JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 118/95

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA vs. ERVELL PHILLIPS

Lawrence Haynes for the applicant

Miss Paula Llewellyn and Janice Gaynor for the Crown

October 22 and December 20, 1996

BINGHAM, J.A.:

The applicant was tried and convicted in the St. Thomas Circuit Court held at Morant Bay before Ellis, J. and a jury of non-capital murder arising out of the death of one Arlene Orridge and sentenced to imprisonment for life at hard labour. The learned judge, in exercise of his discretion, did not specify any period of imprisonment to be served before the applicant became eligible for parole.

Before us, after hearing the arguments from counsel for the applicant, we did not consider it necessary to call upon the Crown to respond to the submissions made. We refused the application. We promised then to reduce our reasons for doing so into writing and this we now do.

The facts out of which the charge of murder arose resulted from the fatal shooting of the applicant's common-law wife at Whitehall District in St. Thomas on Sunday 6th March, 1994, shortly after mid-day.

The deceased and the applicant enjoyed a common-law relationship which lasted over several years and produced two children, the elder Mouricia, aged 8 years, and the younger Raymond. At the time of her death the deceased and the applicant were experiencing domestic problems.

On Saturday 5th March the applicant came looking for the deceased in the evening hours and his enquiries then were directed to the deceased's sister, Diane Orridge, at her home. She was aware of the domestic situation between the couple as the deceased had visited her earlier that day at her home crying and after remaining there for a while had left to visit her mother at the family home. In response to the applicant's enquiries, Diane had told him that she had not seen the deceased. He then left.

The following day, 6th March, the applicant went to the Orridge's family home around mid-day. He called out to the deceased. Her sister Moleisha heard his call and summoned the deceased who responded by walking out to the gate where the applicant was seen standing. He had her brother's bicycle with him which he leaned up by the gate. The two children had accompanied the deceased outside to meet their father. The applicant was seen by Moleisha, as she stood on the verandah, to hold onto the deceased's hand and to lead her from the gate out into the road, and out of her sight.

The eight year old daughter Mouricia testified that the applicant drew her mother off the bank into the road. He gave her brother and herself money to buy "cheese trix" at the shop to take to school. They left their parents on the road standing up and talking. On their return the change from the purchase was handed to the deceased by Mouricia and the children returned to the house leaving the deceased and the appellant still talking. They were playing by the side of the house.

Moleisha, who was cleaning the house, about half an hour after the deceased had left with the children to meet the applicant by the gate, heard three explosions which sounded like gunshots. Moleisha sent the two children to where the deceased and the applicant were last seen standing in the road. After this she called out to her father who was inside the house. They all then went down to the gate. The bicycle which the applicant had taken to the gate was still leaning there. The deceased was seen lying motionless in the road about a chain from the gate. The applicant was no where to be seen.

Following a report made to the police, Detective Inspector Michael Ellis of the Morant Bay C.I.B. visited the scene and viewed the body of the deceased. He observed what appeared to be recent gunshot injuries to the head. He commenced investigations into the killing. A warrant was taken out for the arrest of the appellant.

Over a period of three months after the incident extensive searches were made by the police aimed at locating the applicant without any success. On 15th June, 1994, an attorney-at-law escorted him to the Morant Bay Police

Station where he was handed over. Upon being arrested for murder and cautioned, he said, "Me nuh know nothing about it. I was not there."

The applicant made an unsworn statement in his defence. In this statement he told of farming in the hills spending several weeks at a time in that area. The deceased and himself had a harmonious relationship. She was accustomed to visit her family home at Whitehall on weekends. He visited her at that home on the day of the incident. He gave her money for the support of the children and then left for his farm where he spent a couple of weeks. When he returned to his home he heard that Arlene (deceased) had died and that the police had come there enquiring for him. The police had fired shots at him on one occasion and this caused him to stay away from his home through fear. While admitting visiting the deceased and their children at the Orridge family home on the day of the killing he denied being at the scene at the time that the deceased was shot.

