that Lee was present and made no denial when the appellant Buffonge stated that himself and Lee were playing games when he the appellant Buffonge sent out the girl to buy cigarettes for him, that he was looking for the girl and did not see her come, and when she did come she brought neither cigarettes nor money, that he was beating her and it appeared that as though she was dead. The inference to be drawn from this statement is that Lee being present when the beating took place he confirmed what the appellant Buffonge had said when he stated "its no joke, see the two dice we were playing with." The witness Buffonge also stated that the appellant Buffonge said in Lee's presence that Lee would take away the dead body on the first trip in the garbage truck to the Jumbie Hole. There is no evidence on the record to show Lee denied this statement.

The appellant Lee worked as a garbage collector with Henry Cabey, Beresford Loving and Samuel Aymer. He told Henry Cabey on September 25 around 6 a.m. in the presence of Fred Loving the driver of the garbage truck that he used to see the child every morning but that morning he did not see her. It is true he did not say to which child he was referring but it is

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reasonable to presume that he was referring to Sarah Meade in the light of his statement to the witness Cabey that "nobody kill the child but Midda". Midda was a nickname for the appellant Buffonge. This piece of evidence was admitted not in proof of the allegation made therein but as going towards establishing that the appellant Lee had knowledge at the time when he made the statement of the death of Sarah Meade.

At 5.55 a.m. on the same day the appellant Lee asked Beresford Loving if he had heard about the missing girl and Loving replied that he had not because he had not listened to his radio that morning. Lee told him it was a little girl whom he used to meet every morning "by the jail man ground". Loving stated that the first topic of conversation the appellant Lee had with him that morning was about the dead girl. He also said that Lee again spoke to him on this subject around 11 o'clock the same morning.

Samuel Aymer, the appellant Lee's third workmate on the garbage truck, said that he took up work on the truck at 7 a.m. on September 25. The appellant Lee came up to him and said:

> "But Sam, you hear they can't find one little girl! Me say, what you saying. He said the only thing Sam, I don't believe Midda powerful enough, tall enough to kill the child. I said to him, George who you accuse? This conversation took place at about 11.00 a.m. I did not know at the time that any girl was missing."

The significant point to be noticed in the evidence of these three witnesses is the time when the appellant Lee mentioned to them that the child was missing. He spoke to Henry Cabey around 6 a.m. to Beresford Loving around 5.55 a.m. and again at 11 a.m. and to Samuel Aymer at 11 a.m. on September 25, 1972; yet the fact of Sarah Meade's disappearance was not reported to the police by her stepfather until around 6 to 7 p.m. that day. One is left to conjecture how the appellant Lee obtained the information that Sarah Meade was missing if he was not in some way connected with her disappearance or at least had some personal knowledge of it.

The appellant Lee made three statements to the police. Two were made on 4th October, 1972 before his arrest and the third on October 6th after his arrest. In his first statement he admitted that he knew the little girl who had been killed and that her name was Mon. He also gave an account of his movements on September 24 and 25. He said that he usually went to pictures at nights. He did not go to any picture show on

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Monday 25th September, 1972, but on the Saturday and Sunday before that day he did go to a show. He got home from the pictures around 11.30 on Sunday night 24th September, 1972. As he came out of the show and got to his home he turned on the radio and heard that Radio Montserrat had just signed off. When he got home on Sunday night 24th September he did not come back out until Monday morning when he went to work. He went up to the accused Buffonge's house on Monday morning around 11 o'clock and he heard it was being said that a child was missing. This child was supposed to go home to go to school and no one saw her. He also said that on Monday morning on 25th September, 1972 at around 10 o'clock he saw the appellant Buffonge at his father's house at Tom Beth. He did not see the appellant Buffonge at any time either on the 23rd or 24th September, 1972. The appellant Lee was arrested on October 5th 1972 and charged with the murder of Sarah Moode. When cautioned he said "Ah joke you ah mek man, ah joke you ah mek".

At the conclusion of the Crown's case against the appellant Lee his counsel made a "no case" submission on his behalf which was overruled and the appellant was called upon for his defence. He neither gave evidence nor did he make an unsworn statement but his mother was called as witness on his behalf. Her evidence which was intended to establish an alibi for her son was that on Sunday night September 24, 1972 the appellant Lee slept in her house. He went to bed at 7 p.m. and she awakened him about 6 o'clock next morning to go to work. She was not however sure of the time she awakened him because she had no clock.

