JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 142/91

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

REGINA

VS.

ELVIS McKENZIE

Berthan Macaulay Q.C., Wentworth Charles and
Miss Portia Nicholson for the Applicant

Dr. Diana Harrison for the Crown

March 14, 15, 16 and May 24, 1994

RATTRAY P.:

On the 16th December, 1991 in the St. Catherine Circuit Court the applicant Elvis McKenzie was convicted of the charge of having murdered Carlisa Ann-Marie Davidson and sentenced to suffer death in the manner authorised by law.

For an eye-witness account of the events the Crown relied upon the evidence of Mrs. Anieta King, a neighbour of the deceased in the community of March Pen Road, Spanish Town. The facts as elicited were that the deceased and the accused lived together in a commonlaw relationship and had two children who also resided with them. Mrs. King asserted that the two children were not present when the incident took place.

On the 29th July, 1990 at approximately 3 p.m. Mrs. King was at her home which is across the lane from the house in which the deceased and the applicant lived. She heard the deceased whom she called Cherry "bawling in the house for help". The deceased ran out of the house and called to her saying: "Lord Auntie Minnie, help mi nuh. You nuh see Tony a go kill mi". The applicant is called by the name Tony. She asked the applicant why he was beating Cherry. The applicant threatened to "lick" her down with a stone, using certain expletives. She went into the house and came out with a "bill" which is a machete and told him if he did not stop beating Cherry she would call the police. He treated this threat with disdain. The deceased told her that whenever she went to visit her family and returned home the applicant would beat her. In colourful language the applicant told the deceased what he would do to her if she did not "find a place to go today". The applicant then went into the house and brought out a white plastic bottle and a box of matches. He threw a liquid from the bottle on the deceased and struck a match and lit the deceased afire. The deceased rolled on the ground whilst the applicant kicked her. The witness called out for help and a crowd came down to the scene. They helped to tear the clothing off the deceased and took her to hospital. The witness was so frightened that she immediately had an attack of epilepsy. It was on the next day that she was well enough to make a report to the police.

It was suggested to the witness in cross-examination that the children of the applicant and the deceased were present when the incident occurred, but the witness strongly denied this. She rebutted a suggestion that she never got on well with the applicant maintaining that he "is man that born and grow in mi hand". She denied that she was unable to see what was going on because of a fence.

The medical evidence established that the deceased died on the 15th of August as a result of extensive second degree burns which resulted in complications of bronchial pneumonia and loss of fluid from the burn areas.

The applicant gave evidence on his own behalf. On the date in question he said he was at home with his commonlaw wife the deceased, and their two daughters Diedre and Abigail. The deceased had prepared carrot juice for him but there was no ice in it. She said she had sent Diedre to buy the ice and he remonstrated with her for so doing because Diedre was only six years old. They quarrelled and he pushed her in her stomach and slapped her. She began cursing and he went to sit behind a shop which is in the yard. While there he heard their daughters Diedre and Abigail crying out, "mummy! mummy!" Abigail was four years old at that time. He went around and saw the deceased on fire running out of the house. She took up a bucket of water and threw it on herself. The applicant said to her, "Carlisa why yuh burn up yourself?" but she did not respond. He went outside the road and saw a friend's motor vehicle, placed her in it and drove her to the hospital. The applicant was maintaining that the deceased set herself on fire. When he gave evidence in reply to his Counsel he said:

> "A: I was the one, Mr. Brown, who visit her three times per day. On that said Sunday, the reason why she told the doctor that is she allegedly set herself on fire. She told the doctors them that.
>
> Q: You were not there at that time?
>
> A: At the hospital?
>
> Q: The rules of evidence say that if you were not privy of certain things, you were not there when certain things were said you cannot repeat it.
>
> A: Please, Mr. Brown, I was there, Mr. Brown, when she told the doctor them, she said is she set herself ablaze.

" Q: You cannot give that evidence Mr. McKenzie.

WITNESS: But I hope my Lord will look into that.

And later when asked:

"Q: Did you pick up a stone in your hand?

A: No sir, no, sir. No, Mr. Brown because is Cherry did told the doctor that she burn up herself, Mr. Brown".