Given the accounts related by the deceased's sister Moleisha and Diane Orridge and her daughter Mouricia Phillips, the Crown presented a strong case of circumstantial evidence pointing to the guilt of the applicant. On the case presented by the prosecution there was evidence going towards establishing a motive, opportunity and subsequent conduct on the applicant's part for the shooting of the deceased. This could be inferred from:

> 1. Motive - the evidence of Diane Orridge that she saw the deceased on the day before the deceased met her death at her home in the evening hours crying. She then left for her mother's home at Cluny. Diane later told the applicant that she had not seen the deceased. This she did because she

> was aware that they were having domestic problems.
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> 2. Opportunity - the evidence of the applicant's presence at the scene of the killing talking to the deceased up to a short time before the gunshot explosions were heard and the deceased seen lying on the road about a chain from the gate of Orridge's residence.
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> 3. Subsequent conduct - the applicant's unannounced departure from the scene leaving behind the bicycle which he had taken there. Then his long absence for several months in which NO enquiries were made about even his own children.

In the face of this evidence, learned counsel for the applicant sought to argue two grounds of appeal. These were as follow:

> "1. That there was no evidence or no sufficient evidence to connect the accused to the offence of murder and consequently the learned trial judge was wrong in law in sending the case to the jury at the close of the case for the prosecution.
>
> 2. The learned trial judge was one-sided and unfair in his treatment of the evidence and misdirected the jury as to the nature purport and effect of circumstantial evidence."

Ground 1

In support of this ground, he submitted that the learned trial judge ought to have acceded to the no-case submission made on behalf of the applicant at the end of the prosecution's case. This was because of the state of the evidence adduced which sought to establish his presence at the scene of the crime when the gunshot explosions were heard. The applicant was last seen by the deceased's sister Moleisha talking to the deceased about thirty minutes

before the sound of the gunshot explosions were heard and the deceased was seen lying motionless on the road with gunshot injuries. He contended that for the learned judge to arrive at a prima facie inference of guilt in such circumstances would be to take a leap forward.

This argument, in our judgment, failed to take into consideration the evidence of the witness Mouricia Phillips, the daughter of the applicant and the deceased, who saw them on at least two subsequent occasions to Moleisha Orridge. The first being when with her brother Raymond she accompanied the deceased to the gate of the family home to meet the applicant around midday on the day of the incident. They remained in their presence for a while until the applicant gave Mouricia money to buy "cheese trix" for her lunch at school. They then left for the shop. The second occasion being when Mouricia returned with her purchase and handed the change to the deceased before leaving the deceased and the applicant still together in the road.

This evidence, if accepted, would bridge the period testified to by Moleisha as half an hour between the time the applicant and the deceased were seen together and the time when the gunshot explosions were heard. In such circumstances, the only reasonable inference would be that the deceased was shot by the applicant.

Accordingly, we found no merit in this ground which fails.

Ground 2

Learned counsel for the applicant submitted that the jury were wrongly directed on the question of inferences. Our attention was drawn to the manner in which the learned trial judge dealt with the bicycle left at the deceased's family home by the gate as evidence going towards supporting the applicant's subsequent conduct following the shooting incident. He also submitted that the learned trial judge in his directions failed to point out and explain to the jury that the applicant's departure from the scene could equally be explained by him leaving to go back to his farm as was his practice for long periods at a time.

The substance of the complaint on this ground was that the directions of the learned judge were not sufficient to alert the jury's attention to the critical issue of fact which was the presence of the applicant at the scene at the time of the shooting.

In our judgment, the complaint raised here has already been fully dealt with in ground 1 as the issue as to the presence of the applicant at the time of the shooting would have been established on the premise that the jury having accepted the testimony of the witnesses Moleisha Orridge and Mouricia Phillips on any rational hypothesis it was reasonable to infer that the deceased was shot and killed by the person in whose company she was last seen; moments before the gunshot explosions were heard, namely, the applicant.

Given the strong case mounted against the applicant by the prosecution in support of the charge of murder, it may be convenient at this stage to look at

the directions given to the jury which, if correct, would not provide any proper basis on which this court could interfere with the verdict reached in the matter.

Having carefully examined the summing-up, we do not agree with counsel for the applicant that the directions were "one sided and unfair" and that the jury were deprived of any assistance on how to consider circumstantial evidence. In support we would refer to a few examples in important areas of the summing-up commencing at page 10 of the transcript. Here the learned judge said:

> "The prosecution relies on what we call circumstantial evidence. It is not eye-see evidence at all. And why the prosecution has to rely on circumstantial evidence is that this is a case where you are not finding anybody who will come up there and say, 'Yes, I saw the accused person or the person shoot the deceased.' The prosecution is putting a series of circumstances to you and asking you to draw the inference from those circumstances. And the circumstances that the prosecution have put before you, you will hear when we review the evidence of the witnesses, but just let me give you some assistance as to the nature of circumstantial evidence.
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> Circumstantial evidence operates in this way, members of the jury. You look at all the circumstances that have been placed before you and you find such a series or a collection of undesigned and unexpected happenings and that these happenings to you, the twelve persons there, as reasonable persons condition your mind that your judgment is propelled in one direction only and your thoughts are propelled to one conclusion only and that judgment or conclusion must be the guilt of the accused person.
>
> If the circumstances, when you look at them, the series of happenings do not so propel your judgment