Appellant Buffonge's Appeal:

The following grounds of appeal were argued on behalf of the appellant Buffonge:

(1) There was a mistrial of the accused in that Counsel for the Prosecution during the course of his final reply commented on the fact that the Appellant had not gone into the witness box to give evidence and to be cross-examined in the following words to the jury -

"You have heard so much made about a tape recorder in the statement of the No. 1 accused (pointing to the Appellant Joseph Buffonge) This is the

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first time we are hearing about this. I would have loved to have cross-examined him on this but I was not allowed to do so". In violation of the evidence Act Chapter 25 Sec. 6 Subsec. (b).

2. The Learned Trial Judge erred in that he misdirected or failed to direct the jury on the following matters:-

(a) The question of time which was a most essential ingredient in the Crown's case, in relation to the death and movements of the deceased.

(b) The conflict that arose in the Crown's Case between the main witness and the other witnesses or to the impossibility and or difficulty of reconciliation between them.

(c) The difficulty or impossibility in determining the cause of death of the deceased which was poised on the evidence led by the Crown.

(d) In referring to the appellant, he opined to the jury that the accused Buffonge is a man of intelligence certainly in a general way, but pointed out that he could have given an explanation of his whereabouts on the 27th September 1972 instead of dealing with the matter in a general way.

(e) He failed to point out to the jury that the accused said that he had placed on tape to the Police, an explanation of his whereabouts on the 27th September 1972.

(f) The existence or non-existence of evidence in the case from which the necessary mens rea could be inferred.

(g) In not directing them on the question of manslaughter which plainly arose on the evidence.

3. The summing up was wholly inadequate to the evidence which was both lengthy and complex.

4. The appellant says that the verdict is unreasonable and cannot be supported having regard to the weight of the evidence.

5. Further, or in the event the appellant says, that because of the untimely death of the learned trial Judge, Section 68 of the Criminal Procedure Act Chapter 20 has not been complied with, and that he has been deprived of one of the possible most valuable safe guards to his life, therefore the sentence ought not or cannot be legally carried into execution.

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Ground 1 - Alleged comment by prosecution on failure of appellant to give evidence

The trial judge's note of this incident reads:

"Mr. Christian refers to accused Buffonge saying that the statement he gave was recorded on tape. Mr. C. (Christian) said that only came out when the accused made a statement from the dock, as this court gave him the privilege and right to do. "I would like to have cross-examined him on that but of course I am not allowed to", said Mr. Christian".

It was submitted by counsel for the appellant that this amounted to a comment by the prosecution on the fact that the appellant had not gone into the witness box to give evidence and to be cross-examined, and that this was contrary to s. 6(b) of the Evidence Act Cap 25 and amounted to a mistrial. S. 6(b) in so far as it is material reads:

> "The failure of any person charged with an offence..... to give evidence, shall not be made the subject of any comment for the prosecution".

The circumstances in which the alleged comment was made must carefully be examined in order to ascertain its purpose and its possible effect on the jury. It will be observed that the claim by the appellant that he had made a statement to the police which had been recorded on a tape recorder was made for the first time in his statement from the dock. No questions had been asked of any of the police witnesses about this statement and there can be no doubt that this was the first time it had been mentioned at the trial, for in this ground of appeal counsel for the Crown is quoted as saying "this is the first time we are hearing about this". The appellant's statement about the tape recorder was made at a time when the Crown's case was closed and no opportunity was available to the prosecution of rebutting it.

The jury might thus have formed the impression that the crown was suppressing evidence which was favourable to the defence. This would have been a very serious matter warranting the severest criticism by the judge and counsel for the defence. The Crown obviously did not accept that it had done anything of the sort and its counsel was entitled to ask

/the jury.....

the jury to find that the appellant's allegation was untrue. This was the only reason for the alleged comment and counsel for the Crown by his remark was merely saying that in the state of the law he was not permitted to pursue the matter any further.

It was probably an unfortunate way of dealing with the allegation, but in the view of the court no injustice was done to the appellant. It was not suggested by the Crown that the appellant had failed to go into the witness box because he was afraid of being cross-examined. This of course would have been objectionable. The remark may be construed as being only an oblique reference to the fact that the appellant had not gone into the witness box and not a comment thereon strictly speaking. In the opinion of the court it is unlikely that the jury gave the remark the interpretation which counsel for the appellant seeks to ascribe to it and even more unlikely that they appreciated its significance and were influenced thereby.

