The State v Mitchell (Alvin)

COURT OF APPEAL OF GUYANA
MASSIAH C, FUNG-A-FATT and VIEIRA JJA
29th, 31st MAY, 11th JUNE, 25th JULY 1984

Criminal law – Trial – Submission of no case to answer – Criterion on which trial should be allowed to continue – Sufficiency of evidence on which reasonable jury might convict

Criminal law – Trial – Submission of no case to answer – Criterion on which trial should be stopped – Unsatisfactory or unsound evidence, or evidence of a weak or tenuous nature, or insufficient evidence

Where the defendant in criminal proceedings submits a plea of "no case to answer" at (or before) the end of the prosecution case the trial judge ought to send the case to the jury if, in his opinion, there is sufficient evidence on which a reasonable jury (properly directed) might (in the judge's view) convict; if, however, the evidence is so unsatisfactory or unsound that no reasonable jury could convict on it, or if the evidence (even if all of it is believed) is so weak, tenuous or insufficient that it cannot yield a lawful conviction, the trial judge should withdraw the case and direct the acquittal of the defendant.

R v Hookoomchand and Sagur [1897] LRBG 12 followed.

Practice Note [1962] 1 All ER 448, *The State v Harris* (1974) 22 WIR 41, *The State v Gowkarran Persaud, Jowalla Persaud and Boodram* (1976) 24 WIR 97 and *R v Galbraith* [1981] 2 All ER 1060 applied.

Cases referred to in the judgments

Attorney-General's Reference (No 1 of 1983) [1983] 2 VR 410, 10 Commonwealth Law Bulletin 616.
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152, [1939] 3 All ER 722, HL.
Copertino v McDonald [1964] LRBG 280, British Guiana Full Court.
Director of Public Prosecutions' Reference (No 2 of 1980) (1981) 29 WIR 154, Guyana CA.
Jewell v Parr (1853) 138 ER 1460.
Outar v The State (1982) 36 WIR 228, Guyana CA.
Peacock v R (1911-12) 13 CLR 619, Australia High Court.
Practice Note [1962] 1 All ER 448, Lord Parker CJ.

from the road they discovered the dead body of thirty-year old Nastawantee Persaud. The body, clothed in a blouse that was unbuttoned, faced upwards, and was exposed from the waist down for the skirt was raised and the undergarments missing. The legs were spread apart, and there oozed from the vagina what appeared to be blood. There was grass in the pubic area. Several injuries were seen.

Shortly before they made this discovery, the police party, about a half mile away, at 1½ Miles, Bartica-Potaro road (a point nearer to Bartica than 2 Miles), had come across a number of articles which were identified as the property of the deceased by Lilapattie Romohan, the niece of the deceased. Among the articles found was a shoulder-bag which was lying on the road. On the bag were what appeared to be drops of blood. About five feet away, in a clump of bushes, a pair of yellow panties was found. Attached to it was a sanitary napkin. What appeared to be blood was seen both on the panties and the napkin. Nearby was a girdle.

The police party which Lilapattie Romohan accompanied to the Bartica-Portaro road had been galvanised into action when Romohan reported to the police station on the morning of 7th February 1982 that her aunt was missing from home. At about 3 o'clock that morning, Romohan, one Waveney Gill and the deceased, together left the Nest Discotheque in Fifth Avenue, Bartica, where they worked as waitresses. (The word "discotheque" is popularly contracted into "disco" without any connotative loss, and that variant will be used in this judgment.) Romohan and her companions had worked the night shift and were on their way to the deceased's home in Fourth Avenue where they all lived.

On their way home, they met Alvin Mitchell who was driving a Land Rover. Three other men were in the vehicle. Mitchell was a regular patron of the Nest, and the night before he was seen there at a dance. Mitchell offered to take them home in the vehicle. Gill and Romohan declined the offer. After some apparent hesitation the deceased accepted, declaring to her companions that she would reach home faster than they. Her expectations never materialised, for when Gill and Romohan reached home on foot they discovered to their consternation that the house was securely locked and that the deceased had not arrived there. Overcome by tiredness they soon fell asleep. When Romohan awoke that morning at about 7 o'clock the deceased was still not there. Naturally Romohan became alarmed. She first went to her uncle's home and inquired after the deceased, but there she learnt nothing. She next went to the Bartica police station and reported the matter. It was then about 8.00 a.m. The police left soon after for 1½ Miles, Bartica-Potaro road, on the strength of what one Benjamin had told them, and there they found the articles already mentioned; shortly afterwards they discovered the dead body of the deceased.

