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The State v Khan

COURT OF APPEAL OF GUYANA
b SINGH C (AG), ROY AND CUMMINGS-EDWARDS JJA
1 MARCH, 31 JULY 2012

c *Criminal evidence – Circumstantial evidence – Murder – Submission of no case – Trial judge allowing submission of no case and directing acquittal of defendant – Prosecution case relying on circumstantial evidence – When judge can leave case to jury – Whether judge in error.*

d *Murder – Manslaughter, alternative verdict – Judge's duty to address manslaughter where evidence capable of supporting finding – Whether duty on prosecution to address manslaughter as precondition for issue being put to jury.*

e The defendant had been charged with murder. At trial, there was no direct evidence as to the circumstances by which the deceased had met his death; the prosecution relied on circumstantial evidence, including, inter alia, that the defendant had some time prior to the murder been brandishing a knife in front of the deceased, that the defendant and the deceased had been witnessed fighting in the kitchen of the house, trails f of blood from the kitchen to other parts of the house and the defendant's holding the deceased's head in his hands and crying. At trial, however, the judge upheld a submission of no case to answer made on behalf of the defendant and directed the jury to return formal verdicts of acquittal for both murder and manslaughter. The Director of Public Prosecutions, g pursuant to s 32A of the Court of Appeal Act, Cap 3.01, presented the following questions to the Court of Appeal of Guyana: whether the trial judge had erred in law in: (1) upholding a no case submission where there was circumstantial evidence showing that the deceased had last been seen alive in the company of the accused and thus that the wound h had been inflicted by the accused; (2) ruling that the failure of the prosecution to address the lesser count of manslaughter which might have arisen from the evidence meant that he could not leave same to the jury; and (3) ruling that the prosecution had to negate submissions/issues of accident and accidentally self-inflicted submissions i before a case could be put to the jury for their consideration.

Held – (1) The proper approach to be adopted by the court when met with a no case submission was established: a trial judge ought to send the case to the jury where in his opinion there was sufficient evidence upon which a reasonable jury, properly directed, might convict; on the other

R v Nash (1911) 6 Cr App Rep 225, England CCA.
R v Prasad (1979) 23 SASR 161, South Aus SC.
R v Robertson (1913) 9 Cr App Rep 189, England CCA.
R v Shippey [1988] Crim LR 767, England HC.
R v Somae [2005] SBCA 11, [2006] 2 LRC 431, Solomon Islands CA.
R v Taylor, Weaver and Donovan (1928) 21 Cr App Rep 20, England CA.
State (The) v Gomes and Gomez (2000) 59 WIR 479, Trinidad and Tobago CA.
State (The) v Mitchell (1984) 39 WIR 185, Guyana CA.

Appeal

The Director of Public Prosecutions of Guyana made a reference (Reference No 5 of 2010) under s 32A of the Court of Appeal Act, Cap 3.01 on a point of law, to the Court of Appeal of Guyana following the ruling of the trial judge, Ramlal J, whereby he upheld a submission of no case to answer and directed the jury to return formal verdicts of acquittal for both murder and manslaughter in the trial of the defendant, Hafeez Khan, for the murder of Anthony Waldron. The facts are set out in the judgment of the court.

Shalimar Ali-Hack, Director of Public Prosecutions, for the State.
Khemraj Ramjattan for the respondent.

31 July 2012. The following judgment of the court was delivered.

SINGH C (AG).

Almost thirty years ago, Massiah C in *Director of Public Prosecutions' Reference No 1 of 1987 (Re Levine)* (1987) 41 WIR 169 at 170, commented upon his state of disquiet—

> 'over the fact that the judicial approach to be taken for the determination of a submission of "no case to answer" still appeared to be misunderstood.'

Now, in 2012, I am similarly placed as Massiah C was in *Re Levine,* more so, since the proper juristic approach to a submission of 'no case to answer' has a well-established and settled position at common law and over the years has been repeated in the courts with such clarity, that circumstances of a demonstrated misunderstanding of the common law and/or a lack of appreciation for the judicial approach to be taken when a court is faced with a 'no case' submission is a matter of grave concern, and I daresay, this concern is the concern of all the members of the bench. It is a concern which flows from the decision of Ramlal J, who upheld a 'no case' submission in the court below and directed the jury to return formal verdicts of acquittal for both murder and manslaughter. The Director of Public Prosecutions, as a result of His Honour's ruling, has pursuant to the provisions of s 32A of the

Satisfied as we are, that the questions presented to us do involve points of law and given the course adopted by the learned trial judge, we are expected to offer our opinion on them all but I would add, only if we eventually consider that necessary.