We have given anxious consideration to the question whether in the circumstances the remark was prejudicial to the appellant and whether a miscarriage of justice may have resulted, and we have reached the conclusion that having regard to the strength of the case for the prosecution against the appellant Buffonge, the result of the trial would not in any event have been affected thereby. This ground af appeal therefore fails.

Ground 2(a) - Misdirection or non-direction as to time of death and movements of girl

Ground 2(b) - Non-direction as to conflict of evidence between Buffonge, the main witness for the Crown and other Crown witnesses

Both of these grounds of appeal were argued together and counsel said that his submissions on ground 2(a) were intended to cover ground 2(b) also. This latter ground was intended to refer to the differences in time mentioned in the evidence of the witness Buffonge as compared with that in the evidence of the witnesses Christiana Barzey and Joseph Wyke.

In so far as the time of death of the deceased girl was concerned, it was submitted that if the witness Joseph Buffonge's evidence is to be believed that the girl was stiff when he saw her, then she must have died long before 4 a.m., because he said he got to the appellant's father's house at 4.33 a.m. and he was able to say that this was the time

/because.....

because there was a clock on the table. Next, reference was made to the evidence of Christiana Barzey that the girl left her home "when it was bright morning"; to the evidence of Joseph Wyke that he saw the girl at 5.15 a.m. walking along George Street, and to the evidence of the witness Buffonge that he had gone to the appellant Buffonge's house "at minutes to 5 a.m." where he saw the girl's dead body. All references here to time are references to the morning of September 25, 1972.

It was submitted that it was impossible to reconcile these different statements as to time and it was the duty of the trial judge to draw to the attention of the jury the several inconsistencies in the evidence as regards the time factor. This is exactly what the trial judge did. In a long passage beginning on page 183 of the record and going over to pages 185 and 187 he dealt with this matter. He said at page 183 of the record:

> "Gentlemen, let me again digress for a moment to talk to you a little bit about time. I think there's only at one point that Asia Blood said he referred to a clock which was in "Look and Laugh's house and he saw the time was four thirty. Suggestions have been made about time by many different witnesses in this case. While the element of time is important, not one of the witnesses except Asia Blood came and said the time was precisely so and so because he looked at the clock. Gentlemen, we're all West Indians, you're Montserratians, we are all West Indians. In these communities, especially in the country districts people have a way of judging time. Even Mr. Francis in his address referred to it as whether it was the first time the cock crows, the second time or the third time. I remember that distinctly. So that people in the country districts particularly have a different way of assessing time. For some of them who are already accustomed to getting up early in the morning, they would think that four or five o'clock in the morning as far as they are concerned would be early morning. Some of us late risers may consider it to be still night. It is a question of putting the people in their community and seeing what is their background. The thought that went through my mind is that time and place in these West Indian Islands among the man in the street is very difficult to pinpoint. I would say this by way of digression that, take for example, an Anguillan if he says from where he stands he lives down the road make up your mind to walk about three miles. As far as he is concerned that is down the road."

He then went on to deal very fully with the evidence of Christiana Barzey as to when the girl left her house and also the evidence of Joseph Wyke as to the time when he saw her in George Street; and having done this he told the jury that "these are all things for you to consider". In our view the trial judge far from failing to direct the jury as alleged took great care to bring to their attention all the relevant evidence as to

/time.....

time and left it to them to reconcile the conflicting evidence on this issue.

In actual fact the question of time was of little importance in this case in view of the Crown's allegation as to the time of the murder.

The Crown had alleged and had undertaken to prove that the girl Sarah Meade was murdered between the 25th and 27th days of September, 1972. It did not undertake to establish that her death took place at any particular moment of time between those dates and there was no obligation in law for it to do so. There was uncontradicted evidence from Christiana Barzey, Sarah Meade's great grandmother, that the girl had slept at her house on the night of September 24 and had left next morning when "the morning was open". Joseph Wyke whose evidence was also uncontradicted said that he saw Sarah on Monday September 25 in George Street around 5.15 a.m. According to the witness Joseph Buffonge he saw her dead body in the house which the appellant Buffonge occupied with his father. His evidence is that he went to this house at "minutes to 5 a.m." and it was still dark. Some time in the morning of September 27 between 9 and 10 a.m. Sarah Meade's stepfather saw and identified her dead body. Thus there was evidence from which a reasonable jury could infer that the girl met her death between the early hours of the morning of September 25 and between 9 and 10 a.m. on the morning of September 27 when her dead body was found.

In the opinion of the Court these grounds of appeal fail for lack of substance.

