SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 11 OF 2000

BETWEEN:

SYLVESTER LEWIS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N. J. Matthew	Justice of Appeal

Appearances:

Mrs. Margaret Ferrari for the Appellant
Mrs. S. Bollers and Miss Fraser for the Respondent

2001 : April 12;
June 18;
September 17

JUDGMENT

[1] MATTHEW J.A.: This appeal pertains to the murder of 38 year old German national Heike Rhul close to a beach at Bequia on the afternoon of September 28, 1998.

[2] The Deceased lived with her fiancé, Gerrit Antrobus on the island. The couple had lunch together on that day and Antrobus left for work about 2.00 p.m. at which time the Deceased was leaving for the beach. She never returned home.

[3] The Deceased was seen by several persons including Nigel Peters about 3.50 p.m. on the Princess Margaret beach. The Appellant was also seen on the beach about the same time.

[4] Peters who was on the beach with Kelbourne Griffith and Venold Williams selling their jewellery had occasion to leave the beach to go to the house of Erica Mcintosh, a house which he took care of in the absence of the owner. On his way to Erica's house he heard a scream. He continued walking to the house and when he reached the yard of the house he went around to the back.

[5] From there he saw the Appellant sitting across the waist of the Deceased and each of his legs was on either side of the Deceased. He saw the Appellant as he sat on the Deceased holding her two hands on the stomach with one of his hands. The other hand was to the top of the throat of the Deceased across the front of the throat. He saw the Appellant's hand going up and down on the throat of the Deceased. He said it appeared as if the Appellant was choking the Deceased to stop her screaming.

[6] Peters turned back after seeing that and ran down the hill in search of Winston Simmons who lived nearby. Later on Simmons, Griffith and Peters went to the spot where Peters had seen the Appellant and the Deceased. On their way they met the Appellant coming from the direction where Peters had earlier seen them with the Deceased on his shoulder and he was carrying a bag in one of his hands.

[7] According to Peters the head of the Deceased was hanging in front of the Appellant and her feet behind him. She was not moving. The Appellant's shirt was bareback and his shirt was around his head. Griffith stated that when he saw the Deceased on the Appellant's shoulder she appeared dead. Simmons did not see the Appellant with the deceased on his shoulder. He was outrun by the other two. He said; " I attempted to run but my size kept me back…. On arrival I saw the Accused standing in Erica's yard and the body of a lady lying on the ground."

[8] When Peters and Griffith saw the Appellant with the Deceased on his shoulder Griffith said to him: "Why you kill the lady?" The Appellant said he needed help he did not kill the lady somebody was trying to rape her. The Police was called and Inspector James Peters

arrived. The doctor was called and Dr. Christine Sotero examined the body on the spot at 5:10 p.m. She pronounced her dead on further examination.

[9] Dr. Stephen King, a specialist in anatomy pathology who lives in Saint Lucia performed a post mortem examination on September 30, 1998 at about 1. 30 p.m. He said the body was that of a middle age female and the body was thin. He found contusions to the left side of the face and the left eye. There were abrasions on the left cheek and chin. There were contusions to the front of the neck and around both hips, and the front of the left thigh. There was hemorrhage in the lining of both eyes. There were extensive contusions and hemorrhage in the muscles of the neck and around and behind the esophagus i.e. swallow pipe. There was a fracture of the thyroid otherwise known as the larynx or voice box.

[10] Dr. King found the genitalia were that of a normal female and were unremarkable and in particular he saw no bruising. Dr. King said in summary the cause of death was asphyxia i.e. lack of oxygen secondary to manual strangulation with a fracture of the thyroid cartilage i.e. top of the windpipe. He said further that asphyxia was caused by manual strangulation i.e. "choking." "Woman in my opinion was choked. Thyroid cartilage was broken. Significant force had to be applied to the front of the neck to cause that breaking." Upon cross-examination Dr. King said: "It is easier to strangle (with considerable force) in one position than if the same force with hands moving up and down. Significant force used in this case. Normally one would expect two hands to exert more force in strangulation than one."

[11] When the Appellant was confronted by Peters and Griffith according to Peters he said: "come help me, the man just gone through the bush." He also stated according to Griffith that the man who saw trying to rape the lady was somebody in red pants. In short the Crown was relying on the direct testimony of Nigel Peters supported to some extent by the testimonies of Griffith and Simmons. The defence which was stated at the outset was a denial of killing and that a short dark man with red pants who ran in the bushes was trying to rape the Deceased.

[12] On that main evidence together with other supporting evidence in the matter, the case went to trial before Adams, J and a jury. On August 1, 2000 he was convicted of murder and thereafter sentenced to death.

[13] On August 14, 2000 the Appellant filed a notice of appeal containing seven grounds of appeal. On the day of the hearing learned Counsel for the Appellant intimated that she would no longer proceed with ground 3 which stated that the Learned Judge allowed the witnesses for the Prosecution and the Jury to mingle freely on the boat trip to and from Bequia and engage in conversation. This step was no doubt due to the findings of Mitchell, J. who was ordered by the Court to conduct a hearing into that allegation and who in his report dated February 9, 2001 found the Appellant's allegations unfounded.

