JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 17/04

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag)

SOPHIA ELLIS V R

Mr. Dwight Reece for the Appellant

Mrs. A. Grainger, Crown Counsel, for the Respondent

September 21 and December 20, 2004

HARRISON J.A. (Ag):

The applicant was convicted of non-capital murder of Prince Swaby Jnr. on 1st October 2001, and sentenced to imprisonment for life. She was further ordered to serve a period of ten years before she could become eligible for parole.

Leave to appeal was refused by the single judge on the 11th May 2004, and the applicant renewed her application before the Full Court on the 21st September 2004. We treated the hearing of the application as the hearing of the appeal. The appeal was allowed, the conviction quashed and sentence set aside. We promised to put our reasons for so doing in writing. We now fulfill this promise.

The case for the prosecution

Prince Swaby Snr., is the father of five children and the deceased Prince Swaby Jnr. also called Taz, was one of his children. The appellant and Swaby lived together at Mount Clair, Clarendon, and she is the mother of his last child who was born in March 2000. Shortly after the birth of this child, she returned to live at her mother's house but she still had access to Swaby's house. She would run errands for him and do chores around the house. The relationship between the appellant and his other children was said to be good. However, on or around the 24th September 2000, Swaby said, he had a talk with the appellant concerning his son Taz. He (Taz) had complained to him that on one occasion, the appellant squeezed his neck. He said he told her that if she loved him and did not love his children their relationship "was not going to work". She made no response, when Swaby told her of the complaint made by Taz. According to Swaby, he "sat down" the appellant and had a long talk with her.

Taz who was four years old at the time of his death, attended Effortville Basic School in Clarendon. His father would take him to school and after school was dismissed he either walked to his father's place of business or his father would send a taxi to pick him up. The appellant was not permitted however, to pick up Taz from school.

On the 10th October 2000, Swaby said, he had taken Taz to school. At about 3:30 p.m. that day, Swaby spoke to the appellant on the telephone. She said to him:

> "Mi jus' come yah and mi si Taz bag out the front and mi tek it up and throw it pon the verandah."

At about 4:00 '0' clock she went to Swaby's shop and he sent her on an errand. She took some of the items she bought, to his house. Swaby said she called him again later that day and asked him if he had seen Taz. After they spoke, he said, he left work at about 5:00 'o'clock and went to his house. When he arrived there, his little daughter spoke to him. He searched the house and realized that Taz was not at home. He then left the house and went looking for him but did not find him. He said he was extremely concerned about the whereabouts of Taz, so he continued the search at his house. He looked in a drum that was filled with water and saw Taz in it. He took out his lifeless body and summoned the police. The body was subsequently taken to the funeral home.

Dr. Desmond Brennan who performed the post-mortem examination on the body of the deceased was of the opinion that death was due to a dislocation of the first cervical vertebrae. He was unable however, to determine the time of death. Dr. Brennan found an injury to the back of the head and he described it as a small indentation. In his opinion the dislocation could have been caused from a blow to the front of the neck or from a hit in the head from behind. The doctor agreed under cross-examination that if someone were to fall on his or her back and hit the back of the head it is possible that there could have been a dislocation of the cervical vertebrae. He also agreed that from a medical standpoint, one could not rule out the possibility that the injury to the deceased that resulted in death, could have been caused accidentally.

Lloyd Lawrence, another witness called by the prosecution testified that he had known both the deceased and the appellant. He recalled that on the 10th October 2000, at about 2:00 p.m. he was on his way home when he saw the appellant in the vicinity of the Effortville Basic School. He said she asked him to fetch the deceased who was on the school compound. He went for him and then all three of them walked down to Prince Swaby's residence. He said that the appellant and the deceased child went into the yard and he continued on his way. Cpl. Julius interviewed him and he gave a written statement.