Ground 2(c) - Difficulty or impossibility of determining cause of death

The complaint here is that the trial judge failed to tell the jury that the witness Buffonge had said that he had seen the dead girl in the appellant's house and that he had been told she had been beaten to death in the house. It would have been wrong for the trial judge to have told the jury that the girl had been beaten to death in the house, because there was no conclusive evidence as to where she met her death.

Reference was also made by counsel to the fact that a stone was found near to the dead body when it was discovered in the bushes and that

/the doctor....

the doctor had said that the injuries to the body could have been caused by the stone. It was accordingly submitted that the obvious inference to be drawn from this evidence was that the injuries were inflicted where the body was found and that this would be inconsistent with the statement attributed to the witness Buffonge that the girl had been beaten to death in the house; and therefore in the light of these two inconsistent statements as to where the girl was killed, it was the duty of the trial judge to direct the jury as to the manner or mode of the killing. It has already been pointed out that the witness Buffonge did not say that he had been told that the girl had been beaten to death in the house and the inconsistency to which counsel refers is non-existent.

There was no duty on the trial judge to put forward his own theory to the jury as to the manner in which the deceased met her death. All he had to do was to draw their attention to the relevant evidence on this issue. This he did at pages 165, 167 and 169 of the record where he dealt at great length with the evidence of the doctor as to the cause of death. He again returned to this question at page 175 of the record where he said this:

> "I have told you about the medical evidence. I have told you that in the final analysis you are not to be over-awed because the doctor said this or the doctor said that. You have to consider what the doctor says, naturally, he is a professional person and you will give good weight to what he had said, but in the final analysis you will have to determine from what he has said, what caused the death of Sarah Meade was it the blow in the head or did she die from natural causes? And before I leave that, there is something else that struck me in this connection, Gentlemen, your approach to determine these difficult points. If Sarah Meade died from natural causes, how did this dirt and bush get into the child's, Sarah Meade mouth? Those are the things you have to consider, who put it there? How did it come there? What, did Sarah Meade put dirt and bush in her own mouth before she died or did somebody put it there in an attempt to stop her from talking? That is the matter for you, not for me."

The trial judge dealt with what he referred to as the highlights of the witness Joseph Buffonge's evidence. He said in his summing up at page 207 of the record "I'm picking out the highlights. You have the full range of the case", and then he dealt with those aspects of the evidence of the witness which he considered were of vital importance. He said at page 209 as follows:

> "We went up to 'Look and Laugh's" house." He (i.e. the

/witness....

> witness Buffonge) told you of what he said happened up there. Gentlemen, I am not going to go through "Asia Blood's" evidence in detail because you have heard it. The way I will put it to you, is that if you believe it, the importance of his evidence is that in his evidence he actually connects up links which you could say were missing from the evidence given by the other witnesses for the Crown. So that is the importance of his evidence because as you've heard it expressed ten-thousand times "A chain is only as strong as its weakest link"... And therefore the importance, as I see it, of "Asia Blood's" evidence is, Do you believe it? Do you believe that it supplies the missing link from the rest of the Prosecution's case. And in this connection, as I said, Gentlemen, you will take the evidence of "Asia Blood" and you will look at it, and all the other evidence given by the other witnesses and see how far "Asia Blood" is supported in what he has been saying.
>
> Now, yes, he told you about seeing the dead body of "Mon" in that house."

So clearly in the very last passage of this quotation the trial judge did refer to the fact that the witness Buffonge had said that he had seen the girl's dead body in the appellant's house; and consequently the allegation of non-direction as regards the witness Buffonge's evidence in this respect cannot be sustained.

All the circumstances surrounding the death of Sarah Meade negative the possibility that she died from natural causes. Indeed, the evidence adduced in this connection is so cogent and compelling as to leave little doubt that on no rational hypothesis other than murder can her death be accounted for. Her stepfather said she was in fairly good physical shape and had recently taken part in athletic events in Montserrat and abroad, so it may reasonably be assumed that she was a healthy girl. Her body on examination after death showed no abnormality of the bowels or of the internal organs such as the lungs, heart and liver.

It will be remembered that the witness Buffonge said that when he saw her dead body grass and a handkerchief were stuffed into the mouth.This suggests that the girl had been subjected to some form of unlawful violence, that she may have been crying and that these objects were intended to stifle her cries. She may well have died in the appellant Buffonge's house from the violence inflicted on her there. Assuming however that she was still alive but unconscious when carried to the spot where her body was found, the injuries to her face would also suggest that she had been beaten to death with the stone found near to her body. The doctor's evidence is that these

/injuries.....

injuries in his opinion caused her death. Therefore, whichever view is taken of the facts there was evidence to go to the jury from which they could reasonably infer that Sarah Meade met her death from unlawful violence.

