JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 88/89

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

REGINA vs. JONATHAN STEWART

Dennis Daly and Nova Hall for the applicant

Robert Brown for the Crown

October 1 and 17, 1990

WRIGHT, J.A.:

On October 1, 1990, we treated the hearing of the application for leave to appeal as the hearing of the appeal. The appeal was allowed, the conviction for murder quashed, the sentence set aside and a verdict and judgment of acquittal entered. As promised then, we now put our reasons in writing.

Resulting from an alleged incestuous relationship between the appellant and nineteen year old Enid Stewart, who claims she is his daughter while the appellant contends she is his step-daughter, a baby boy was born to Enid Stewart on the 3rd day of June, 1988. The death of this child is the subject-matter of the murder charge against the appellant on which he was convicted in the St. Catherine Circuit Court on May 24, 1989, and sentenced to death.

Far from disputing the relationship and the resultant pregnancy, as well as other acts of sexual intercourse during the pregnancy, the appellant readily admitted them. Indeed,

he said he was looking forward to the birth of the child - "pretty everlasting little baby". But, whether or not he gave that account to meet the motive attributed to him for strangling the baby to death, that is not where the mischief in the whole proceedings lay.

The mother's account was that she was alone at home when she gave birth and that the baby was on the bed crying when the appellant, who had been at work, came home for lunch, entered the room where she and the baby were. Upon seeing the baby, he asked what was that and upon receiving the obvious answer he responded "A nuh fi me pickney this, him favour Drummond" (i.e. the mother's employer). The mother protested that it was his child whereupon he is alleged to have said "Better a kill it" and having so said he pushed the mother away and "squeezed the neck of the baby". Froth came from the nose and mouth of the baby. He tried to quell the mother's crying and then put the baby into a blue "scandal bag" and, before he returned to his work, he directed his son David to bury the baby but David did not obey him.

He was recalled to the home by a neighbour, Joycelyn Williams, whose daughter discovered the bag and its contents under the cellar of the house where the appellant had put it. Joycelyn Williams counselled that the baby be taken to the hospital but he countered that that would serve no purpose because it was dead already. Thereafter, he dug a hole and buried the baby near a pig-pen at the home. But before long, the Police were alerted and visited the home.

Conflict on the real issue in the case, namely, the cause of death of the child began to emerge. On the mother's account when she saw the Police approaching and informed him he said "All me have fi tell them say the baby born dead". To this, she made no response.

Her account was challenged in cross-examination. She denied the suggestion that she had told her father that she was standing when she felt the pains and that the baby dropped on the floor. However, she agreed that the appellant did bring her warm water to attend to herself. She revealed, also, that the Police did arrest her as well as the father.

Contrary to the testimony of the mother that she was at home alone, her two sisters, Ida Stewart and Yvette Stewart, testified that they were at home. Indeed, Ida's evidence was that she observed that the mother's "belly draw down"and that she looked sick. Neither of the sisters saw the baby alive.

Detective Sergeant Andrew Burrell said that after receiving a report he visited the home on June 3, 1988, and told the appellant that he was informed that his daughter had given birth to a child and that he had killed it. The appellant responded, "Nothing like that sir". The body was disinterred and replaced in its shallow grave. The appellant and the mother were both taken to the Police Station where the officer cautioned the mother and told her he did not believe her account of the baby's death, viz., that the baby was born dead, whereupon she said, "You right, sir, papa squeeze the neck and mi tell him not to do it". Cautioned and asked why he had killed the baby, the appellant is alleged to have said, "A the disgrace mi try fi cover up so me bury it. Me never kill it, it born dead".

Accordingly, at the end of the prosecution's case, the cause of death was not, by any means, a settled issue. There was no medical evidence in the case. The officer said he was unable to secure the attendance of the pathologist. Yet the body was not preserved. Some six months later, to wit, on January 5, 1989, the skeletal remains were exhumed,

but to no purpose. The critical issue apparently escaped everyone's notice and so the appellant gave sworn evidence in support of the defence adumbrated in cross-examination relating to the baby's death, namely, that the mother had told him that she was alone at home at the time of birth and that the baby had dropped on the floor where she saw it dead "by the time she to look after herself and spin around". Further, he said he had not succeeded in getting the mother to attend a pre-natal clinic. Also, he denied telling the mother to tell the Police that the baby was born dead.

The only ground of appeal argued was Ground 2, which was as follows:

> "Further or alternatively, the witness, Enid Stewart, was clearly a witness with an interest to serve by giving false evidence against the applicant and that particularly in the circumstances of this case where there was no independent evidence as to the cause of death, the Learned Trial Judge erred in failing to warn the jury of the danger of acting on her uncorroborated evidence."

The ground of appeal is self-explanatory and is supported by the decision of this Court in **R v. Lincoln Golding** (unreported) S.C.C.A. 134/83, delivered on April 21, 1986. Counsel for the Crown readily admitted that the warning contended for was desirable and had not been given.

On the evidence, the issue of the cause of death was strictly a matter of the credit of Enid Stewart, who was the only witness to testify that the baby was born alive. Impeaching her credit is the account she gave the Police, though she subsequently sought to retract it. In the end, the jury had two inconsistent accounts on this vital issue emanating from her. But there is another aspect

of the case which lends ground to the complaint. The police had charged the mother with incest as well and it is obvious that she was being rehabilitated, even if unwittingly, by the learned trial judge when, at page 72 of the record, he told the jury:

> "But remember the officer said she was arrested for incest, she was not arrested for the murder of the child, what she was arrested for was for incest and he was asked why and he said he did not think she contributed to the death of the child so, it is not a question of her coming here to tell a lie to save her skin. The officer never arrested her for murder, what he arrested her for was having sex with her father, bear that in mind." [Emphasis supplied]

It could fairly be contended that the portion underlined virtually concluded the issue against the appellant in circumstances where there was no independent proof that she had given birth to a live child. Then, too, what effect would the criminal charge preferred against her produce on her mind in dealing with the death of the child? Further, assuming that the child was born alive, it ignores the very relevant issue of post-partum trauma which the law recognises in dealing with the death of a child under the age of twelve months at the hand of or due to an omission by the mother. Section 75 of the Offences Against the Person Act states as follows:

> "75 (1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted

> "to murder, she shall be guilty of felony, to wit, of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.
>
> (2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provision of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.
>
> (3) Nothing in this section shall affect the power of the jury upon an indictment for the murder of a newly-born child to return a verdict of manslaughter, or a verdict of guilty but insane, or a verdict of concealment of birth, in pursuance of section 74.
>
> (4) ....."

The relevance of the provisions of the section to the issue under discussion is that the law recognises that there is such a factor as the balance of the mother's mind being disturbed as a consequence of parturition with tragic consequences to the new-born. The jury was left in the dark about this.

The evidence of Detective Sergeant Burrell that the appellant said he was "trying to cover disgrace" is counter-balanced by the parallel consideration that the mother could also be trying to avoid the disgrace of having to live with a child which is at once her son and brother!

The position, therefore, is that at the end of the prosecution's case the evidence was rather tenuous and,

having regard to the serious nature of the charge, ought properly to have been withdrawn from the jury. But, not having adopted that course, then the learned trial judge ought to have placed before the jury the matters which we have highlighted, in addition to giving the relevant warning to enable a proper assessment of the evidence to be made. In failing so to do he erred as complained of in the ground of appeal. Hence our decision as stated before.