

GRENADA:

IN THE COURT OF APPEAL

CRIMINAL APPEALS NOS. 3, 4, 5 & 6 of 1977

BETWEEN: LENNARD STEWART
DENIS VIECHWEG - APPELLANTS
RENARD FREDERICK
CECIL BOYKE

Vs.

THE QUEEN - RESPONDENT

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: H.M. Squires for Appellant Stewart.
C. St. Louis for Appellant Viechweg.
H.R. Scipio for Appellant Frederick.
W. Nyack for Appellant Boyke.

Attorney-General (Ag) for Respondent.
Mrs. E. De Freitas with him.

1977, May 4, 5, 6, 9 and 13

J U D G M E N T

PETERKIN J.A. delivered the Judgment of the Court:

The four Appellants Lennard Stewart, Denis Viechweg, Renard Frederick and Cecil Boyke were charged jointly with the murder of Bernadette John on a date unknown between Sunday 12th and Tuesday 14th September, 1976, at Tanteon, St. George's. They were all convicted on 30th March, 1977, and sentenced to death by hanging, and have all appealed against their convictions.

On 14th September, 1976, the body of Bernadette John was found floating in a drain at Tanteon, St. George's. She

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had accompanied her sister Ann-Marie John on 12th September to the G.B.S.S. auditorium to a youth show. They had left there about 12.30 on the morning of 13th September to go home. On the way Ann-Marie had left Bernadette walking on the road to drink some water at a stand pipe near to some buildings. On her return she did not see Bernadette. She called and searched in vain and eventually returned home where she met Robert Mitchell, Bernadette's boyfriend. They both together searched for Bernadette but did not find her. On the morning of 14th September Robert Mitchell made a report to the Police and continued his search. At about 2 p.m. that afternoon while standing near to a drain at Tanteen he noticed a number of flies, and saw a dead body in the drain, naked from the waist down, which he later recognised to be Bernadette's from the bodice which she was wearing and which he knew very well. He went to the C.I.D. and returned with a Policeman to the scene. Sgt. Louison who visited the scene said that the body was lying face downwards in the water. A pair of brown and beige shoes was found near to the body, and a pair of pants was taken out of the water where the body was lying. They were both identified by Ann-Marie John as the pants and shoes which Bernadette was wearing on the night of the 12th September at the auditorium at Tanteen.

A post mortem examination was carried out by Dr. Radix on the body of Bernadette John. He found two wounds on the head, one on the forehead with a laceration of about $\frac{1}{2}$ to

$\frac{3}{4}$ inch.....

$\frac{3}{4}$ inch in length surrounded by a haematoma; the other on the occipital region of the scalp, slightly smaller and also surrounded by a haematoma. There was some bruising of the anterior aspect of the thighs. There were small lacerations on the vulva and the anterior of the vagina and also on the anterior aspect of the vagina. There were some bruises and swelling around the nose and lips. He attributed the lacerations at the entrance and walls of the vagina to sexual intercourse. The bruising of the anterior aspect of the thighs he felt might have been caused during intercourse if there was a struggle. Any blunt instrument, he said, such as a piece of wood could have caused the wounds on the head. The bruising and swelling around the nose and mouth in the doctor's opinion could have been caused by the pressure thereon of some soft material. He gave his opinion of the cause of death as asphyxia due to suffocation effected by obstruction of the nose and mouth with some soft material.

Augustine Mitchell who testified on behalf of the Crown stated that on the evening of Sunday 12th September he went to the G.B.S.S. auditorium where he met the 2nd Appellant who told him that he was looking for a feeding. He said that the 2nd Appellant left and returned a little while later telling him that he controlled a feeding and inviting him to accompany him. He said that he accompanied the 2nd Appellant who led him into the Institute yard where he said he saw the 4th Appellant standing, and, on taking a few steps around a

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little curve, he saw the 3rd Appellant wrestling with a woman on the ground, and trying to get his feet between the woman's legs. He next saw the first Appellant come from behind a corner. He then stated as follows:-

"He said, " Man all you stand up dey." He was talking to the four accused when I saw them. He went on to say, "All you help the man hold the woman." The 2nd accused hold her hand, her right hand, 1st accused hold her foot, 4th accused hold left foot. Then 1st accused say, "Redlip, you stand up there, you not holding a hand. Even though you hold or you no hold I calling you name still." Then I hold her other hand. 3rd accused was on top the woman. The woman was saying in a small voice, "Oh God, let me go." 2nd accused took off a tam he had on and pressed it on her mouth with one of his hands. (Witness demonstrates). 3rd accused took off his pants and had sex with the woman. After he came down, he took 2nd accused's position holding the girl's right hand and the tam over her mouth and 2nd accused went and had sex with the girl. After 2nd accused came down I went and had sex with her. Then 1st accused went and had sex.

