[2012] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 128/2005

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

MICHAEL ASSEROPE v R

Miss Nancy Anderson and Miss Gillian Burgess for the appellant

Miss Kathy-Ann Pyke and Miss Melissa Simms for the Crown

20, 21 January, 16 October, 11 December 2009 and 30 March 2012

PANTON P

[1] This appeal challenged the appellant's conviction for capital murder arising from the killing of Tamara Tamica Osbourne in the course or furtherance of the offence of carnal abuse. The appellant was convicted on 28 January 2005, in the Clarendon Circuit Court and sentenced on 17 August 2005, to suffer death in the manner authorized by law.

[2] The appeal against the sentence of death did not require our consideration as the prerogative of mercy had already been exercised in the appellant's favour and the sentence commuted to one of life imprisonment.

[3] This appeal arose from the third trial that the appellant faced in this matter. The first trial resulted in a hung jury, and the second resulted in a conviction which was quashed by this court due to a judicial error.

[4] On 16 October 2009, the appeal against conviction was dismissed and the appeal against sentence was allowed. The matter was adjourned to 11 December 2009, for submissions to be made in respect of sentence after which, we promised to put our reasons in writing. We apologize for the delay in keeping that promise.

[5] The prosecution's case consisted of circumstantial evidence along with a cautioned statement made by the appellant to the police in the presence of a long-standing justice of the peace for the parish of Clarendon.

[6] On 24 June 1999, at about 6:45 a.m., the deceased, who was born on 30 May 1989, and so was a mere 10 years old at the time of her death, left home for the Denbigh Primary School where she was a student. She lived with her adopted parents, Mrs Idel Osbourne and her husband, Herbert Keith Osbourne, at 9 Bennett Street, Denbigh in the parish of Clarendon. Miss Sherona Thomas, the sister of the deceased, also lived at that house. The deceased was wearing a white blouse with blue tunic and black shoes. She had with her a school bag. She

was accustomed to walk to school and the journey would take about 15 minutes, by Mrs Osbourne's estimate, or about half of an hour by Miss Thomas' estimate.

[7] The residence at 9 Bennett Street and its occupants are quite familiar with the appellant. He would visit the house two or three times each week, according to Mrs Osbourne. Indeed, he visited the house on the night before the murder. The frequency of the appellant's visits was not a matter of coincidence considering that he has a child born in March 1996 whose mother is Miss Thomas, the sister of the deceased.

[8] According to Miss Thomas, she slept at the appellant's house on the night before the murder. On the morning of the murder, she had walked with the appellant from his house. She continued to her house while he went in a different direction to get his car to commence his day's work as a taxi driver. Later, the appellant came to her residence at 9 Bennett Street and had breakfast. In examination-in-chief, she said that he came "after 8 going 9". Later when she learnt of what had befallen her deceased sister; she called the appellant who said he would go to see if he saw her. She next saw the appellant when he came to her residence "after midday". Under cross-examination, she said that she had breakfast with the appellant about 9:30 a.m. and he left shortly after.

[9] Dr Desmond Brennan, a registered medical practitioner attached to the Denbigh Health Centre, performed a post mortem examination on the body of the deceased on 30 June 1999. He noted a laceration of the super aspect of the larynx totally severing the oesophagus and the trachea; partially severing the right carotid artery which is the main vessel supplying blood to the brain. There was a laceration across the upper throat, 6 centimetres from the manubrim which is the bony section in the centre of the throat. There were blood clots in the main bronchi, that is, the windpipe. Dr Brennan also noted multiple small lacerations to the lateral right distal arm and proximal forearm, above the elbow joint. There were also bruises to the upper lateral right arm and a circular bruise of the left wrist. He also noted multiple irregular bruises on the lateral forearm and multiple small abrasions on the left forearm from the wrist to the elbow. There was clotted blood in the vaginal orifice and multiple jagged lacerations and bruises to the entire circumference of the hymenial ring, which is the opening of the vagina. There was also a laceration to the bottom side of the vaginal opening.