Ground 2(d) - Judge's comment on appellant's statement from the dock

The complaint under this ground of appeal concerns the following comment made by the trial judge which appears at page 181 of the record:

> "But, Gentlemen of the jury, you may consider it, it is a matter for your consideration whether if he had applied the same details to the month of September, to the earlier part of September, it might not have been helpful in this case."

This comment was made in the context where the judge was referring to the fact that the appellant whom he described as a man of some intelligence had given a detailed statement as to his movements between the 14th and 27th September, 1972, but as to his movements on the essential dates, i.e. between the 25th and 27th September he had said very little or nothing at all. His counsel submitted that this comment might be understood by the jury as casting on the appellant the burden of proving his innocence. Counsel for the Crown submitted that the judge's comment was a fair one. He urged that all the judge was saying to the jury was that the appellant who is obviously a man of intelligence could have given details as to his whereabouts on September 27; he had in fact given details as to his movements on dates which were not of vital importance and it might have been helpful if he had chosen to do the same as to vital dates, but he had not done so and it was for the jury to consider the matter as it stood. Counsel further submitted that nowhere in the summing up did the judge import the idea that it was for the defence to prove anything.

We are of the opinion that the comment made by the trial judge could not by any test be interpreted to mean that he was placing the burden of proof on the appellant, nor would the jury have so understood it.

Ground 2(e)- Failure of judge to tell jury that appellant had said he had made a statement to the police on tape recorder explaining his whereabouts on September 27

The allegation in this ground of appeal is entirely without foundation. The trial judge in his summing up dealt fully and adequately with the question of the tape recorder in a passage at pages 181 and 183 of

/the record.....

the record and brought to the attention of the jury all the circumstances in connection therewith.

Ground 2(f) - Judge's failure to tell the jury that there was no evidence of mens rea

It was submitted that the witness Buffonge's evidence was the only evidence from which it might be inferred by what means the girl met her death and that, save for the statements of the few persons who were in prison with the appellant, the witness Buffonge's evidence was the only evidence connecting the appellant with the crime. It was further submitted that the trial judge when dealing with the question of the beating of the girl failed to leave it to the jury to determine whether there was the requisite intent to cause death or serious bodily harm to her.

The trial judge at page 169 of the record when explaining the constituent elements of murder referred to malice aforethought and related the facts of the case to the definition of malice. He referred to both express and implied malice and told the jury that if the facts were accepted and the proper inferences drawn and they found that death resulted from blows on the head with a stone, then in the circumstances of this case it would be open to them to return a verdict of murder.

In this connection the trial judge said at page 171 of the record as follows:

> "I just want to mention the other kind of malice briefly and that is what is called implied malice. The law would imply malice from deliberate cruel act committed by one person against another person. It may be implied where death occurred as a result of a voluntary act of the prisoner which was intentional and unprovoked. So there again whichever way you look at it gentlemen if you believe the facts as given by the prosecution the question of malice would not be too difficult for you to resolve, whether it is express malice or implied malice - a deliberate cruel act committed by one person against another the law would imply malice in such circumstances".

There is an abundance of evidence in this case from which the necessary mens rea can be inferred. The girl's body was found with objects stuffed into her mouth and assuming she was alive when this was done the law would ~~apply~~ imply malice from this act because it was a deliberate cruel act done to the girl Sarah Meade intentionally without provocation. Further, account must be taken of the nature of the injuries found on the body. These can hardly be explained on any ground other than that

/there.....

there was a studied intention on the part of the person inflicting them either to cause death or serious bodily harm.