To the Court: When I was having sex with her 3rd accused was holding the tam over her mouth and when Lennard Stewart (1st accused) was having sex with her he was holding it still.

Witness continues: 4th accused then had sex with the girl after 1st accused. Nobody was holding the tam over the girl's mouth then."

His evidence continued as follows:-

"I had sex for about $\frac{1}{2}$ hour, 1st accused for about $\frac{1}{2}$ hour, 4th accused for about $\frac{1}{2}$ hour. The girl said, "You mean to say a man like you that doing that Precious." 4th accused said, "Like she know you." 4th accused said, "Best we knockout that." Right by the switchboard 4th accused bend down and pick up a piece of wood and turned and told Precious, "P when we knock out that what we going do with it?" Precious said, "I don't know." Then he said, "Oho! we go put her in the canal by the fencing." At that ime, 4th accused had the wood in his hand. He hit the girl with the wood by the forehead going backwards(witness demonstrates). I did not see any blood come when he hit her. Then 1st accused said "Let we put her in the canal eh!" 4th accused hold her hand, 3rd accused hold the waist no. 2 accused hold her

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hand, no. 1 accused hold a foot. He tell me "come and hold man! what is that?" I hold a foot. We lift her up and we walk with her to the wire fence. When we got there 1st accused climbed over. 4th accused told me "move there man, you too short man, move." They pass her over the wire. 1st accused start to support her on the other side come down to the drain. Her foot to her waist was in the water in the drain."

Carlyle Patrice also gave evidence on behalf of the Crown. He stated that he was with the 3rd and 4th Appellants at the G.B.S.S. Auditorium on the night of the 12th September; that he had heard the 3rd appellant asking the 4th Appellant if he had seen the girl; that the 3rd Appellant had then left, and the 4th also sometime later. The witness then testified as to a conversation which he alleged he had heard at the Fort where he had been taken by the Police.

He said,

"Next a.m. they took me to the Fort. There I met 4th accused and 1st accused and Franklyn Joseph and Redlip. They were in the same room with me. When I was put in the room I met them there. I was there from the Wednesday till Friday about 6 p.m. While I was there Ka-Ka (witness points to 2nd accused) and 3rd accused joined us. 1st and 4th accused were crying. 1st accused said "Boyke is you that hit the girl with the piece of wood." 4th accused said, "man P, you could lie we!" 3rd accused said "Precious is you that kill the girl and when all you do all you thing, all you like to put people in it." Shortly after the lady came with lunch. I was released on Friday."

Cpl. Garraway testified to having seen the 2nd appellant at Tanteen at about 12.15 to 12.45 a.m. on the 13th September. He saw him run from behind the bushes by the netball court on to the pavement, and thence in the direction of Key Universal's building.

/Cpl.

Cpl. Charles testified to having seen No. 2 Appellant coming from behind the tennis court at Tanteen in the area between the tennis court and a large gutter at about the same time.

The witness Augustine Mitchell is also known as "Redlip". The first Appellant is known as "Precious", the second as "KeKair", and the third as "Marchi".

All four Appellants gave statements to the Police, and these statements were all admitted to evidence at the trial without any objection on the part of the Defence. No. 1 Appellant in his statement admitted to being present at the scene. He implicated the witness Augustine Mitchell and the other three Appellants. He then went on to state in part,

"I called and I say ah want me share and I went across to the spot where they were. I realised that she was dead. I touched her and she was not breathing I then say "you all kill the girl then Boyke Amber Dicky cousin and Redlip raised her and threw her over the fence. Redlip climbed over the fence and rolled her into the drain. It had water in the drain. Then he come back over the fence and take up her pants and the panty and throw it over too. Then the four of them left and went away."

No. 2 Appellant gave two statements to the Police. In his second statement he admitted to being present, and to having had sexual intercourse with the girl while she was being held. He then said in part,

"While the girl was bawling, Precious take the tam, a kind ah hat from me head and he bar she mouth then the hat come out from she mouth and she start to bawl Murder Murder then Precious take up ah piece of pitch pine wood and he hit her on she forehead after, Rasta man shake the girl and he say she dead then Rasta man, Precious, Mushair and Redlip raise her and pelt her in the water by way dey have a culvert dey."

No. 3 Appellant in his statement admitted having had sexual intercourse with the girl while she was being held.