Cause and time of death

[10] On internal examination, the doctor found that the deceased had ex-sanguinated, that is, there was no blood left in the body. On the basis of these findings, the doctor concluded that death was due to hypovolemic shock, secondary to laceration of the right carotid artery, trachea, oesophagus and

vagina. The volume of blood that would normally have flowed to the vital organs had fallen below a critical point.

[11] The main injuries were, in Dr Brennan's opinion, caused by a sharp instrument such as a knife. Considerable force had been used to sever the carotid artery. Where there has been a total severing of that artery, he said, death would ensue after about five to eight minutes. Where there has been only a partial severing, death would follow within six to ten minutes. The injury to the vagina, he said, could have been caused by a penis. The hymenial ring, he said, had been torn minutes before death or during the process of dying.

Nature of attack

[12] Dr Brennan formed the view that the bruises suffered by the deceased were due to the rubbing of the skin against a surface that was hard and irregular. In relation to the laceration across the neck, he was of the view that it was possible for the attacker to have approached the deceased from the front. However, he would not rule out the attack being from behind. He would expect blood to be on the implement, but not necessarily the assailant. If the attack was from the front, blood would have perhaps caught the clothing and the head and face of the attacker.

[13] At the post mortem examination, fingernail scrapings, vaginal swab and a section of the sternum of the deceased were taken for further analysis. These were handed over to Det Sgt Evon Williams.

[14] Det Sgt Lorna Callam visited the scene of the tragedy, a canefield at Woodley, Denbigh, and took photographs which were exhibited at the trial. The photographs were taken on 24 June 1999, and showed the position of the deceased and some of her injuries, as seen when the photographer visited the scene.

[15] Sgt Williams gave evidence that, having received certain information, he went to what he knew as Bestwell Farm at about 8:20 – 8:25 a.m. Bestwell Farm is, he said, off the Bustamante Highway. There, he saw the body of the deceased, dressed in her school uniform and all her clothes bloodstained. Her school bag with books were about one and a half yards from the body. There was white bloodstained tissue on the ground nearby and the ground and shrubbery were also bloodstained.

[16] Sgt Williams later saw and spoke with the appellant. He told the appellant that he had heard that he had transported the deceased in his car that morning. The appellant's response was that he did not remember. The sergeant took possession of the car and removed from the floor in front of the driver's seat a multi-coloured dagger in a sheath. The sergeant also removed a roll of white toilet paper from the glove compartment of the car.

[17] The prosecution presented evidence from Miss Sherron Brydson as to her examination and findings in respect of the material that was presented to her for forensic analysis. The significant portions of that evidence were as follows:

(a) the appellant and the deceased shared the same blood type – Group B;

(b) the blood on the ground and on the vegetable matter at the scene of the killing was Group B;

(c) human blood and also semen in which there was spermatozoa were in the two vaginal swabs taken from the deceased;

(d) human blood was on the sneakers that the appellant had been wearing; and

(e) human blood in sero sanguineous stains was present on the handle aspect of the sheath found in the car.

Cautioned statement

[18] The appellant volunteered to give a statement to the police. He was interviewed by Det Sgts Colin McKenzie and Evon Williams on 26 June 1999. When he was asked if he wished to write the statement, he suggested that Sgt McKenzie should write it. The appellant requested the presence of a justice of the peace. This request was granted as Ms Myrtle Roye, a retired teacher who has been a justice of the peace since 1972, was present throughout the process of the taking of this statement.

[19] In his statement, the appellant said that he had taken up the deceased in his car. According to him, she kissed him, told him that she loved him and wanted to make love with him. As a result, he said, he drove on to the Bustamante Highway, then turned on a road going in the direction of Glenmuir Road. He then went on a side road, stopped the car, and the deceased came out and asked him if he was not coming out. She told him to hurry as she wanted to "goh back a school" (p. 127 line 16). The appellant said that he made love to her; she started to bleed, and she took toilet paper and started to wipe herself. According to the appellant, he did not remember anything after that stage. He did not remember whether he drove away or stayed a while after the act. He just found himself at work until Mr Young (his employer) called him. He parked the car at the police station and the police searched it and found the knife and the toilet paper. The police also took his sneakers and belt.