Jacqueline Garrick, a teacher at Effortville Basic School, testified that she knew the appellant for a number of years. She recalled seeing her on the 10th October 2000. While she was assisting a small girl to cross the street she had seen the appellant walking towards the direction of the school premises. They spoke to each other and she asked her if school had been dismissed. Miss Garrick said she returned to the school compound and saw when Lloyd Lawrence and the appellant came to the school gate. Lawrence called the deceased child who was then sitting close to her and she told him to go to Lawrence. She then saw the appellant, the child and Lawrence leave together. She did not see the deceased again that day. She subsequently heard something later that day and as result of what she heard, she went to Swaby's home. The appellant was also there and Miss Garrick said she asked her about the picking up of the deceased from school but she denied that Lawrence and herself went to the school.

Elroy Pottinger testified that he did gardening at Prince Swaby's residence at Mount Clair. He recalled that a man named Vincent and himself worked at Swaby's home on the 10th October 2000. He completed the job at about 12:15 p.m. and both of them left the premises. He did not return to the premises and subsequently learnt that Taz had died. He recalled seeing the appellant visit Swaby's home twice on the 10th October. He said she came there alone at about 12:55 p.m. and then left. At about 3:30 p.m. she returned to the premises with a lady.

Det. Cpl. Dale Julius who was the investigating officer, testified that he received a report on the 10th October 2000, and at about 7:00 p.m. he went to Swaby's home. He recalled seeing the dead body of Prince Swaby Jnr. and that it was clothed in school uniform. The deceased also had on his shoes. He gave instructions for the body to be removed to the funeral parlour and commenced investigations into a case of murder. Statements were collected. He subsequently saw the appellant at Four Paths Police Station and told her of the report he had received. He cautioned her and she said:

"mi never go ah him school fi him. Mi never see him."

Cpl. Julius attended the post-mortem examination that was held on the body of Prince Swaby Jnr. and he subsequently arrested and charged the appellant for the offence of murder. When cautioned she said:

"Mi ah tell you di truth Mr. Julius. Ah nuh mi kill him."

At the close of the Crown's case, counsel for the appellant submitted that a prima facie case had not been made out against the appellant and that she

ought not to be called upon to answer the charge. The Court ruled however, that a case had been made out and called upon the appellant.

The Defence

The appellant made an un-sworn statement from the dock. She said:

> "My name is Sophia Ellis. I live at 7 Douglas Avenue off Oliver Drive. I am a hairdresser. I am innocent of the death of Prince Swaby Jr. That is it."

The grounds of appeal

The following grounds of appeal were filed:

1. The learned trial judge should have upheld the no case submission made on behalf of the applicant.

2. The prosecution's theory and reliance on circumstantial evidence was not made out and the learned trial judge had misdirected the jury as to same.

Leave was granted for a supplemental ground of appeal to be also argued. It reads as follows:

3. That the evidence led by the prosecution that Prince Swaby Snr. spoke to the applicant on one occasion about having received a report from the deceased Prince Swaby Jnr that the applicant had squeezed his neck was inadmissible evidence prejudicial to the Applicant without any probative value.

Ground 1

It was submitted by Mr. Reece that the learned trial judge fell into error when she failed to uphold the no case submission. It was contended:

(a) That no evidence was led by the Crown to satisfy the necessary ingredients of a prima facie case of murder, particularly:

(i) There was no evidence of the appellant doing any act which caused injury to the deceased.

(ii) There was no evidence to negative accident to which Dr. Desmond Brennan adverted.

(iii) The Crown failed in its attempts to rely on circumstantial evidence as it was in fact mere suspicion and could not point in her direction.

After a dialogue between Bench and Bar, Mr. Reece discontinued his submissions with regard to ground 1. We were of the view that this ground was without merit since the evidence presented by the prosecution revealed that:

1. The deceased child was last seen in the company of the appellant.

2. The appellant was not permitted to pick up the child from school.

3. Two persons had seen the appellant when she left the school with the deceased.

4. The appellant had given Prince Swaby Snr. the impression that she did not see Taz that afternoon.

We therefore agree with the learned trial judge that a prima facie case had been made out against the appellant and that she was properly called upon to answer to the charge of murder. Ground 2 was abandoned by counsel for the appellant.