Ground 2(g) - Failure of trial judge to leave issue of manslaughter to jury

It was submitted that the issue of manslaughter arose on the facts and should have been left to the jury because as there was no evidence as to the nature of the beating the girl had received it was possible that there may have been no intention to cause her grievous bodily harm. Counsel made it clear that he was not relying on provocation or drunkenness, but he submitted that if there was evidence that death resulted from beating, the judge should have told the jury that they should be satisfied that the severity of the beating was such as to meet the necessary test in law to constitute malice; more particularly, as there was uncertainty as to the cause of death in the medical evidence. In the judgment of the Court these submissions are untenable. The witness Buffonge stated that the appellant said he was beating the girl "and it appears that if she is dead". If the girl died from violence inflicted upon her by the appellant Buffonge, it is of course relevant to inquire whether he intended to cause her grievous bodily harm or to cause her death; or whether as a reasonable man he knew that the violence to which he was subjecting her was likely to cause grievous bodily harm or death. In other words whether he was acting with malice. We are of the opinion that from the circumstances of her death and the condition of her body the jury could reasonably infer that the appellant was actuated by malice when he was beating her. When the witness Buffonge stated that he saw grass and a handkerchief in her mouth a reasonable inference to be drawn from this fact is that these articles were intended to stifle her cries when she was being beaten. It would hardly make sense to conclude that they were put into her mouth after death. In the view of the Court these articles were part and parcel of the violence inflicted on the girl and may have caused or contributed to her death. It could not be reasonably contended that a person who treated another in this way would not realize that death or serious bodily harm would be the natural and probable result of such treatment; and consequently, he must be held to have intended this result.

In these circumstances the question of manslaughter did not arise on the evidence and the trial judge was right in not leaving this issue to the jury.

Ground 3 - Inadequacy of summing up

The complaint that the trial judge's summing up was inadequate cannot be supported by the record. The judge in fact dealt with all relevant matters such as the burden and standard of proof, the presumption of innocence and the functions of the jury. He directed the jury to approach each case independently of the other and to consider the evidence against each man separately. He drew the attention of the jury to the inconsistencies in the evidence. He commented at length on the evidence of the witness Buffonge and warned the jury to look at it "very seriously to determine whether you will accept it or not". He also warned the jury about their approach to the evidence of the three witnesses to whom the appellant had made statements while he was in prison and told the jury that as they had criminal records they must look very carefully at their evidence. The judge dealt with the evidence of every witness whose testimony was of a material nature. In these circumstances it cannot be said that the summing up was inadequate.

Ground 4 - Verdict unreasonable and cannot be supported having regard to the evidence

In the opinion of the Court there was a superabundance of evidence from which the jury could come to the conclusion which they did and this ground of appeal therefore fails.

Ground 5 - Non-submission of report by trial judge as required by s.68 of Cap. 22

Section 68 of the Criminal Procedure Act Cap. 22 in so far as it is material provides that"In the case of any prisoner sentenced to the punishment of death, the judge, before whom such prisoner has been convicted, shall without delay make a report of such case to the Administrator (now Governor) previously to the sentence being carried into execution....." Unfortunately, the trial judge died suddenly within a few hours after the trial had been completed and the appellant sentenced to death and before he had time to make a report to the Governor concerning the case. It was

/submitted.....

submitted by counsel for the appellant that the words of this section make it obligatory on the judge to deliver a report, that the submission of a report to the Governor is a condition precedent to the carrying into effect of the execution and as this condition is incapable of being fulfilled because of the death of the trial judge the sentence of death cannot lawfully be carried into execution.

Counsel for the crown contended that section 68 is merely a statutory direction to the judge as to what he must do and it did not require a report to be sent by the judge to the Governor before the sentence of death could be carried into effect. He said that the Royal Prerogative was not affected by failure to supply a report and notwithstanding this failure the sentence of death could be carried into effect.

The question however is not whether the Royal Prerogative can be exercised in the absence of a report from the trial judge but whether the sentence of death can be carried into effect in such circumstances. In the opinion of the Court the making of a report to the Governor by the trial judge is a condition precedent to the carrying into effect of the sentence of death and since no report was made in this case we are of the opinion that the sentence of death cannot legally be carried into effect.

The appellant Buffonge's appeal is accordingly dismissed.

Lee's Appeal

There are seven grounds of appeal contained in the appellant Lee's notice of appeal. Of these, ground 2(a)(b) and (c) corresponds to ground 2(b)(c) and (f) of Buffonge's notice of appeal, and grounds 3, 6 and 7 to grounds 3, 4 and 5 respectively of Buffonge's notice of appeal. In relation to these grounds of appeal common to both appellants, counsel for the appellant Lee was content to adopt the arguments advanced by counsel for the appellant Buffonge and to abide by the decisions of the Court as regards the common grounds.

Ground 4 of the grounds of appeal was abandoned and only grounds 1 and 5 were argued. These grounds read as follows

"1. The learned trial judge erred in that he misdirected or

/failed.....

failed to direct the Jury on:

(a) The meaning of aiding and abetting and/or the meaning of acting in concert.

(b) The meaning of Accessories.