The appellant's unsworn statement

[20] The appellant, in the face of the evidence presented by the prosecution, chose to make an unsworn statement that consisted of a mere six lines. In it, he gave his name and a Denbigh address. He denied killing anyone and denied taking the deceased to school that morning. He also denied giving the statement that was recorded by the police and witnessed by Ms Roye. He called no witnesses.

The grounds of appeal

[21] Eight grounds of appeal were argued before us. Significantly, in our opinion, none of the grounds challenged the cautioned statement in any respect. That statement placed the appellant on the scene indulging in sexual activity with the child. There was a submission on behalf of the appellant, in support of ground number eight, that the learned judge should have left open for the jury's consideration a verdict of guilty of the offence of carnal abuse. That submission overlooked two matters. Firstly, in our jurisdiction such an offence could not have been left on a charge of murder. Secondly, the evidence of Dr Brennan showed a very clear link between the act of carnal abuse and the death of the deceased. Dr Brennan said that the hymenial ring of the deceased was torn either minutes before death or during the process of dying. With that evidence in their minds, it is little wonder that the jury took less than 23 minutes to return their verdict of guilty.

Ground one

> "The learned trial judge erred in not excluding the photographs of the crime scene and the body of Tamara as the potential probative value of such evidence was outweighed by its prejudicial effect."

[22] Miss Nancy Anderson submitted that the viva voce evidence was sufficient and so there was no need for the photographs. She said that there was no dispute as to the position of the body of the deceased or as to the fact that she

had been sexually assaulted. She submitted that the value of the photographs was minimal or non-existent so far as assisting the jury in determining guilt was concerned. It was her view that the sole object of the introduction of the photographs was to elicit an emotional response from the jury – that is, "to provoke sympathy toward the victim and indignation toward the Appellant". She referred to the cases ***Barnes et al v The Queen*** (1989) 26 JLR 100, ***R v Sang*** [1979] 1 WLR 263 and ***Johnson v R*** (1996) 33 JLR 158.

[23] Miss Kathy-Ann Pyke for the Crown responded that the inherent nature of the case was graphic and gruesome. The critical issue, she said, was whether the deceased had been killed in furtherance of carnal abuse. The photographs made it possible for the jury to appreciate the case more.

[24] In ***Sang***, the question was whether the trial judge should have excluded evidence of incitement by an agent provocateur. The House of Lords dismissed the appeal on the basis that, save as regards admissions and confessions and generally, evidence obtained from the accused after commission of an offence, the judge had no discretion to refuse to admit relevant admissible evidence on the ground that it had been obtained by improper or unfair means. However, it was recognized that a judge in a criminal trial has a discretion to refuse to admit evidence if, in his opinion, its prejudicial effect outweighed its probative value.

[25] In ***Barnes et al,*** the issue was whether a trial judge in a criminal case has a discretion to refuse to admit a sworn deposition of a witness who has died before trial. It was held that the deposition was admissible on the basis of a statutory provision and that there was no statutory discretion to exclude it. However, it was acknowledged that the judge has a discretion to ensure a fair trial and the discretion includes the power to exclude admission of a deposition but this power should be exercised with great restraint.

[26] In ***Johnson v R***, the appellant was tried on an indictment containing only one count for the murder of a named individual. However, during the trial, the prosecution led evidence from a detective that he had obtained warrants for the arrest of the appellant on two charges of murder, but there was no further evidence from any other witness as to the second victim. In addition, there were many confrontations between counsel for the defence and the prosecution in the presence as well as in the absence of the jury. The Court of Appeal quashed the conviction for non-capital murder on the basis of the failure of the trial judge to exclude what was clearly inadmissible evidence that had a prejudicial effect, and also for his failure to control the behaviour of counsel for the prosecution.

