Director of Public Prosecutions' Reference No 1 of 1987 (Re Levine)

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COURT OF APPEAL OF GUYANA
MASSIAH C, HARPER and BISHOP JJA
20th JULY 1987

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Criminal law – Trial – Submission of no case to answer – Defences raised by accused involving findings of fact

Following the death of the deceased, the accused voluntarily surrendered
d himself to the police. In a statement he said that the deceased had assaulted him; he had pushed the deceased away and he had fallen. The statement did not refer to the manner of the deceased's death, but the accused told the police sergeant that, when the deceased fell, he had sustained injuries. At the accused's trial, his counsel raised the issue of self-defence and submitted
e that there was no case to answer; that plea included a proposition that even if it could be inferred from the circumstances that the accused had stabbed the deceased, the prosecution had not negatived self-defence nor accident. The trial judge acceded to the defence plea and dismissed the proceedings. The Director of Public Prosecutions referred the judge's decision to the
f Court of Appeal.

Held that the trial judge ought not to have allowed the submission of "no case to answer" as the defence had raised the issues of self-defence and accident and also the prosecution had adduced sufficient and relevant
g evidence to support the charge; the jury should, accordingly, have been left to determine whether the inference emanating from the prosecution evidence provided a natural explanation of the guilty act of the accused which was destructive of other possible inferences or hypotheses.

h *The State v Alvin Mitchell* (1984) 39 WIR 185 followed.

R v Hookoomchand and Sagur [1897] LRBG 12, *State (The) v Gowkarran Persaud, Jowalla Persaud and Boodram* (1976) 24 WIR 97, and *R v Galbraith*
j [1981] 2 All ER 1060 applied.

Cases referred to in the judgments
de Freitas v R (1960) 2 WIR 523, Federal Supreme Court.
Martin v Osborne (1936) 55 CLR 367, Australia High Court.

Bishop JA. Three years ago a question, similar to the one raised now, and also requiring an examination of circumstantial evidence, was considered by this court (Massiah C, Fung-a-Fatt and Vieira JJA) in *The State v Alvin Mitchell* (1984) 39 WIR 185, by virtue of section 32A of the Court of Appeal Act. The response given then is appropriate in the instant discussion, and it is to be regretted that the wise words of Massiah C, who gave the leading judgment of the court, were not considered, at the trial of Cecil Levine, to guide the arguments and influence the trial judge's ruling. As in *Mitchell's* case, so here, the "no case" submission of defence counsel, should *not* have been upheld.

At Mitchell's trial, the evidence was that the accused, the driver of a Land Rover, professed (at 3.00 a.m.) to be in a desperate hurry to reach his destination. However, subsequent events established the antithesis of that and demanded of him an explanation, to the jury, for the death of thirty-year old Nastawantee Persaud, whose semi-nude, dead body was found some five hours later, in a clump of bushes. It suggested that she had been brutally beaten and raped. The accused had been the last person in whose company the woman had been seen alive. He had promised to get her home earlier than her two female companions, with whom she had been walking.

The three women were night-club waitresses who, at first, had all rejected the accused's offer of a lift home, but eventually the deceased reluctantly joined the vehicle in the sincere expectation of swift conveyance to her home. Her colleagues, on foot, reached home ahead of her for the simple reason that the accused drove in a direction away from her residence, as soon as he had surreptitiously sent the other passenger (a male) on a false errand into another night club. Forty-five minutes later, the accused returned without the deceased, said nothing about her, but announced to his merry colleagues that they were to drive back forthwith to the village (twelve miles away) from which he had earlier taken them that night. That they did. But in a few hours, the accused left camp for Georgetown some eighty-five miles away, where he was arrested. After he had been in custody for the greater part of three days, Mitchell claimed (for the first time) that the deceased had fallen out of his vehicle and met her death. There was no suggestion that police conduct towards him had been improprietous. Significantly he had not given that account to any of his colleagues; not even to de Florimonte, the person to whom he had spoken, when he was setting out for Georgetown. What is more, his colleagues denied the accused's further claim that he had shown them the deceased's body on the roadway, during their return journey to the village.

In spite of such an impressive array of facts, the trial judge held that there was no case for the accused to answer. Our Court of Appeal was appalled at the ruling and saw fit to review a wide range of authorities starting with *R v Hookoomchand and Sagur* [1897] LRBG 12 and ending with *R v Galbraith* [1981] 2 All ER 1060. And at page 190 of his judgment (on the reference) in *Mitchell's* case, Messiah C synthesised the precepts which a trial judge should observe, when required to rule on a "no case" submission:

accused did not explain how the deceased sustained his injuries but, according to Police Sgt David Jeenarine, to whom the accused voluntarily surrendered at the central police station, New Amsterdam, his prisoner reported that when the deceased fell, he suffered injuries.

An interesting development, brief though it was during cross-examination, was that defence counsel put to the detective constable who took the accused's statement, that the accused told him that he was attacked by the deceased, then armed with a broken bottle. The witness denied that the accused made that allegation. Counsel seemed then to be genuinely set on a course of raising *self-defence*, aimed at reinforcing what was offered by the accused, in his statement to the police. Indeed, self-defence was one of the points urged in defence counsel's eleven-point "no case" submission; *accident* was another. His penultimate proposition was that even if it could be *inferred from the circumstances* that it was the accused who stabbed the deceased, the prosecution had not negatived the defences of *self-defence* and *accident*. So that, although defence counsel sought to have the case withdrawn from the jury, his alternative defences of self-defence and accident depended on findings of fact which the jury were to make: *de Freitas v R* (1960) 2 WIR 523, *Palmer v R* (1971) 16 WIR 499 at page 510, and *The State v Lewis* (1975) 23 WIR 226 at page 236. It was for the jury to determine whether the case put forward by the State had disproved the special defences. If they were left in doubt, or could not say what the position was, *they* were to acquit the accused, since the State would have failed the test. On the other hand, if the State had successfully negotiated that hurdle, its task was not over. It had to prove to the extent that the jury were left *sure* that it was the accused and no other person who killed the deceased.

A reasonable view of the evidence should have repelled the idea that the deceased was armed, or fell on a sharp cutting-instrument held by him, or partly imbedded in the road surface, or resting on it. Once those eliminations (which should not have proved difficult to make) were made, the remaining facts and circumstances tended to suggest that since the two men were the only adversaries in close proximity to each other and the deceased was (up to the moment immediately before the engagement) without injury, even though the human eyes of the witnesses called by the State did not detect (or care to report) how the deceased received his injury, it was not difficult to deduce that the accused seemed accountable for it.

In short, the stage had been reached in the case when the jury, given a proper direction, should have been required by the trial judge to answer this question: was the desired inference, emanating from the evidence tendered by the prosecution a natural explanation of the guilty act *and* destructive of other possible inferences or hypotheses? Or, were the facts tendered by the prosecution susceptible of only one inference, namely the one for which it was offered?

When, therefore, the submissions of defence counsel are studied, they reveal that he recognised that there were certain facts and circumstances

The result is that the point of law raised here under section 32A of the Court of Appeal Act as to whether the trial judge was correct in ruling that a prima facie case had not been established, thereby requiring a defence not to be led, is meritorious. In fact, there could hardly be many cases, based on circumstantial evidence, whose attributes congeal to produce such an irresistible presumption of guilt, as in the case presented against the accused, Cecil Levine. There was no mystery here: the narrative of events was too plain to titillate the mind.

Harper JA. I too agree that the "no case" submission should not have been upheld by the trial judge.

Order accordingly.