He said in part,

"When Precious finish taking out she pants he hold ah hand, REDLIP hold ah hand BOYKE hold ah foot KECKEY hold ah foot and I started to have sex with her. When ah finish Precious had sex with her, then "REDLIP" had sex with her, then KECKEY had sex with her, then BOYKE the big hair boy had sex with her."

No. 4 Appellant in his statement to the Police stated that he saw the girl lying on her back with her pants and pantie removed. Then he continued in part as follows:-

"Then the girl opened her mouth like she wanted to bawl, then Precious lash her on her head with the piece of wood he had. Then Mashae take 'K'K' tam hat and hold the girl mouth with it. Then after, four of them fuck the girl, Marchae, Precious, 'K'K' and Redlip. After that Marchae say well we can leave the girl here, then I picked up a piece of stick and I touch her on her shoulder to see if she was alive, but she wasn't moving again, so I say, is like the girl dead. Then Precious say let we roll her down in the drain, then Marchae hold her under her arm while Precious hold her on her foot and they rest her close to the side of the drain and she roll down in the water."

At the trial Nos. (1) and (2) Appellants made unsworn statements from the dock, while Nos. (3) and (4) Appellants both gave evidence on oath.

No. (1) Appellant in his statement from the dock said in short that he knew nothing about the matter. No. (2) Appellant alleged in his statement that he had gone to the Empire Cinema that night, and from there had gone to the Market Square to sleep. No. (4) Appellant in his evidence said in short that he was not there, that he had been at

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the G.B.S.S. Auditorium but had already gone home. No. (3) Appellant in his sworn testimony implicated not only himself but the other three Appellants as well. His evidence, in the words of Sec. 6 of the Evidence (Amendment) Act, 1968, "becomes evidence for all purposes of the trial". It should be allowed to speak for itself. He said in part,

"I saw two girls standing on the side of the road I did not know them then. I did not know their names then. I do not know their names up to now. Carlyle spoke to one of them. I heard what he said. He said, "Come girl I want to talk to you." He did not say anything else. She cursed him. She said, "Man kiss me arse." The next girl say, "Let's go home." The show was still going on. The girls moved in the direction of Key Universal. I remained where I was.

To the Court: I remained where I was for about 10 minutes and then went to the Auditorium yard.

Witness continuing: I never went in the direction taken by the girls. When I left the Auditorium yard I went in the direction Key Universal. I did not see either or both of the girls. I did not see either of them turn off the road and go anywhere. I have slept many times in the old headmaster's building. I know the building and the surroundings. I know there is a stand pipe there. I drink water there. I went down the road alone. I was not followed by anybody. Afterwards I saw the girl that cursed in the Institute yard. I was standing on Key Universal steps and 2nd accused, Denis Viechweg, was coming up. He told me he see watchman Precious, I mean Lennard Stewart 1st accused, grab a girl and run in the Institute yard with her. 2nd accused and I went back to the Auditorium and whilst going up we met 4th accused and Carlyle Patrice. 2nd accused told 4th accused he see Precious going in the yard with a woman. We went back in the yard -- me and Boyke and Viechweg. On getting to the yard I saw 1st accused holding a girl round her waist and in her neck. It was the girl who was up in the Auditorium, the one that curse. I went to the Institute yard with 4th accused and 2nd accused. There were then in the yard apart from me, 1st and 2nd, 4th accused and Patrice. I saw Augustine in the yard too. 4th accused held her two hands. Before he held her hands nobody said anything. I now say, I told 1st accused to let go the girl in her neck. The girl was fighting to get away and 1st accused hit her a lash of plank on she forehead. 1st accused then said she knock out. 4th accused was holding the girl stand up by the

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wire and then 1st accused said put her on the ground. All this time the girl was on her feet and had on her clothes. Augustine Mitchell took off the girl's clothes, a pants and a shirt and a pantie. The girl lie on the ground. She was shaking her head. 1st accused tell Augustine Mitchell take first, then Viechweg, then 1st accused asked me if I ain't want I said yes and I took too. Then 4th accused took and after 1st accused took. All of us sex the girl. During the taking 2nd accused was holding a tam over the girl's face. A tam is a knitted hat. It was removed at a certain stage. I told him to remove it and he removed it. It was put back when she started to bawl, "Precious, Precious I know you."

To the Court: It was removed when Boyke was sexing.