[27] We took the opportunity to view the photographs in question. We did not agree that they would have elicited an emotional or irrational response from the jury. Like Miss Pyke, we formed the view that the case was graphic and gruesome. The photographs not only confirmed the nature of the case but also

presented a clear picture and understanding of the physical location and circumstances of the killing and the extent of the violence that had been applied to the deceased. We saw no reason why that should have been hidden from the jury.

[28] The learned trial judge, it should be noted, warned the jury to be calm and not to be aghast at the pictures, and not to "get in any hype" over them. They were told to merely look at them and consider them in conjunction with the oral evidence. We are of the view that the jurors who serve in our courts are by and large intelligent and mature individuals who take the instructions of judges seriously. There is absolutely no reason to doubt that they did so in this case. We also cannot help noting that there was not a single challenge made in respect of any of those persons who were called into the jury box to be sworn to try this case.

[29] The authorities are clear that it is in the judge's discretion to exclude admissible evidence if, in his opinion, the prejudicial effect outweighs its probative value (***Sang***). In this case, the learned judge gave the matter the consideration required and followed that up with appropriate instructions to the jury. He cannot be faulted for admitting the evidence. The ground therefore failed.

Ground two

> "The learned trial judge erred in not carrying out a proper investigation into the reason for the absence of juror #2 and/or wrongfully exercised his discretion under section 31(3) of the Jury Act in discharging juror number 2 and ordering the trial to proceed with only eleven jurors."

[30] It is necessary to look at the relevant portion of the Jury Act in order to understand this ground. Section 31 of the Jury Act reads in part thus:

> "(1) ...
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> (2) ...
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> (3) Where in the course of a criminal trial any member of the jury dies or is discharged by the Court through illness or other sufficient cause, the jury shall nevertheless, so long as the number of its members is not reduced by more than one, be considered as remaining properly constituted for all the purposes of that trial, and the trial shall proceed and a verdict may be given accordingly.
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> (4) Where one juror has died or has been discharged as provided for in subsection (3), the verdict of eleven jurors in a trial for murder or treason, or of six jurors in a trial for any other offence, shall be deemed to be a unanimous verdict of the jury ..." .

[31] The challenge to the conviction through this ground was that some investigation ought to have been carried out. The question posed by Miss Anderson was whether the judge had properly exercised his discretion. According to her, the appellant was unfairly deprived of the voice of this juror in the jury room and so that could have affected the trial to the detriment of the appellant.

She relied on the cases ***R v Goodson*** [1975] 1 All ER 700 and ***Newton Spence v The Queen*** [2001] UKPC 35, PC App. No 47/ 2000 delivered 16 July 2001.

[32] Miss Pyke pointed out that it was a matter of record that the juror had a medical condition. There was, she said, substantial evidence that the juror was ill. She said that the case was well underway and the end of the Circuit Court session was near. Parliament, in her view, had made allowance for the non-attendance of a juror, and for him or her to be discharged at any time.

[33] The case of ***Newton Spence***, originating in Saint Vincent, and cited by Miss Anderson, provided no real support for the point argued by her. Indeed, their Lordships of the Privy Council compared the Saint Vincent legislation with that which obtains in England and Wales and commented on the restricted nature of the former. The law in Saint Vincent reads:

> "If, during the course of any criminal proceeding, one of the jury dies, or becomes incapable of serving, or absents himself, it shall not be necessary to discharge the jury or to add thereto another juror, but the trial shall be proceeded with by the remaining jurors notwithstanding such death, incapacity or absence."

In the Jamaican legislation, the judge is positively conferred with the authority to discharge a juror who becomes ill and as long as the number of jurors does not go below 11 in a case where the accused is convicted of murder, the verdict by them will be regarded as unanimous.