[14] The original grounds 4 and 5 related to identification evidence and corroboration. They were not pursued before us but instead a new ground 4 was substituted, namely, that there was " No proper and fair direction on honest mistake." So grounds of appeal that remained were grounds 1 and 2; amended ground 4; and grounds 5, 6 and 7. I shall now deal with these in my order of convenience.

[15] Grounds 1 and 2. They are set out as follows:

> "(1) The Learned wrongly permitted the Jury to visit the locus in quo before the close of the case of the prosecution;
>
> (2) The Learned Judge questioned various witnesses at the visit to the locus in quo without said witnesses being sworn and moreover did not give the Accused the opportunity of putting his side of the story at the time".

Learned Counsel for the Appellant submitted that the Court should only have visited the locus at the close of the case for the defence and the failure of the Court to allow the Appellant to put his side of the story at the locus was a fundamental breach of fair trial procedure and highly prejudicial to the Appellant. Counsel relied on R v Hunter 81 C.A.R.40 C.A.

[16] Learned Counsel for the Crown in reply to Ground 1 submitted that the Learned Trial Judge may permit the Jury to visit the locus in quo at any time during the trial and the only restriction is that no view of the locus in quo may take place after the conclusion of the summing up. Counsel's submission is well supported at paragraph 4 - 83 of Archbold 1999 and this ground of appeal fails.

[17] Learned Counsel for the Crown responded to Ground 2 of the appeal by submitting that the Learned Trial Judge communicated with the witnesses at the locus for the sole purpose of the said witnesses giving demonstrations; and that all witnesses who attended the locus in quo had already given evidence on oath.

[18] The account of what took place at the visit to the locus quo is to be found at pages 33 to 34 of the record. It consists of Kelbourne Griffith, Venold Williams, Nigel Peters and Inspector James Peters showing places and spots related to their evidence. This was done in the presence of the Appellant and his Counsel who had the opportunity of requesting that certain places be also pointed out. The record at page 34 states "Accused says man ran along main track [Police Inspector Peters on main track]". This would seem to indicate that Appellant used the visit to his advantage. Further as Mrs. Bollers pointed out the Appellant had the opportunity of having the witness recalled to be cross-examined if he so desired. At page 34 of the record is stated "Witnesses pointing out area not require for questioning in Court".

[19] I am of the view that nothing, which occurred at the visit of the locus in quo on July 28, 2000, was unfair and prejudicial to the Appellant. This ground of appeal fails.

[20] Ground 6. This ground of appeal states;

"The Learned Judge in his summing up failed adequately or at all to put the defence case to the Jury and his summing up was heavily weighted in favour of the Prosecution".

[21] Learned Counsel for the Appellant complained on the issue of motive that the Judge did not go far enough and should have directed the Jury that the complete absence of motive made it less likely that the Appellant had done the killing. Counsel also submitted that in the critical area of DNA testing the Judge failed to direct the Jury that the presence of the unexplained pubic hairs on the Deceased could have supported the evidence that there was another Party involved.

[22] In reply Learned Counsel for the Respondent referred extensively to passages in the summing up where the case for the defence was put. On the issue of motive the Judge correctly directed the Jury that the law does not require as a necessity that the Prosecution should provide a motive for a killing but he told them that the Defence uses the lack of motive as a defence.

I would not fault the Judge for not saying that the absence of motive made it less likely that the Appellant had done the killing. See Price v The State (1982) 37 W.I.R. 222.

[23] As regards the DNA testing the Judge told the Jury that none of the strands of hair that were taken from the pubic region of the Deceased could be proven to be that of the Appellant and that fact as the defence alleged, clearly clears the Appellant; but the fact that hair is found on somebody's body does not necessarily mean that there has been some intimate relationship between the body on whom the strand of hair has been found and the person to whom the hair really belongs for the reason that hair could be found anywhere because of the very nature of the object. I agree with this last observation of the Learned Judge. Another factor to be borne in mind is that this case can hardly be described as a sexual case. The Appellant said a man was trying to rape the Deceased but Dr. King's evidence as it pertained to the genitalia hardly bears that out.

[24] On such a ground of appeal one has to have regard to the summing up as a whole. I agree with Learned Counsel for the Respondent that the defence of the Appellant was clearly and adequately put to the Jury and the summing up was not weighted in favour of the Prosecution. I need only refer to a few of the passages of the summing up.

[25] No one can deny that the burden and standard of proof was well put. The Learned Judge gave the Jury a specific direction that where behaviour or things said or things done may be given more than one interpretation they ought to interpret them in a way that favors the Appellant unless they are so compelling against him that they feel bound to draw the conclusion against the Appellant.

[26] The Learned Judge told the Jury that the Appellant was saying from the very outset that Peters, Griffith and Simmons were telling lies on him, some of whom sleep in the same house and he asked them to consider whether they were telling lies on the Appellant. asked the Jury to consider the probability or the possibility of the man Peters having done the killing and was turning around on the Appellant. He further asked them to consider if that possibility could leave them in real doubt.