The facts of the case out of which this reference arose may be shortly stated. Around 9.30am on Sunday 22 February 2004, Anthony Waldron (the deceased) who was also known as Pumpkin, Hafeez Khan (the accused), Omar, the brother of the accused, Rondon Lyte, a main witness for the prosecution and Joycelyn Willis were all present at Willis's house at 35 New Road, Vreed-en-Hoop, West Coast Demerara. At around 9.30am they began to drink vodka. As the morning progressed, Willis retired to her bedroom, leaving Lyte, the deceased, the accused and his brother Omar involved in the joint effort of exhausting the contents of the two bottles of vodka that had been earlier purchased.

As the morning progressed and presumably as the effect of the alcohol began to be felt, the accused who was by then wearing a towel around his waist according to the prosecution witness Rondon Lyte, began 'to fan' the towel in front of the deceased and was heard saying 'girl, I real'. The deceased, who at the time was wearing eye shadow as well as silver bangles and rings in response, told the accused 'girl, I more real than you'. The accused was a male and the forensic examination determined that the deceased was also male.

Lyte related that the accused thereafter went into Willis's kitchen where he picked up a knife and returned with it. His evidence was that:

> 'He started to fan the knife in front of Pumpkin. I told Hafeez that he can't do that and I called Joycelyn. Joycelyn came and told Hafeez that he can't do that and he already drunk and she took away the knife from Hafeez and she put it in the microwave.'

The accused having been relieved of the knife by Joycelyn, the witness Lyte, then went outside to the toilet where he spent five to ten minutes. He testified that while he was returning to the house he saw the accused and the deceased fighting in the kitchen. By the time he got up to the kitchen he said the two were not there, but he saw what appeared to be blood on the floor of the kitchen leading to the living room and onto the dining room floor. In the verandah of the house, he saw the accused sitting, holding the head of the deceased. Norma Dundas, a policewoman who visited the scene on the very day, saw the deceased lying in the yard at 35 New Road. She said he was wounded in the left area of his neck. She also saw the accused and said he had what appeared to be blood stains on his hands. She testified that in the house she saw what appeared to be blood on the kitchen wall and on the living room floor. Her further evidence was that when she saw the accused who was at the time sitting next to the deceased in the yard, she asked him what had happened and his response was that he did not know what had happened.

The decision of Massiah C in *The State v Mitchell*, in my view, provides adequate and ample guidance to trial judges on the proper approach to be adopted when met with a no case submission. It was a decision that was lucid and coherent and presented no difficulty of comprehension.

After a review of numerous authorities, Massiah C explained ((1984) 39 WIR 185 at 190):

> 'A trial judge ought to send the case to the jury where in his opinion there is sufficient evidence upon which a reasonable jury, properly directed, might convict. I place emphasis on the word "might" and on its subjunctive character. The trial judge ought, on the other hand, to withdraw the case, if the evidence is so unsatisfactory or unsound (established through cross-examination or otherwise) that no reasonable jury could convict on it, or if the evidence, even if all is believed, is so weak, tenuous or insufficient, that it cannot yield a lawful conviction.'

In light of the guidance provided by Massiah C it is an opportune moment to consider the evidence before the court at the time the 'no case submission' was made. It should be pointed out that there was no direct evidence as to the circumstances by which Anthony Waldron met his death. The prosecution was relying on circumstantial evidence which is evidence of a type from which a jury may infer a fact or facts in issue. In this matter, a fact in issue was whether the accused was the person who inflicted injuries on the deceased which caused his death.