5. The learned trial judge was wrong in overruling the submission of no case to answer made on behalf of the accused".

Counsel submitted that the trial judge failed to direct the jury as to the meanings of the expressions "aiding and abetting", "acting in concert" and "accessories". He said that these definitions were vital because of the nature of the case against the appellant Lee. Substantially what was being contended was that Lee was neither an aider or abettor nor was he acting in concert with the appellant Buffonge.

When the case for the prosecution against the appellant Lee was closed, his counsel submitted there was no case for his client to answer as there was no evidence to go to the jury on the question of murder or manslaughter, because if all the evidence against his client were accepted this would make him nothing more than an accessory after the fact and he could not be convicted as such on the indictment as framed. This submission was overruled. The two grounds of appeal referred to above in effect question the correctness of the trial judge's decision in refusing to uphold the submission that the appellant Lee was only an accessory after the fact and also his refusal to direct his acquittal on this ground. They also question the trial judge's decision to leave Lee's case to the jury on the basis (a) that he and the appellant Buffonge were acting in concert and (b) that Lee was a principal in the second degree.

On the assumption that there was room for different interpretations of the evidence against the appellant Lee, was the effect of this evidence such as to make him an accessory after the fact, as his counsel submitted, or a principal in the second degree as the trial judge maintained?

It is clear from the indictment that the appellant Lee was not charged with being an accessory after the fact. He was charged jointly with the appellant Buffonge as a principal in the first degree. The

/Crown.....

Crown by its indictment was thus alleging that they were both implicated in the death of Sarah Meade and were jointly responsible therefor; and the trial judge in his summing up asked the jury to consider this aspect of the matter.

An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. The evidence of the witness Buffonge was to the effect that the appellant Buffonge said in Lee's presence that Lee had undertaken to remove the dead body and Lee did not deny this. The appellant Buffonge does not suggest that Lee was to play any other part than this. If the appellant Lee with knowledge that the appellant Buffonge had murdered the girl, and not intending to disclose this fact had undertaken merely to remove the dead body this would undoubtedly indicate knowledge on his part that a felony had been committed and an intention to suppress information about the murder. This in itself would not make him an accessory after the fact to murder. To make one an accessory after the fact to felony, it must be proved that some act was done in relation to the felony to assist the felon personally. There is no evidence that the appellant Lee even removed the body. Indeed, if the witness George Cooper's evidence is accepted, it is to the effect that the appellant Buffonge told him that he himself had put the dead body on his shoulders about "3 a.m. that morning" and taken it to the spot where it was found, So, put at its highest, all that could be imputed to Lee from the evidence admissible against him was knowledge that the girl was killed and that he intended to make no disclosure of this fact. This was not sufficient to make him an accessory after the fact to the felony of murder and the trial judge was right in not leaving this question to the jury.

On the question whether both appellants were acting in concert the trial judge directed the jury as follows:

> "Were these two men, Buffonge and Lee acting in concert in causing the death of the child Mon? If you believe what "Asia Blood" said both of them were present at the time when he (Buffonge) was beating her and she died. This is what the accused Buffonge is supposed to have said".

/And.....

And dealing with the question of aiding and abetting he said this:

> "The last point is the question of the two men together. Now we come to the situation. If you believe evidence for the Prosecution, in which you may ask yourselves; how was the killing done? Who actually did the killing? Gentlemen, the law talks about people principals being in the first degree in felony and principals being in the second degree and they talk about a principal in the second degree. Now principals in the second degree are those who are present at the commission of the offence and aid and abet in its commission. In other words, it is a matter for you on the evidence. Do you believe it is the accused, Buffonge, who actually struck the blow that killed the child? Then you go on as far as the accused, Lee is concerned. You'll ask yourselves the question, if you find that the accused Lee, was present at the time when the child was killed: Do you find that he was aiding and abetting in the commission of the crime? Do you find that he was in some way assisting Buffonge in the killing of the child? You actually have to find that he was aiding and abetting. Now one of the things that you will have to consider in that connection, Gentlemen, is that if you find that the accused, Buffonge, told "Asia Blood" that he was beating the child and the child died and you do not accept that story, you believe that he was instrumental in causing the death of the child, by hitting the child in the head with the stone or something else, but then you also find that the accused, Lee, is, as it were, supporting what the accused, Buffonge, said by saying, "O yes. we were actually here playing dice, see the dice we were playing with you will ask yourselves the question" why was it necessary for him to support Buffonge in this situation? What is the connection between them?"