Wintess continues: During the taking nobody was holding any part of the girl. I now say during the taking somebody was holding some part of the girl. Her hands and feet were being held. I was holding her right hand. 2nd accused was holding her left hand. Mitchell was holding her right foot, 4th accused was holding right foot. When 1st accused was having sex 2nd accused was holding the tam over her mouth. The girl lie down on the ground shaking her head for about 20 minutes. Then the girl attempt to get up. She lifted her hand and her head and said, "Precious I am going to the station." 4th accused said, "Precious, let us knock she out" and hit her a lash of wood on her forehead. He picked it up from where 1st accused put it after he hit her the 1st time -- by where she lie down.

To the Court: He had taken it from the Institute building, right by the verandah.

Witness continues: I told him he shouldn't lash the girl with the wood. 1st accused said, "Let's put her in the canal." I told him to leave her there when she recovered from the knock out she going to go. 1st accused said, "No, let we put her in the canal." 4th accused held one foot and 1st accused another, Augustine hold right hand and 2nd accused the left. Nobody held anywhere else. The four of them pass by the switchboard and go by the drain by the wire. 1st accused jump over the wire and say, "All you pass her." He take her and put her down in the drain."

The case for the prosecution was that the appellants were acting in concert since they all showed by their conduct that they approved the use of the "tam" over her

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mouth and nose in order to silence her. The contention was that they should have foreseen that that act was of such a kind that if they had used reasonable caution and observation it would have appeared to them that the act would probably cause or contribute to the death of Bernadette John, or that there would have been great risk of that act causing or contributing to her death, and in such a case the intention to cause death was established.

In respect of appellant Stewart there were four grounds of appeal but counsel abandoned ground 4 and argued grounds 1, 2, and 3 together. Counsel submitted that the statement of the appellant which was given to the police was inadmissible and that the trial judge ought to have withdrawn it from the jury. He admitted, however, that at the trial he allowed the statement to be admitted as a voluntary one when asked by the judge whether he was objecting. He further submitted that the evidence disclosed that the statement was obtained by inducements. In our view the evidence shows that the statement was voluntary. The evidence pointed out by Counsel were suggestions made by him in cross-examination which were denied.

Counsel further submitted that there was no evidence to connect the body in the yard with the body in the canal identified as Bernadette John. In our view there is no merit in this submission. He also submitted that the body when put in the drain was naked and alive and that there

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was a probability that some other person came later and suffocated her. In our view this is pure speculation as there is no evidence to suggest this. The evidence shows on the contrary that Bernadette was dead when placed in the canal.

In regard to appellant Viechweg Counsel abandoned ground 1. He submitted that although this appellant held the tam over the nose and mouth of Bernadette John during the act of intercourse by appellant No.1 and that when he was having intercourse appellant No.3 held the tam over her face, this act alone was not sufficient to prove an intent to murder.

We do not agree. The doctor's evidence shows the cause of death to be asphyxia and his conduct certainly contributed to the death of Bernadette John.

Counsel for appellant No.3 conceded that Bernadette was already dead when placed in the canal but submitted that the appellant's sole intention on that night was to have unlawful sexual intercourse with the deceased and nothing more and the fact that he assisted in moving the body over the fence and into the canal cannot show an intention to cause death as she was already dead. In our view it is not as simple as that. He took part along with the other appellants in the unlawful sexual intercourse and he also took part in the act of silencing Bernadette by using the tam and in consenting to its use. We repeat that according to the doctor's evidence that this was the act which caused her death.

/Counsel.....

Counsel for appellant No.4 conceded that appellant was present and had unlawful sexual intercourse with Bernadette John but submitted that when he left the scene the deceased was still alive. In support of this he referred to the statement which he gave the police in which he stated when he was going through the gate No.1 appellant called out, "she not dead yet". Her death, he stated might have been caused by the intervention of a person or persons unknown. We cannot accept this submission. There is evidence to show that she was dead before the body was taken to the canal. He himself in his statement to the police indicated that he knew she was dead before she was placed in the canal. As to his state of mind we would simply refer to the evidence of Renard Frederick who said that the appellant called out, "let us knock her out" and proceeded to give her a blow on the head with a piece of plank. He was also one of the consenting parties to the use of the tam to keep Bernadette quiet.

We find that the summing up in some parts was defective but these defects were not made grounds of appeal. Had they been so made, owing to the facts and circumstances of this case we feel that there would have been no miscarriage of justice and would have applied the proviso to section 41(1) of the West Indies Associated States Supreme Court (Grenada) Act, 1971.

The appeals are accordingly dismissed.

/N.A. Peterkin.....

(N.A. Peterkin)
JUSTICE OF APPEAL

(B.L. St. Bernard)
JUSTICE OF APPEAL

(Sir Maurice Davis)
CHIEF JUSTICE