[34] In ***Goodson***, a juror who had been given permission to leave the jury room after the jury had retired, was refused re-admission to the room because he had been seen making a telephone call. The judge discharged the juror and accepted the verdict of the others. The Court of Appeal of England held that the entire jury should have been discharged. This, it should be noted, was a case in which the juror, though willing to confer, was not permitted to take part in the deliberations. Certainly, that was a material irregularity which warranted the action taken by the Court of Appeal. In ***R v Hambery*** [1977] 3 All ER 561 another case from the Court of Appeal of England, the appellant was tried and convicted of theft and false accounting. The trial was expected to last no more than four days; however, it went beyond that period. It seemed that the holiday plans of a lady juror were likely to be adversely affected. The learned judge purporting to be acting under section 16(1) of the Juries Act 1974, discharged that juror and continued the trial with 11 jurors. The verdict of the jury was unanimous. The appellant challenged the conviction saying that the judge had no jurisdiction to discharge the jury; however, if he had jurisdiction, it was argued, he exercised it wrongly. The relevant section of the Juries Act 1974 reads thus:

> "Where in the course of a trial of any person for an offence on indictment any member of the jury dies or is discharged by the court whether as being through illness incapable of continuing to act or for any other reason, but the number of its members is not reduced below nine, the jury shall nevertheless (subject to subsections (2) and (3) below) be considered as remaining for all the purposes of that trial properly

> constituted, and the trial shall proceed and a verdict may be given accordingly."

It will be observed that section 16(1) of the Juries Act is in terms that are similar to section 31 of our Jury Act. The English Court of Appeal, in dismissing the appeal, held that since the discharge of the juror did not hinder the administration of justice, in that, the legislation provided that the jury remained properly constituted, and since the exercise of the discretion by the judge had not been capricious, there was no reason for the appellate court to interfere with the judge's decision.

[35] In the instant case, the Jury Act clearly allows the judge for "illness or other sufficient cause" to discharge a juror. The circumstances clearly showed that the juror was ill. We are at a loss as to what more the learned judge could or would have needed, to exercise his discretion to proceed with the trial without the juror. There was no prejudice that we have been able to discern in the matter having been decided on by 11 instead of 12 jurors. Indeed, it was desirable that there should have been no further delay in the proceedings. Accordingly, this ground failed.

Ground three

> "(a) The Learned Trial Judge erred in failing to allow defence counsel sufficient time to examine the details as to how the calculations on the DNA tests in 2001 were carried out and should have adjourned the trial to facilitate defence counsel thus denying the appellant his

constitutional right to be given adequate time and facilities for the preparation of his defence.

(b) The prosecution failed in its duty to disclose the details of the 2001 tests and the basis of the calculations."

[36] There were two sets of DNA tests conducted during the investigations in this case – one in 1999, the other in 2001. The details of the second set of tests were not communicated to the appellant's attorney-at-law prior to the commencement of the trial. It was during the conduct of the examination-in-chief of the expert witness Miss Brydson on 27 January 2005, that this came to light. The appellant's attorney-at-law immediately informed the court of the non-service of the information. The learned judge expressed concern at the situation. Whereupon, the attorney indicated that he needed "a little time to go through the results itself". The attorney suggested that the evidence could be led in chief but he would "need a little time to go through (it) ... along with the necessary material that we received when the matter came back to these courts". After a few more questions, the adjournment was taken until the following morning. Further examination-in-chief was conducted for another 33 minutes. The appellant's attorney then cross-examined the witness for 40 minutes. The concluding portion of the cross-examination reads thus at page 308 lines 16 - 21:

"Q. So, in relation to the DNA analysis, Miss Brydson, you can only tell us of similarities, you cannot tell us whose DNA it is?

A. No, I cannot. For the samples, no.

Q. You cannot say?

A. No."

[37] The cross-examination by defence counsel appeared to have been well-conducted. He seemed to have appreciated the evidence given in examination-in-chief and to have understood the material supplied to him by the prosecution. He made no complaint whatsoever in respect of the adequacy of the time allowed to him for preparation. In the circumstances, it was not within the bounds of reasoning for the attorney on appeal to be making that complaint. After all, defence counsel at trial is an experienced attorney who has practiced well in these courts. We found no merit whatsoever in this ground.

Ground four

> "The Learned Trial Judge erred in his directions to the jury on the DNA evidence:
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> a. in that he failed to explain to the jury the significance of the 'random occurrence ratio' and to give proper directions on it (sic) application in the appellant's case.
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> b. as his directions on the evidence were unclear, unhelpful and confusing and failed to give any guidance to the jury on the issues of the expert evidence."