When he was being cross-examined by Counsel for the Crown he was asked:

"Q: And then you say you pushed her in the - how you push her?

A: A little dress back push.

Q: And you go around the shop to cool-out. And then you heard suddenly, mummy, mummy?

A: Yes, miss, because I have Diedre as evidence to speak.

Q: You have Diedre as your evidence?

A: Yes, miss".

And later in the cross-examination:

"Q: And yet Miss Minni - you have heard Miss Minnie say you were the one she saw, Carlissa, Cherry on fire?

A: It is an untruth and I can prove it miss, it is untruth Miss Minnie telling on mi, because the doctor down by the hospital - Carlissa allegedly set herself ablaze too report ...

Q: Mr. McKenzie, you and you only set Miss Davidson on fire.

A: No, miss".

The applicant called a witness Dr. Paul Brown who attended to the deceased as a patient at the Spanish Town Hospital. He described the burns found on the deceased. On the 27th November he wrote a letter to the Resident Magistrate's Court. The letter was read and is as follows:

"Dear Sir:

Re : Carlissa Davidson

This patient was admitted to the Spanish Town Hospital on July 29, 1990, having allegedly set herself on fire earlier that day.

She received flame burns to both upper limbs, trunk, thighs, along with other areas of her back. She was treated with analgesic antibiotics and IV fluids for resuscitation. Her wounds were cleaned and dressed.

She made gradual improvement over ensuing days. However, she had a low grade pyrexia. On August 15, 1990, she died suddenly and unexpected.

Yours sincerely,

Dr. Brown".

He stated that the injuries could be consistent with a person burning herself. He saw her on the day after admission and she had received medical treatment prior to his seeing her. He was asked in cross-examination by Counsel for the Crown:

"Q: This document doctor, exhibit 1, that you read to the jury, allegedly setting herself on fire ...

A: Yes.

Q: This was not communicated to you?

A: No, not from the patient".

It is to be noted that the applicant several times used the language of Dr. Brown's letter that the deceased allegedly set herself on fire. No witness was called to say that the deceased had said to any doctor on admission or at any time that she had set herself on fire. Although the applicant later said he was there when she said so this was only after it was made clear to him that he could not give hearsay evidence.

This then was the evidence which had to be considered by the jury which after due deliberation returned a verdict of guilty of murder. There is no challenge to the judge's summing-up to the jury of the case. There is no allegation that a reasonable jury thus appropriately directed could not have properly arrived at the verdict. Instead the challenge is on the ground that one Det. Sgt. Carlito Porter whose name was on the back of the indictment was not called by the prosecution at the trial to give evidence and that the failure of the prosecution to do so or to tender him for cross-examination or to supply his statement to the defence deprived the applicant of a fair trial and resulted in a miscarriage of justice.

It was further urged that the prosecution failed to give statements of two witnesses to wit the two children of the applicant and the deceased Diedre and Abbey McKenzie which were taken by Det. Sgt. Porter and which the prosecution had in their possession, to the defence, that the statements were favourable to the defence and that the prosecution's failure amounted to a contravention of Section 20(6)(b) of the Constitution which provides that adequate facilities shall be given to a person charged with a crime for the preparation of his defence.

On the application of Counsel for the applicant we ordered the production of the deposition of Det. Sgt. Carlito Porter taken at the Preliminary Examination and the statements of Diedre and Abbey McKenzie given to the police to allow us the opportunity of appreciating fully the contentions of the applicant.

At the Preliminary Examination Det. Sgt. Porter deponed in his evidence-in-chief of his execution of the warrant charging the applicant with the offence, and the denial by the applicant on being cautioned of knowing how the deceased was burnt as well as the arrest of the applicant by the defendant for the offence of murder.

On cross-examination by Counsel for the applicant Det. Sgt. Porter deponed as follows:

> "I took statements from three eye witnesses in this matter. Their names are Aneita King, and the two daughters of the accused. During the course of my investigations I spoke with Dr. Paul Brown. I did not collect a Medical Certificate from Dr. Paul Brown in relation to the deceased. I did collect a letter from Dr. Paul Brown which I handed to the Clerk of Courts in this matter. This letter was received from Dr. Paul Brown about six months after the deceased death. I can't recall when I took the statements from the accused two daughters".