[27] Later he specifically put the defence of the Appellant that he did not do the killing and that there was a man on the scene who was running away and that man may have done it. He told the Jury that they must bear in mind that the Appellant does not have to prove anything. The Judge said later that the bulk of the evidence which points to the guilt from the Prosecution standpoint would be the evidence of Nigel Peters. The Appellant is saying that Nigel is lying on him. That the Appellant says he was helping the body of the Deceased and Nigel Peters says he was harming it, choking it. In another passage the Judge said; "Well members of the Jury you will decide whether this is so or not. The Defence says in this case that there is no motive the Prosecution have given you no reason under the sun why this accused man would kill this woman". In another passage he says: "Because he admits that he was there by the body and that is what Nigel Peters swears to. Where they differ is that the accused is saying the use of his hands was to serve a healing purpose, whilst the other man Nigel Peters is saying he was killing with his hands."

[28] I have said enough to indicate that this ground of appeal must fail. See Learned Judge did not fail the test of impartiality and fairness. See Mears v R (1993) 42 W.I.R. 284. I must confess that I was not too happy with the frequent use of the words "Satan, son of Satan

and grandson of Satan" or words to the like effect in the summing up in the context in which they were used. That could be attributed to style but it is a long way from saying that the Judge in his summing up failed to put the defence case to the Jury. The Judge did not go beyond the proper bounds of judicial comment.

[29] Ground 4. No proper and fair direction on honest mistake. I think that was the main ground of the appeal. Learned Counsel for the Respondent in answer to the original Grounds 4 and 5 in her skeleton arguments had submitted that no directions were given by the Learned Trial Judge pursuant to R v Turnbull 1976 3 A.E.R. 549 since none were necessary in light of the clear admission of the Appellant that he had been interacting with the Deceased. I agree. In Turnbull the Court of Appeal stated that "whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be a mistake."

[30] The defence here does not allege any identification to be mistaken so this is not an identification case. No doubt this is the reason why the original Grounds 4 and 5 were scrapped. And Learned Counsel for the Appellant in her skeleton arguments concedes this is not strictly speaking an identification case. None the less Counsel submits that there should be a direction in terms similar to the Turnbull directions. I do not agree that there should be any direction on honest mistake.

[31] In her submissions on this ground Learned Counsel stated that there were in reality only three essential areas of dispute, namely:

(a) Was the Appellant sitting on the Deceased as stated by Nigel Peters or crouching next to her?

(b) Did the Appellant have his hands on the front of the Deceased's throat, moving up and down or did he have his hands on the side of the Deceased's neck checking her pulse?

(c) Did the Appellant have his shirt on his head covering his hair when he was next seen by Nigel Peters or did remove his shirt and put it on his head at some later stage?

[32] These contended areas of dispute in my view take the case no further. It does not matter too much whether the Appellant was sitting on the Deceased or crouching next to her. The killing could take place in any of these positions. Neither is there significance in the hands moving up and down the throat or in one place. All the doctor says is that it is easier to strangle in one position than if the same force with hands moving up and down. And one must remember this was a thin middle aged woman aged 38 interacting with a 25 year old labourer. I cannot see the significance between the Appellant being seen bareback carrying the body with his shirt covering his head or seeing him at a later shirt barebacked.

[33] The area of dispute can be put in a simple form as the Learned Judge correctly put it, the version of the Appellant as a Good Samaritan or the direct testimony of Peters that he saw the killing. The version of Peters is that the heard a scream. He went in the direction of the scream and he saw the Appellant choking the Deceased. Does that explain the reason for no other scream in light of the evidence of Dr. King? Later he saw the Appellant carrying a lifeless body on one shoulder and holding a bag in one hand. The version of the Appellant was he did not kill but there was a man who was trying to rape the Deceased and who had run into the bushes. The acceptance of one version or the other would determine the guilt or innocence of the Appellant.

[34] The issue therefore was whether the Appellant had been assisting the Deceased as he alleged or whether he was choking her as alleged by Nigel Peters. This was essentially an issue of credibility for the Jury to determine whether they believed the Appellant or whether they believed Nigel Peters. This ground of appeal fails as also the final ground of appeal that "In all the circumstances of the case the conviction of the Appellant was unsafe and unsatisfactory." In my judgment there could be "no lurking doubt" as envisaged in R v Cooper 1 Q. B. 267.

[35] There remained the issue of sentence in light of the then pending decision of the Court in Newton Spence v The Queen touching on the constitutionality of the mandatory death sentence. The majority decision of the Court was that the trial Judge out to inquire before imposing a sentence of death whether the offence was of a capital or non-capital nature.

In light of that decision the mandatory sentence of death imposed by Adams J. on August 1, 2000 must be set aside and the case referred back to the High Court accordingly for an inquiry as to sentence.

Albert N. J. Matthew
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Albert J. Redhead
Justice of Appeal