The question whether these two directions were either accurate or adequate will be considered later.

If it be assumed that there was evidence which might support the judge's view that the appellant Lee was present at the commission of the offence by the appellant Buffonge and that he aided and abetted him in the commission thereof and was thus a principal in the second degree, then it was perfectly proper for the appellant Lee to be indicted as a principal in the first degree. Authority for this statement is to be found in Archbold's Pleading, Evidence and practice in Criminal Cases, 29th edition (1934) at page 1435 where the learned authors, dealing with the mode of indictment of principals in the second degree said this:

> "In Stephen's Digest of the Criminal Law (6th ed.) p. 36 it is stated that principals in the second degree in felony, may <u>in all cases</u> be indicted as principals in the first degree. But where by particular statutes the punishment is different (of which it would be difficult now to find an instance), then principals in the second degree must be indicted specially as aiders and abettors. 1 East P.C. 348, 350· R v Sterne 1 Leach 473; 2 East P.C. 701".

/Since.....

Since the punishment in this case for principals in the first and second degree would be the same there was no need to indict the appellant Lee specially as an aider and abettor.

To return now to the first direction dealing with the question whether or not the two appellants were acting in concert. In the opinion of the Court this amounted to a misdirection, for there was no evidence of a pre-concerted plan on the part of the appellants to cause the death of the girl Sarah Meade. There is nothing on the record to show that there was "a prior meeting of minds" between them as to the crime to be committed, and accordingly, when the trial judge directed the jury to consider whether the two appellants were acting in concert in causing the death of Sarah Meade he was asking them to come to a conclusion on a matter which was unsupported by the evidence.

In regard to the issue of aiding and abetting, the appellant Lee could only have been held to be aiding and abetting on the basis of inferences to be drawn from the fact that by his presence in the appellant Buffonge's house when the girl was killed (assuming she was killed there) he intended to give encouragement and in fact wilfully encouraged the appellant Buffonge to kill the girl.

If it is accepted that there was evidence to justify the assumption that the presence of the appellant Lee in the appellant Buffonge's home when the girl was killed was not accidental(and in the view of the Court, there was evidence to justify this assumption) then his mere presence was not in itself conclusive of aiding and abetting. The Crown has not shown that the appellant Lee did anything to cause the death of the girl or that he assisted the appellant Buffonge in killing her. By his saying that the statement which the appellant Buffonge made in connection with what happened in the house was "no joke", and showing the dice with which they were playing, the appellant Lee was not thereby admitting complicity in any criminal act which the appellant Buffonge may have committed. Knowledge of the fact that a crime had been committed and having an intention not to disclose such knowledge is quite a different thing from actual participation in the crime.

/In.....

In the case of Clarkson, Dodd and Carroll (1971) 55 Cr. App. R. 445, the learning on the question of aiding abetting was reviewed by Megaw L.J. He indicated in his judgment what a judge ought to tell a jury in a summing up where this principle of law is involved, and also what has to be proved before a conviction of aiding and abetting can be obtained. He said at p. 449:

> "CONEY (1882) 8 Q.B.D. 534 decides that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting. The jury has to be told by the judge..... in clear terms what it is that has to be proved before they can convict of aiding and abetting; what it is of which the jury.....must be sure as matters of inference before they can convict of aiding and abetting in such a case where the evidence adduced by the prosecution is limited to non-accidental presence.
>
> What has to be proved is stated by Hawkins J. in a well-known passage in his judgment in CONEY at p. 557 of the report. What he said was this: "... In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime."...
>
> It is not enough, then, that the presence of the accused person has, in fact, given encouragement. It must be proved that he intended to give encouragement; that he wilfully encouraged."

In the opinion of the court the evidence established that the presence of the appellant Lee in the appellant Buffonge's house was non-accidental. The evidence failed to establish on Lee's part any firm agreement or positive physical participation in the actual commission of the crime. In these circumstances it was incumbent on the trial judge to direct the jury that it was the duty of the prosecution to establish two elements, viz, an intention on the part of Lee to encourage the appellant Buffonge in the commission of the crime and actual encouragement of Buffonge by Lee. As the Judge's instructions to the jury failed to contain this

/essential.. ..

essential direction this amounted to a serious omission and the conviction of the appellant Lee cannot be allowed to stand. His appeal will accordingly be allowed his conviction quashed and the sentence set aside.

P.Cecil Lewis
Acting Chief Justice

Neville Peterkin
Acting Justice of Appeal

John Renwick
Acting Justice of Appeal