And then to the Court he said:

> "The ages of the accused daughters are six and eight years respectively".

The statement which Det. Sgt. Porter took from Abbey McKenzie was as follows:

> "I am four years old. I attended Miss Brown's Basic School. My father's name is Elvis McKenzie and my mother's name is Cherry. I have one sister her name is Daedre.
>
> On Sunday the 29th of July, 1990 during the day I was inside mummy shop when I heard daddy and mummy quarrelling. Daddy told mummy to go to her 'stinking mumma house'.
>
> Mummy was inside the old house. Daddy left the yard and went down to 'Mammy'. Mammy and daddy are friends.
>
> I saw when mummy pour kerosene oil on herself then she light the matches and put it on her frock tail. Mummy frock caught fire and she ran outside into the yard into the lane.
>
> Mummy was wrapped up into a curtain and taken to the hospital. My mummy is dead.

X

WITNESS: ANGELLA HENRY
140 Line Tree Grove.

"Taken by me at the Spanish Town Police Station this 18.1.91 about 10 a.m. The witness was unable to sign her name hence she make her mark which was witnessed.

CARLITO PORTER D/SGT #3206
18.1.91. "

The statement taken from Diedre McKenzie was as follows:

"I am six (6) years old I attend the Spanish Town Primary School. My mother's name is Cherry McKenzie and my father's name is Daddy McKenzie - Elvis.

On Sunday the 29th July 1990 I was inside mummy's shop when I heard mummy and daddy quarrelling. Daddy came in and did not get his food and he started to quarrel with mummy.

I saw when mummy pour kerosene oil on herself and then she light the matches and light her frock tail. Mummy then ran outside the house into the lane. I saw her frock burning. Mummy used a bucket of water to duck herself. Mummy dress then stop burning.

Mummy was wrap up and taken to the hospital by in a vehicle. My mother is dead.

X
ANGELLA HENRY
140 Lime Tree Grove.

Taken by me at the Spanish Town Police Station this 18th day of January 1990 about 10:00 a.m. The witness was unable to sign her name hence she make her mark which was witnessed.

CARLITO PORTER D/SGT #3206
18.1.91. "

It is to be noted that the statements were taken on the 18th of January, 1991 approximately 5½ months after the incident.

The gravamen of the submission of Mr. Berthan Macaulay Q.C. representing the applicant was that:

> The statements of the two children were inconsistent with the Crown's case in that:
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> (i) the Crown's case was that the children were not present; and
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> (ii) that it was the applicant who set the deceased on fire.

Mr. Macaulay contended that the statements were consistent with the defence as to both the presence of the two children as well as to the setting on fire of the deceased by her own act. The applicant was therefore denied a fair chance of acquittal. Mr. Macaulay further submitted that if the prosecution had called Det. Sgt. Porter he would have been cross-examined as to the circumstances in which he took the statements and in which he elicited the answers from the children. It was, Counsel maintained, the duty of the Crown to make the witness available to the defence.

In the examination-in-chief already cited Mrs. King the prosecution's witness had stated that the children were not present. In cross-examination by defence Counsel the suggestion was made that the children were present and she steadfastly maintained that they were not.

In cross-examination by Counsel for the Crown the applicant had clearly stated that: "I have Diedre as evidence to speak". The applicant therefore was stating on oath that Diedre was one of his witnesses upon whom he would rely to rebut the evidence of the prosecution on the facts. She was available to him as a witness and would give evidence on his behalf. Diedre was six years old when she gave her statement in January 1991 and Abbey was four years old. They both were unable to sign their names and had to have their statements witnessed by a mark. In the application for the production of the statement to the Court of Appeal, which was not objected to by Dr. Harrison representing the Crown there was no allegation of prosecutorial misconduct at the trial. No affidavit was filed stating that any request had been made of the prosecution

either before or during the trial, for the statements to be shown to them and that such a request had been refused. Neither did Mr. Macaulay who was not the Counsel appearing at the trial allege this. Indeed this request would be surprising in view of the fact that the applicant was saying that he was calling Diedre as a witness.

