JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 93/95

COR: THE HON. MR. JUSTICE CAREY, J A
THE HON. MR. JUSTICE WOLFE, J A
THE HON. MR. JUSTICE PATTERSON J A

REGINA

VS

RUFUS DUNCAN

Dennis Daly Q C for applicant

Miss Audrey Clarke & Miss Linda Wright for Crown

22nd & 31st July, 1996

CAREY, J A

After a trial which began on June 14 and ended on June 21, 1995 before Pitter J and a jury in the Manchester Circuit Court, the applicant was convicted of non-capital murder. The allegation was that the applicant hit his wife fatally in her head, probably with a stick, then placed her in the bath in a nude state and reported that she had fallen in the bath.

The conviction of the applicant was founded on circumstantial evidence which the jury accepted as pointing in one direction and one direction only. There was evidence led showing that the applicant and his wife did not enjoy a happy relationship, there were frequent quarrels, often noisy enough to be heard by neighbours. A school-

boy Kevin Mornan said that they occupied separate bedrooms and he confirmed the fact of quarrels. The slain woman's sister Delores Morgan asserted that they never got on and did not occupy the same bedroom. She also taxed him with a report made to her by her sister accusing him of having kicked her. His response was to curse her when she remonstrated with him. She took her injured sister to find medical assistance and to make a report to the police. A police officer Corporal Alwyn Brown spoke of an occasion in June 1994 when he visited the applicant at his home to warn him of the consequences of his having threatened his wife; this occurred in the presence of the applicant's wife. The applicant's retort was that his wife was mad.

On the material date, Kevin Mornan, a student who resided with the couple said there was a quarrel over some trifling matter and unusually the applicant gave him a lift to school. It was the very first time he had done so. At 10.30 a.m. when they set out, Mrs. Duncan was left alone at home. At about 1.00 to 1.10 p.m. the applicant was seen by a neighbour Ralph Henry, who waved to him but got no response. At 2.00 p.m. the same neighbour heard a motor vehicle drive out from the applicant's premises. He could not of course say positively it belonged to the applicant but assumed it to be.

The applicant visited Nickele Johnson who was carrying his child, at about 7.00 a.m. and between 11.00 a.m. and noon and finally between 5.00 p.m. and 6.00 p.m. At the two earlier visits he wore blue overalls. When he returned on the last occasion, he was dressed in a floral shirt and black pants. Another neighbour of his, Windell Lyne saw him walking in an open lot carrying a stick over his shoulder between 2.15 p.m. and 2.30 p.m. He gave details of his attire - blue overalls.

At about 6.00 p.m. Calford Lewis saw the applicant at home. He testified that between 6.30 to 7.00 p.m. the applicant raised an alarm, calling out for Ralph Henry, and reporting that his wife was dead. Henry refused to go over, but Lewis did. He

found Mrs. Duncan lying nude in the bath with the shower running. The police were summoned. Detective Constable Solan confirmed the condition of the body and noticed that a number of bottles of cosmetics in a small area on top of the bath tub appeared undisturbed, that the victim was wearing jewellery on her arm including a wrist watch with a leather band and ear-rings. There was no sign of breaking, or any struggle. He observed a wound at the back of the deceased's head. The bath had no sharp edges. There was evidence from the victim's sister that her sister was not in the habit of wearing jewellery when she took a bath.

A forensic officer, Miss Sharon Brydson examined the house. She saw no signs of breaking in but found blood in the master bed-room and on a table near the door. She detected sero-sanguineous stains on the top of the dressing table, and on the floor between that room and the back room, and brown smudges of blood on a chair against the wall. There were also sero-sanguineous stains on the floor mat and floor of the bathroom, the wash basin and on the counter of the wash basin. She gave as her opinion that an attempt had been made to remove the blood from the floor, the basin and the counter. The sero-sanguineous stains were not detectable by the naked eye but by chemical means. The blood was human but she was not able to group the sero-sanguineous stains she detected.