The evidence being relied on included evidence that:

> (a) The accused had been brandishing a knife in front of the deceased and was cautioned by the witness Lyte and the woman Willis that he could not do that and the knife was subsequently taken away.
> (b) The accused and deceased were seen fighting in a kitchen.
> (c) Upon reaching the kitchen, the witness Lyte did not see the accused and the deceased there, but he saw what appeared to be blood on the kitchen floor and a pair of scissors with what appeared to be blood on it.
> (d) The witness Lyte saw a trail of what appeared to be blood leading from the kitchen where he had seen the deceased and the accused fighting to the living room and then onto the dining room area of the house. The accused and the deceased were seen in the verandah of the house. The deceased was in a lying position and the accused was holding his head in his hand and was crying.

It is to be noted that all of the circumstances revealed through the evidence of the witness Lyte, were proximate in time, particularly the

'prosecution's witness Rondon Lyte's evidence is of some value but it is weak and tenuous since he said expressly that he did not see at anytime Hafeez inflict any injury to Pumpkin. He also said that he did not know where or at which place Pumpkin got injured.'

In the written reasons His Honour compiled as his ruling in response to Mr Ramjattan's no case submission, he at the very beginning of those reasons, stated:

'There is no direct evidence implicating the accused in the infliction of any injury on Pumpkin (deceased). As a matter of fact this was conceded by the prosecution.'

Later His Honour noted:

'The absence of any evidence which would explain or tend to explain what really happened to Pumpkin, how, when and where in or out of the house he sustained the injuries and who inflicted them, renders the prosecution evidence in this regard very, very weak in light of the fact that all of the above must have transpired within the five to ten minutes absence of Lyte.'

It is obvious that His Honour was clearly influenced in his comments by the fact that there was no direct evidence that the accused had inflicted any injury on the deceased. In other words, that there was no evidence led by the prosecution of any overt act by the accused which resulted in the death of Anthony Waldron.

Regrettably, His Honour adopted a misguided approach by his failure to appreciate the nature and quality of the evidence before him and the law applicable thereto. More so, he obviously failed to take guidance from the cases, with similar facts and circumstances and the approach of the courts in those cases, where there was no direct evidence of the commission of an offence.

I refer firstly to *R v Robertson* (1913) 9 Cr App Rep 189, where the headnote states:

'On an indictment for murder, no overt act need be proved against the accused; circumstantial evidence may suffice.'

In this case, the appellant was alone with his three children. He represented to other occupants of the house, that the children had been taken into care by the Salvation Army. This was an untruth. He subsequently vacated his room and was replaced by a new occupant who detected a foul odour in the room. When the floor boards were raised, the badly decomposed bodies of the appellant's three children were discovered. The appellant was convicted of murder and he

'In view of the facts that the child left home well and was afterwards found dead, that the Appellant was last seen with it and made untrue statements about it, this is not a case which could have been withdrawn from the jury.'

There were certain items of evidence in the present case which in my view are significant but which attracted no consideration by the learned trial judge. Firstly, policewoman Dundas said when she arrived at the scene, she met the accused sitting next to the lifeless body of Anthony Waldron. She asked the accused 'what had happened' and his response was that he did not know what happened. Given the evidence of Lyte that the accused was the person last seen with the deceased and that just before the deceased was seen by Lyte lying on the floor of the verandah of Willis's house, he had seen the accused and the deceased fighting in the kitchen, these were circumstances as in *R v Robertson* and *R v Nash*, which called for an explanation, but none was forthcoming.

Secondly, the testimony of the forensic pathologist, Dr Nehaul Singh, who found two oval incised wounds on the anterior aspect of the deceased's neck—going from left to right and downwards and the evidence of Lyte that when he got to the kitchen where he had only moments before seen the accused and the deceased fighting, he saw a pair of scissors on a cupboard, which had what appeared to be blood on it, if juxtaposed to the evidence of the shape and nature of the injuries seen on the body of the deceased, might have been a circumstance from which the jury might have been inclined to infer that those scissors had been used to inflict the injuries which caused Waldron's death.

Thirdly, both witnesses Lyte and Dundas saw a trail of blood leading from the kitchen where Lyte claimed he saw the accused and deceased fighting, to the living room and onto the dining room of the house.

Fourthly, the presence of what appeared to be blood on the hands of the accused.

Fifthly, the evidence of police witnesses Dundas and Dyal that the accused was seen holding the head of the deceased and crying incessantly.