Counsel for the Crown in examining the statements would have had to determine whether or not these witnesses of very tender years unable to read and write and giving a statement five and a half months after the incident for which their father had been arrested and charged with murder of their mother could be regarded as credible witnesses. Their names also did not appear on the indictment. The applicant and his legal representatives were aware that Det. Sgt. Porter whose name was on the indictment had taken statements fron the two daughters of the applicant and the deceased as he had deponed to this at the Preliminary Examination under cross-examination by Mr. Brown of Counsel who appeared for the applicant there as well as at the subsequent trial at the Circuit Court. With respect to the complaint that the Crown did not call Det. Sgt. Porter or offer him to the defence, Crown Counsel had stated in Court: "My Lord the other witness we have the officer. He has not shown, we could do without him".

Counsel for the applicant was therefore aware that the Crown was not calling the witness whose evidence really was formal evidence of the arrest of the applicant. His cross-examination at the Preliminary Examination had revealed the statements taken from the children, but he could not in any event, if called, give evidence as to the contents of those statements.

Lord Denning, M.R. in Dallison v. Caffery [1965] 1 Q.B. 348 at p. 369 stated the duty of prosecuting Counsel in this regard as follows:

> "The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings, gave the solicitor for the defence the statement of Mr. and Mrs. Stamp; and thereby he did his duty".

The defence was aware of the existence of these two witnesses, the children, and that they had given statements to Det. Sgt. Porter. The applicant had stated at the trial his intention to call the six year old daughter Diedre as his witness. The names of the children were not on the indictment, thus it was clear that the prosecution did not intend to call them. The failure to call Diedre by defence Counsel must have been as a result of a decision taken by the defence itself. The defence has not maintained that it requested to see the statements and that the request was refused.

It would indeed be inconceivable in all the circumstances that Counsel representing the applicant at the Preliminary Examination and at the trial did not have a copy of the statements of the two infants. It must be presumed that having failed to call Diedre as a witness for the defence as was intimated he must have acted on proper instructions and an informed assessment of the credibility of the two infants. We therefore cannot accept the bold assertion of Counsel that the prosecution failed to provide the defence with the statements.

The question to be determined relates to whether or not in all the circumstances the prosecution acted unfairly to the prejudice of the applicant. There has been nothing brought to our attention which could lead us to this conclusion. We found the reference by Mr. Macaulay Q.C. to Berry v. The Queen [1992] 3 W.L.R. 153 and the cases cited therein unhelpful in that what was being considered by the Privy Council in Berry was the duty of the Crown when the statement taken by the police is materially at variance with the maker's evidence in Court.

Counsel for the applicant submitted further that the failure to provide copies of the statements to the defence was in contravention of the fundamental rights of the applicant under Section 20 subsection 6(b) of the Constitution which reads as follows:

> "(6) Every person who is charged with a criminal offence ...
>
> (b) shall be given adequate time and facilities for the preparation for his defence".

In our view the giving of "facilities for the preparation for his defence" cannot relate to a situation where what is being sought is a statement of a person taken by the police not requested at the trial and such person not having been called to give evidence at the trial. Our view is buttressed by the fact that it was to the knowledge of the defence that the statements had been taken and the applicant had said in evidence that Diedre who made one of the statements was giving evidence on his behalf. In Berry v. The Queen (supra) Lord Lowry delivered the judgment of the Privy Council citing with approval what was said by Shelly J.A. in his judgment in R. v. Barrett (1970) 12 J.L.R. 179 at p. 180 as follows:

> "The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as minister of justice whose prime concern is its fair and impartial administration".

In our view it cannot be said that the failure to provide the defence with statements in the possession of the prosecution in this case is, without the establishment of any request, a failure to give a person charged with a criminal offence adequate facilities for the preparation of his defence and as such a breach of the provisions in Section 20(6)(b) of the Jamaica Constitution.

In view of the foregoing we treated the application for leave to appeal as the hearing of the appeal and we dismissed the appeal. We classified the offence as non-capital murder under the provisions of the Offences against the Person (Amendment) Act 1992 and ordered that the applicant be not eligible for parole until he had served a period of fifteen (15) years imprisonment.