[38] The complaint in this regard was to the effect that the learned judge failed to follow the "procedures" numbered 11 to 13 listed in the English case:

R v Doheny [1997] Cr App R 369 which were adopted by our court in ***R v Asserope*** SCCA No 279/2001, delivered 19 December 2003. In the ***Doheny*** case, 13 "procedures" are listed for the trial judge to follow in a DNA case. The complaint was in relation to procedures 11, 12 and 13. Collectively, the judge is to give careful directions on "any issues of expert evidence" and explain to the jury the relevance of the "random occurrence ratio". We carefully examined the judge's summation and we concluded that the complaint was not justified. The learned trial judge, in our view, did that which was required of him (see pages 361-371 of the transcript).

Ground five

> "The Learned Trial Judge erred in his directions and/or lack of directions on how the jury should treat an unsworn statement and/or alibi given by the Appellant."

[39] It was submitted that as regards alibi, the learned trial judge instructed the jury in a manner that was confusing and not in keeping with the authorities. The passage complained of is at pages 374 and 375 of the record. This is the full text of what the learned judge said:

> "He denied the statement and he said he never took her to school that morning, which means that wherefore he was, he certainly was not in a situation with the crime attributed to him. In effect, I am just giving you the statement of the accused and make what you can of it, but in effect, it is an alibi. Alibi means, I was not there. It is not for any accused

> person to establish an alibi and the disproof of the alibi lies, matter [for] you, which on your assessment, you are not relieved of the burden of assessing, you are to scrutinize it and ask yourselves whether or not you are satisfied to the extent that you feel sure, that the proof offered makes you reject the alibi, because, you have to be satisfied about the proof offered in any event, any rejection, that dilate on where he was. Say like I was down by Gimmi mi bit, not that, but he says I was not there. So a false alibi may be offered when a person has nothing to hide. So now, you cannot take that, if you reject the alibi as adding to proof, proof and certainty to the extent, certainty, a feeling of being satisfied to the extent that you feel sure rests on the consideration of the evidence as a whole, given to you."

[40] Having carefully analysed this passage, and taking into consideration the summation as a whole, we think that there may well have been a situation of certain words obviously used by the judge not finding their way into the transcript. For example, where he is reported as having used the word "wherefore" we are satisfied that what he must have said was "wherever". We also noted that the punctuation marks, which are not of the judge's making, may have given the impression of confusion in some areas. The overall effect of the passage, however, was that the jury was told that it was not for the appellant to prove the alibi but rather for the prosecution to disprove it.

[41] So far as the unsworn statement is concerned, the learned judge told the jury it was for them to attach to it such weight as they thought fit. He stressed that rejection of the unsworn statement did not entitle them to return a verdict

of guilty as they could only return such a verdict if the prosecution's case made them feel sure (see page 316 lines 5-16). This direction was correct. The learned judge was clearly guided by cases such as ***Director of Public Prosecutions v Walker*** (1974) 21 WIR 406 and ***Mills, Mills, Mills and Mills v R*** (1995) 46 WIR 240. In the latter, the guidance appears at page 249 b - c thus:

> "The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

The learned judge followed the guidance faithfully. Accordingly, there was no basis for complaint in this regard.

Ground six

> "The Learned Trial Judge misdirected the jury on circumstantial evidence and its consequences and failed to deal specifically with each item of circumstantial evidence pointing out to the jury the possible inferences capable of being drawn from each."