Ground 3

Mr. Reece submitted that the evidence with regard to what the deceased told his father about the appellant squeezing his neck was inadmissible and ought not to have been admitted in evidence. He argued that this evidence was highly prejudicial and had no probative value. He further submitted that the learned trial judge fell into error when she directed the jury to consider whether or

not the evidence showed that the appellant had a propensity to be violent. Miss Grainger, Crown Counsel, submitted however, that even if the evidence was inadmissible, the Crown's case was overwhelming in other respects and in the circumstances the jury had properly returned a guilty verdict.

We now turn to examine the directions that were given by the learned trial judge in relation to the complaints referred to above by Mr. Reece. Very early in her summing-up, the learned trial judge told the jury how they should treat inferences and at page 110 of the transcript she said:

> "For example, whereas counsel for the Crown was saying that the child was last seen in the company of Miss Ellis, some hours later, the body was subsequently found in the premises that both of them had gone to and that she had the opportunity to do certain things, and based on her propensity, he is asking you to draw certain inferences."

At page 130 she said:

> "Now, in outlining to you the bits of evidence that you should take into consideration, counsel for the prosecution said that this showed that Miss Ellis had the propensity to squeeze Taz's neck and you recall, on the other hand, counsel for the defence, Mr. Reece, said that this is not direct evidence as to her having squeezed his neck, it was a conversation which took place between them, and that there is no evidence before this court that that actually happened because Taz unfortunately is not here to tell us that what had happened and it was just a conversation. So what Mr. Reece is saying is that although that conversation was had, there is no evidence before you to say that she had actually done that and a possibility suggested is that the child could have been lying. But that was the conversation ..."

Then at page 157 she said:

> "They are also asking you to look at that conversation between Miss Ellis and Mr. Swaby Sr. about her having squeezed his neck sometime in September. They are saying that that conversation is significant because it showed a propensity on her part. But I also ask you to look at the other side of the coin, where that is not indirect evidence. This is a conversation, and Mr. Reece told you how you should treat that."

We gave serious consideration to the above directions and concluded that the learned trial judge erred in her direction to the jury about the complaint made by the deceased to his father. The jury ought to have been directed that they should disregard that evidence since there was no evidence that the appellant made a response to the complaint when Prince Swaby Snr. confronted her from which the jury could infer that he adopted the statement. See ***R v Christie*** 10 Cr. App. R. 141. In our view, the evidence of the complaint was highly prejudicial and the jury ought to have been warned about its irrelevance instead of leaving it to them to decide which of the attorney's comments made during addresses to the jury, they would accept in relation to the complaint.

The authorities have made it abundantly clear that evidence cannot be adduced by the prosecution to prove that a defendant has a propensity to commit criminal acts of the same nature as the offence charged, merely for the purpose of leading to the conclusion that the defendant is a person likely from his criminal conduct or character to have committed the offence for which he or she is being tried. See ***R v Marcello D'Andrea*** SCCA 77/98 (unreported) delivered on the 29th March 1999. We were further of the view that in the instant case, there was

the danger that the jury may have attached undue weight to the evidence about the squeezing of the neck on a previous occasion, and regard it as probative of the crime with which the accused is charged. We therefore agreed with the submissions made by Mr. Reece and concluded that there was merit in Ground 3 and that the appeal ought to be allowed.

The question that arose for consideration was whether or not we should order a retrial. Counsel for the Crown submitted that although the evidence of the earlier complaint was likely to be prejudicial, there was other material evidence upon which the jury acted, so, given the strength of the Crown's case the Court should consider ordering a retrial. Counsel for the appellant on the other hand, argued that the offence was committed in October of 2000 and the trial commenced in 2001. He submitted that the justice of the case would not be served if the matter were returned for a retrial to take place some four years after arrest.

We gave very anxious consideration to the submissions made by counsel and in the end we agreed with the submissions made by Mr. Reece. For the reasons we have given, we allowed the appeal, quashed the conviction and set aside the sentence. We considered that the interests of justice would be best served if we declined to order a retrial and we did so. We therefore entered a verdict of acquittal.