Could it have been that the accused was so overwhelmed with a sense of guilt and seized both with a shocking sense of the gravity of the occasion and of remorse, found himself unable to control his crying? This according to the *Galbraith* formula was 'one possible view of the facts' which a jury properly directed might have made.

These matters however received no attention by the learned judge. A perusal of the reasons he advanced for upholding the defence no case submission shows a totally imbalanced focus on what His Honour perceived to be weak and tenuous evidence and in taking the prosecution's case at its highest dealt only with those aspects of perceived weakness. That such an approach is clearly wrong is illustrated by the

His Honour's ruling is replete with evaluation and weighing of the prosecution's evidence with several instances of fact finding. It was an approach which Lord Widgery CJ addressed in *R v Barker* (1975) 65 Cr App Rep 287 at 288 where His Lordship observed:

> 'It cannot be too closely stated that the Judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the Judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks the witness is lying. To do that is to usurp the functions of the jury.'

Similarly, in *R v Prasad* (1979) 23 SASR 161, King CJ explained (at 163):

> 'If there is no evidence which would justify a conviction then, as a matter of law, there must be an acquittal. That decision is for the Judge and the Jury must accept and act on his direction on that question of law. If however, there is evidence which is capable in law of supporting a conviction, a direction to the jury to acquit would be an attempt to take from them part of their function to adjudicate upon the facts. That as it seems to me would be contrary to law.'

When consideration is given to the prosecution's evidence as a whole, it appears clear that it was evidence of such a nature and quality, that a reasonable jury properly directed might have drawn an inference adverse to the accused and might have concluded therefrom his guilt. The statement found in 10 *Halsbury's Laws* (3rd edn) at p 722, is in this context instructive. It reads:

> 'In murder, as in other criminal cases, a jury may convict on purely circumstantial evidence, but to do this, they must be satisfied that the circumstances were consistent with the prisoner having committed the act, but also that the facts were such as to be inconsistent with any other rational conclusion than that he was the guilty person.'

His Honour would have done well to heed the advice of Ibrahim JA in *The State v Gomes and Gomez* (2000) 59 WIR 479, there His Honour noted (headnote):

> 'A judge sitting with a jury and faced with a submission of no case to answer must be careful not to be too anxious to relieve the jury of the responsibility and the right to make their own assessment of any perceived weaknesses in the prosecution case.'

Before concluding, I pause only to refer to some observations of the DPP that the decision of the Privy Council in the case of *R v Somae* [2005] SBCA 11, [2006] 2 LRC 431 placed a burden on the prosecution different from that established in cases such as *Mitchell*'s case and *Re Levine*.

In *R v Somae*, the Privy Council declared that—

> 'the evidence that is to be considered for the purposes of a no case submission ... must be capable, if accepted, of proving guilt beyond a reasonable doubt.' ([2006] 2 LRC 431 at 436.)

In *Mitchell*'s case, Massiah C explained ((1984) 39 WIR 185 at 190) that:

> 'A trial judge ought to send the case to the jury where in his opinion there is sufficient evidence upon which a reasonable jury, properly directed, *might* convict.'

It surely could not be said that by addressing the sufficiency of evidence, Massiah C did not mean that whatever evidence was deemed sufficient for a conviction did not have to be capable of proving the guilt of the accused beyond a reasonable doubt. This is the standard of proof required in all criminal trials and whatever evidence is presented by the prosecution must be capable, if accepted, of proving an accused's guilt beyond reasonable doubt. With respect to the views of the DPP, we do not agree that *Somae*'s case places any different burden on the prosecution than that established by *Mitchell*'s case or *Re Levine*.

The result of the instant case in our view presented a shocking state of affairs. The prosecution had presented to the court cogent and compelling evidence which should have been left to the jury for their determination of the guilt or innocence of the accused.

We have taken judicial notice of the high incidence of no case submissions which are upheld in the High Court. Rumours abound in the profession and the wider Guyanese community as to why this is so. We take the opportunity only to say that upholding a no case submission and withdrawing a case from the jury, as was done here, in the face of cogent and compelling evidence, undoubtedly worthy of being left to the jury for their consideration, serves only to erode public confidence in the administration of justice in our courts and subjects the judicial system to unnecessary but justified criticism and ridicule. The ruling of the learned judge resulted in a grave miscarriage of justice and must be deprecated.

Order accordingly.