[42] The main submission in support of this ground was that the learned judge had failed to follow the guidelines set out in the judgment of the Court of Appeal in ***R v Morrison*** (1993) 30 JLR 54 (CA). Miss Anderson said that the judge had failed to direct the jury that they "could only be sure of the Appellant's guilt

beyond a reasonable doubt if the evidence was not only consistent with his guilt but also inconsistent with any other reasonable conclusion". On the other hand, Miss Pyke described the judge's directions as "meticulous". She said that he had pointed the jury clearly to the manner in which the facts ought to be assessed and the inferences to be drawn therefrom in relation to the issues in the case and the ingredients which the prosecution had to establish. She submitted that the judge, contrary to the contention of the appellant, had highlighted the items of evidence from which facts could be found and inferences drawn. She said that there was no deficiency in the summation in this respect. However, if there was, she contended that no injustice would have been occasioned to the appellant in view of the fact that the prosecution did not rely completely on circumstantial evidence but on other material such as the cautioned statement. In such a situation, the general directions on the drawing of reasonable inferences would have been sufficient.

[43] An examination of the summation will reveal that the complaint by the appellant has no foundation whatsoever. The learned judge instructed the jury thus:

> "The Prosecution need not prove anything like a grudge, a spite, for the motive for killing, because many killings, perhaps you live in Jamaica, sometimes apparently are not capable of being defined in terms of a motive. When they speak of circumstantial evidence, the analogy is made to a rope and the fibres of a rope. Each fibre by itself, not being able to sustain full strength of the rope, the capacity of a rope, but taken together, they make up a rope. So it is such a set of

> undesigned, or unexpect [sic] coincidences and this would include the inferences you draw. If you were to accept that the statement was given by this man, that would lead you, as reasonable persons, to come to a conclusion and one conclusion only. If it is capable – if all the circumstances you pray in aid, are capable of another conclusion, other than implicating the accused man as the person who killed the deceased, well then, the test of circumstantial evidence would not be satisfied. In other words, you may say yes, she must have been killed by somebody who intended to do her in real badly, but some circumstances prevents (sic) you from saying it answers the test, that is to say, pointing to one conclusion and one conclusion only.
>
> In this, as in all ingredients constitute the charge, you may apply the same test, that is, you must be satisfied to the extent of feeling sure of the guilt of the accused, before it is open to you to return a verdict of guilty."

[44] We found that the directions were in keeping with the law as stated in ***Morrison*** at page 56 B and C:

> "The jury should be told (i) that if on an examination of all the surrounding circumstances, they find such a series of undesigned and unexpected coincidences, that as reasonable persons, their judgment is compelled to one conclusion; (ii) that all the circumstances relied on, must point in one direction and one direction only; (iii) that if that evidence falls short of that standard, if it leaves gaps, if it is consistent with something else, then the test is not satisfied. What they must find, is an array of circumstances which point only to one conclusion and to all reasonable minds, that conclusion only. The facts must be inconsistent with any other rational conclusion."

Ground seven

> "The Learned Trial Judge misdirected the jury in failing to make a clear direction that they must 'feel sure, beyond a reasonable doubt' before they can find the Appellant guilty."

[45] The appellant's complaint in this respect was wholly unmeritorious. There is no requirement that a judge must use the words "beyond a reasonable doubt" in instructing the jury in a criminal case as to the standard of proof. In saying that the jury had to be satisfied so that they feel sure before convicting on the evidence, the learned judge was doing that which was required of him. In ***Walters v The Queen*** [1969] 2 AC 26, a case originating in this jurisdiction, their Lordships had this to say at page 30 C:

> "As Lord Goddard C.J. said in ***Rex v Kritz*** [1950] 1 KB 82 at p 89:
>
> > 'It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there'."

Their Lordships continued at page 30 F - G:

> "By the time he sums up the judge at the trial has had an opportunity of observing the jurors. In their Lordships' view it is best left to his discretion to choose the most appropriate set of words in which to make *that* jury understand that they must not return a verdict against a defendant unless they are sure of his guilt;"

[46] In our view, the admission by the appellant of having had sexual intercourse with the deceased and the medical evidence as to the cause and time of death made the verdict inevitable. In addition, we were of the view that there was no error in the conduct of the trial. And so, for the foregoing reasons, we dismissed the appeal. As indicated in paragraph [2] herein, the appellant's sentence has been commuted to life imprisonment. We are of the view that the appellant should serve a period of 30 years before becoming eligible for parole and we so order. That period should be deemed to commence on 6 March 2002.