The overalls which the applicant wore on the day in question were tested and found to have traces of human blood. The deceased's trousers which she was last seen wearing were found to have traces of human blood throughout. Traces of human blood were found throughout the blouse which the deceased was last seen wearing on the material date. A worn soiled pink night gown was found to have brown stains on the back and traces of human blood throughout. All these articles of clothing were recovered from the washing machine in the house. The inference which the jury were

asked to draw was that this was an effort to remove evidence of blood from some garments, but the blood had permeated all the articles. The human blood was classified as type group O in which group the victim fell.

Pathological evidence regarding the victim disclosed that she did not suffer from any heart condition, a fact confirmed by her own doctors Dr. Foote and Dr. Bedassie. There was a wound at the back of the head, inflicted possibly by a piece of wood. The Doctor's opinion was that death was due to blunt force to the head. He did not think that the injury could have been caused by falling in a smooth tub. He placed the time of death at about 11:30 a.m. on the 19th October, 1994.

The applicant gave as the cause of his wife's death that she had fallen in the bath tub and had been suffering from dizzy spells (told to Cecil Bailey) or giddiness and heart problem (told to Detective Warmington).

The defence was a denial. His wife suffered from a heart murmur and had consulted Dr. Foote. He admitted having a stick which he had cut to hoist a clothes line but said he had it in the morning. He denied quarrels. He called a witness.

The circumstantial evidence against this applicant was strong. There was opportunity, suspicious circumstances, for example the condition of the body in the bath with jewellery including a watch with a leather band, the clothes in the washing machine, the pathological evidence as to the nature of the wound and the unlikelihood of the injury being caused in the way suggested by the applicant himself, and the presence of blood in her bedroom and floor, on the garments which both wore on the relevant date, the bad relationship which he denied, and the possession of the stick. In our view, that evidence entitled the jury to return a verdict adverse to the applicant.

Mr. Dennis Daly, Q.C. argued two of the six grounds of appeal which he filed and one was abandoned, viz ground 6. He sought to have the application for leave

adjourned to enable him to obtain a full transcript. We were of the view that having regard to the fact that all the grounds sought to impugn the directions of the learned trial judge, an adjournment for the reason given was misconceived.

Ground 1:

> "1(a) That the learned trial judge erred in law, and to the prejudice of the accused in permitting evidence to be led by the prosecution that in June 1994 the deceased had reported to her sister that the deceased had kicked her in her left breast and had taken up a brick to hit her (pp. 15 & 16) such evidence being inadmissible as irrelevant, prejudicial and hearsay.
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> (b) Further that the learned trial judge's directions to the jury (i) that they should use their common sense to see if the deceased's sister would be expected to like someone who was ill-treating the deceased (p. 16) and (ii) that they ask themselves how she would know about 'ginseng' if the deceased hadn't told her, that the accused had kicked her (p. 50), were highly prejudicial to the defence in assuming the truth of the deceased's sister's evidence and even further, the truth of the report she had received.
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> (c) Alternatively and/or additionally the learned trial judge to the prejudice of the defence failed to direct the jury that what Mrs. Morgan alleged she was told by the deceased as well as what Corporal Brown was told (p. 10) was not evidence of the truth of the contents of the statements that the accused had kicked the deceased and threatened to kill her."

With respect to the question of the admissibility of the evidence alluded to in ground 1(a), it is to be noted that the report of the sister as to the applicant's conduct, was made to him. His response to her was that her family was no good and he was not leaving the house as he was invited to do by the victim's sister. At the time she was upbraiding the applicant, her sister was holding her breast, and her clothes and hands were dirty. That evidence, as a matter of law, was admissible to show his reaction to the report which was capable of confirming the truth of the report. The authority for this

proposition is ***R. v. Christie*** [1914] A.C. 545. The headnote so far as is material is set out hereunder:

> "There is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement; but where the accused denies the truth of the statement the presiding judge, in the absence of special circumstances, should intimate to counsel for the prosecution that, inasmuch as the evidence, though admissible, would have little value and might unfairly prejudice the jury against the accused, it ought not to be admitted.
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> The respondent was convicted of an indecent assault upon a little boy. At the trial the boy's mother stated in evidence that, as she and her son came up to the respondent shortly after the act complained of, the little boy said in the respondent's hearing 'That is the man' and described what the respondent did to him, and that the respondent replied 'I am innocent.' The Court of Criminal Appeal quashed the conviction upon the authority of ***Rex v. Norton*** [1910] 2 K. B. 496, on the ground that evidence of a statement made in the presence of the accused was not admissible against him unless he acknowledged the truth of the statement:
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> *Held*, that the evidence was admissible in law in reference to the demeanour of the respondent..."

In the light of that decision, which still has force and effect, we cannot agree that the evidence was inadmissible.

We confess that it is not altogether clear wherein lies the prejudice to the applicant. We have already indicated that the notion put forward by Mr. Daly, Q.C. that the evidence of the report was inadmissible, is unfounded. We must therefore assume that the complaint relates to the comment made by the trial judge. Assuming that is the position, it should be pointed out that the applicant gave evidence in the case in which he was saying that there were minor quarrels between his wife and himself but nothing

to cause concern, and that he owns packs of ginseng but it was not true that his wife had thrown away a pack and he had gone looking for it. Perhaps we should set out how this matter arose (pages 49-50):

> "...but says he owns several packs of ginseng. He doesn't know whether it has any aphrodisiac qualities and he says it isn't true that his wife threw away a pack of ginseng and he did not go looking to her for it. Now you remember this ginseng it first came up when Mrs. Morgan said the deceased had reported to her that she had thrown away the ginseng belonging to the accused. So perhaps you ask yourselves how Mrs. Morgan knows about this ginseng if his wife didn't report to her about this kicking on the breast and also the throwing away of this ginseng."

These were issues raised at the trial and which the trial judge was discussing with the jury. Since the evidence, as we have shown, is admissible, we fail to see in what way the comment was unfair or prejudicial. The facts were accurately stated and the comment in the form of queries to the jury appear to us warranted on the facts, and to arise from these issues raised at the trial.

As to the alternative ground that the trial judge did not direct the jury in the manner suggested in the ground, we have already dealt with the admissibility of the report made in the presence of the applicant by the victim's sister. The same reasoning applies to the report made to the police officer because it was done in the presence of the applicant. But further in this instance, it was the person who had been threatened who had made the report. It was evidence of the truth of the contents if the jury accepted that the police officer spoke the truth. The evidence went to prove intention to kill or cause serious bodily harm. For these reasons, we reject this ground.

Ground 2:

> "2. That the learned trial judge failed to give the jury any assistance as to the significance of evidence in relation to the chain or circumstances by which the prosecution alleged that the accused's guilt could be inferred. In particular he failed to point out to the jury the

> several instances where evidence adduced was or might be as consistent with innocence as with guilt."

The trial judge's structure of the summing-up, we fear, was not as helpful as it could have been. We think that where a case depends, as this did, entirely on circumstantial evidence, the review of the evidence should be classified under specific heads as we have adumbrated in this judgment. For example, suggested heads could be, relationship of parties under which evidence of threats, violence and the like would fall, motive, suspicious circumstances and conduct of accused. It is hardly helpful to read out the evidence of witnesses in the order in which the witnesses happened to have been called to give evidence. In that respect, complaint may justifiable be made but we do not agree that the jury were deprived of any assistance as to the significance of evidence. We will content ourselves by reference to a few instances which support our conclusion (at page 22):