> "to one conclusion of guilt, it is not good circumstantial evidence and it does not avail the prosecution.
>
> And not only, members of the jury, must the conclusion that you draw from the circumstances point to one conclusion of guilt alone but it must be of such a nature that that conclusion is inconsistent with any other rational conclusion."

Having explained the distinction between direct and circumstantial evidence pointing out the advantages and disadvantages of each, the learned judge then set out the various headings under which he proposed to deal with the legal questions that arose for consideration in relating the law to the facts, having regard to the evidence in the case. He then continued his directions in this manner (page 12):

> "For circumstantial evidence to be proven there must be three things, one, the opportunity that a person had to do something. Secondly, the motive for doing that something and thirdly, subsequent behaviour after the thing has happened. Three things: the opportunity, the motive and subsequent behaviour. In a criminal case the prosecution is not obliged to prove a motive - not obliged. But as judges of the facts you can see from circumstances what are they. If they had to give you a motive, when we review the evidence I will put to you the opportunity, the motive and the subsequent behaviour and you will see from that whether the prosecution is correct that that is circumstantial evidence."

The learned judge then explained to the jury that it was their function in assessing the evidence to determine whether the facts relied on by the prosecution in each of the two critical areas of opportunity to commit the crime

of murder and subsequent behaviour that they were satisfied that the case, as presented by the prosecution, had attained the standard of proof required.

The defence of alibi was raised in the unsworn statement of the applicant by virtue of the words "I wasn't there". These words in the context in which they were used by the applicant, was in essence saying, "I was not present at the time of the shooting and killing of the deceased." The jury were properly directed that by this statement the applicant assumed no burden of proving his innocence; that it was for the prosecution to establish his guilt, this would result if they came to the conclusion that the only reasonable inference that could be drawn was that the applicant was the person who shot the deceased.

Learned counsel for the applicant argued as a specific ground of complaint that the directions given when looked at as a whole tended to be unbalanced, one-sided and this moreso in favour of the prosecution than the defence. In our judgment, the summing-up is far from this being biased. The learned judge gave directions on visual identification. There was a challenge made by counsel for the applicant to the testimony of the prosecution witnesses Moleisha Orridge and Mouricia Phillips as to his presence in the vicinity of the Orridge's home on 6th March around midday talking to the deceased prior to the shooting. These questions were aimed at suggesting to the jury that the applicant, given the alibi defence raised later in his unsworn statement, was not at the crime scene on the day of the shooting. When he gave his unsworn statement, however, he remarked that:

> "I went to visit her (referring to the deceased) on 6th March, 1994."

a statement which placed him at the locus around the material time thus rendering the learned judge's directions on visual identification unnecessary in the light of the applicant's admitted presence there.

Conclusion

This was a very strong case of circumstantial evidence in which at midday the deceased and the applicant were seen by at least three persons one of whom was his own daughter conversing together: and following three explosions - identified as gunshots - the deceased was found lying dead with bullet wounds to her head, at the very spot where she had earlier been seen talking with the applicant. He having left the scene, remained incommunicado even to his own children for several months until he was escorted to the Morant Bay Police Station and handed over by an attorney-at-law in June 1994.

His unsworn statement represented a bare denial: "I was not there", which although there was no burden on him to prove anything, left for the jury a serious issue of fact to be determined having regard to the applicant's presence at the scene at the time of the shooting. It is abundantly clear that having determined that fact in the affirmative the jury correctly inferred that the applicant was the perpetrator of the killing.

The case was one which on the evidence adduced by the prosecution established a combination of facts which, when examined on any rational basis, pointed in one direction only, that being the guilt of the applicant.

Having carefully examined the summing-up we are satisfied that not only was there ample evidence upon which the jury could have come to the conclusion they did , but that they were given proper assistance by the learned trial judge as to how they were to approach their task. In the result, the verdict arrived at was inevitable.

It was for these reasons that at the end of the arguments advanced by counsel for the appellant we came to the decision as is set out hereinbefore.