> "You see, the prosecution has not got to prove motive to you, that is to say why an accused person commits an act; why as in this case as the prosecution is saying, the accused man killed the deceased, but if you find that there is motive, you can use it in assessing the evidence.
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> He said he needed something to eat and he went and had something to eat. He went in one of the rooms and stayed there for some three to four hours. He said at about 4:30 Detective Warmington came there while the accused was still there. And then he tells of the case where he was invited to a cook-out, but they didn't really go. He said he asked the accused if he was going to the post mortem and the accused man said the wife's family didn't care to see him there, so he is not going.
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> Again, you will have to consider that, if a man who says he loves his wife as he does and the wife met into this unfortunate accident, was that why he didn't want to go to the post mortem? That is a matter for you. What you make of it?"

pages 25-26:

"She (the forensic officer) says she tested the pair of navy blue overalls, and you recall this was the same overall which was tendered in evidence as the overall belonging to the accused. She says she analysed it and found traces of human blood present throughout and she said she marked it in red pencil, the areas that she -remember she held it up to show you all the areas - found blood on his overalls."

Pages 26-27:

"She says that she examined the blue denim trousers worn and soiled. It had cutwork patterns on the front and brown stain to the front and back.

There was also a sheet of white two ply paper towel in the left front pocket, and I examined the trousers and found traces of human blood present throughout. Remember this blue jeans now belonged to the deceased, because that was the blue jeans that Kevin the boarder told you that he saw her wearing that morning, the morning of the 19th.

What is the significance of this? You have to ask yourselves if she was really in that bath bathing, what would blood be doing on her jeans; and she told you, she pointed out to you the areas where she saw blood. She said the hand towel, on the hand towel there were areas of blood. She said there was a soiled pink blouse with brown stains to the front and the back and on analysis, traces of human blood present throughout.

Again Mr. Foreman and your members, if she found blood on the blouse and blood on the trousers, how did it get there? This is the same blouse she was wearing in the morning. This is the same jeans she was wearing in the morning. How did these blood stains get there, if she is supposed to be in her bath? Is it because - was it because she was struck in her bedroom whilst she was wearing these clothes? Because you will remember the doctor told you from the injury he saw, she would have bled a lot."

There are many other instances where the trial judge used words such as "so what is the importance of this bit of evidence?" In our view, the trial judge was carrying out his functions in relation to the facts, i.e. he was indicating to the jury in the light of his experience, the significance of evidence.

There is no obligation on the part of a trial judge to point out instances where evidence adduced was or might be as consistent with guilt as with innocence. The judge gave correct directions on circumstantial evidence at page 3:

> "Now, circumstantial evidence consists of this: when you look at all the surrounding circumstances, you find such a series of undesigned unexpected coincidences that as reasonable persons you find your judgment is compelled to one conclusion. All the circumstances relied on, must point in one direction and one direction only and that direction must be to the guilt of the accused. If the circumstantial evidence falls short of that standard, if it does not satisfy that standard, if it leaves gaps, then it is of no use at all. Circumstances may point to one conclusion, but if one circumstance is not consistent with guilt, it breaks the whole thing down. You may have circumstances consistent with guilt, but equally consistent with something else. That is not good enough, what you want is an array of circumstances which point only to one conclusion and to all reasonable minds that conclusion only, namely, the guilt of the accused."

The jury were enjoined to consider all the facts to see if they pointed in one direction and one direction only. Where the circumstances are not consistent with guilt necessarily there is created a gap. But the determination of the inference to be drawn from those circumstances is a matter for the jury, not the judge. We were never, however, apprised of which circumstances were as consistent with guilt as with innocence. We assume that it is meant that the inference which could be drawn from proven facts pointed in either direction. It is unrealistic in the case of circumstantial evidence to isolate the facts from their context to determine which inference to draw. It is the accumulation of inferences which will indicate in what direction the rational mind

is compelled. The facts considered in isolation one from the other may be equivocal, but placed together and viewed in context will lead the mind inexorably in a clear direction. This ground also fails.

Although learned Queen's Counsel chose not to argue the remaining grounds, we have considered them. In our view, they are not supportable.

On a review of the evidence adduced before the jury, we are satisfied that there was ample evidence on which the jury could have arrived at the verdict they did.

For all these reasons, we refused the application for leave to appeal.