The cumulative circumstances led the police to conclude that the deceased had been murdered. Suspicion fell on Alvin Mitchell (the person last known to have been with her) who by then had hastily fled to Georgetown. He was arrested there on 8th February 1982 and taken to

There was a time when English criminal jurisprudence ordained that a case must necessarily be sent to the jury so long as there was some evidence in support of it, the tenuity thereof notwithstanding. But there was a turn in the tide as it came to be realised that that was manifestly unfair, and that evidence rather more substantial than a mere scintilla ought to be required before a case should be sent to the jury for its determination (see *Jewell v Parr* (1853) 138 ER 1460 and *Toomey v London, Brighton and South Coast Railway Co* (1857) 140 ER 694). *Hookoomchand* is paradigmatic of the new approach. The judges in that matter clearly disagreed with the principles expressed in the earlier authorities to which they did not consider themselves tethered, preferring to pay allegiance to the later authorities to which they referred with approval. At page 16 of *Hookoomchand* Sir Edward O'Malley CJ speaking for the Court of Crown Cases Reserved, observed as follows on this particular point:

> ". . . the point we have to consider is whether, apart from the evidence of Ramkellawan, Juglall and Juggernath there was evidence that might properly be left to the jury as sufficient upon which to convict. *The test in such cases is whether there is reasonable evidence on which reasonable men could reasonably or fairly find a verdict.*" [*emphasis supplied*]

Lord Lane CJ put it this way in *Galbraith* (at page 1062):

> "How then should the judge approach a submission of 'no case'? If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. Where, however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury *and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.*" [*emphasis supplied*]

In *The State v Harris* (1974) 22 WIR 41, and in *The State v Gowkarran Persaud, Jowalla Persaud and Boodrain* (1976) 24 WIR 97, this court approved of the test laid down in *Hookoomchand*. In England the position has been the same. I instance not only *Galbraith* but also the *Practice Note* appearing in [1962] 1 All ER 448, which, incidentally, was cited with approval by our Full Court in *Copertino v McDonald* [1964] LRBG 280 at page 285. In that *Practice Note*, Lord Parker CJ said (*inter alia*):

Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722 at page 733. He observed:

> "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

With those remarks I respectfully agree.

Massiah C then drew attention to several portions of the evidence which, when taken together, enabled an inference to be drawn that the deceased was murdered and reviewed the medical evidence. He then commented: The evidence so far analysed seems to me to have been sufficient to enable a reasonable jury, properly directed, to infer that the deceased met her death as the result of the voluntary act of someone who had the intention either to kill her or to do her serious bodily harm.

Massiah C then addressed the question whether there was sufficient evidence from which a reasonable jury might have inferred that Mitchell was the murderer, so as to satisfy the test in *Hookoomchand*.

Massiah C, referring to Mitchell, continued: Although he later said that the deceased had fallen out of the Land Rover and thus met her death, Mitchell never explained this to de Florimonte (a companion) to whom he spoke when he was leaving for Georgetown, nor to the police in Georgetown, although he was in custody there until 11th February, and had actually been questioned by the police about the alleged crime. He was taken to Bartica police station on 11th February, and there, for the first time, he told the police that the deceased had fallen out of the vehicle and died. If the deceased met her death as Mitchell said, a reasonable jury might well wonder why he waited so long before telling the police about the accident. Was the delay due to a surrender to the influence of fear or panic, or might it, on the other hand, be reasonable (in the light of all the circumstances) to infer that "the accident" was later concocted out of a sense of guilt? In my judgment, the evidence was capable of yielding that inference. In Lord Lane CJ's memorable phrase in *Galbraith* that was "one possible view of the facts".

Yet there is more to it than that. When Mitchell saw the police at Bartica police station on 11th February, he told them that on the morning of 7th February, when he returned to Bourne's Disco, he had told de Florimonte, Garraway and Naraine (his companions at the disco) that the deceased had fallen out of the Land Rover and that, while they were on their way back to Tiperu, he had shown the men the body of the deceased lying on the road, presumably at the spot where the deceased had fallen. In the presence of de Florimonte, Garraway and Naraine, and of the police, Mitchell repeated this story at the invitation of the police, but all the men denied that he

seek to weigh the evidence and determine which deducement is the more or most reasonable. That would amount to a judicial supplantation of the jury, and must be strictly and carefully guarded against. Barton J (sitting with Griffith CJ and O'Connor J) put it this way in the Australian case, *Peacock v R* (1911-12) 13 CLR 619 at page 651:

> "Whether the fact, or that body of facts which is called the 'case' is capable of bearing a particular inference, is for the court, and unless it is so capable, the court's duty is to withhold it from the jury, as a single fact or as a case. *But when the case is undoubtedly capable of the inference of guilt, albeit some other inference or theory be possible, it is for the jury, properly directed, and for them alone, to say not merely whether it carries a strong probability of guilt, but whether the inference exists actually and clearly, and so completely overcomes all other inferences or hypotheses, as to leave no reasonable doubt of guilt in their minds.*" [*emphasis supplied*]

I cited this passage with approval in *Outar v The State* (1982) 36 WIR 228 at pages 270, 271. I see no reason to retract what I said then. Taggert JA in *R v Heywood and Nash* (1972) 6 Can CC (2d) 141 expressed similar views. He observed (at page 143):

> "That [*R v Comba* (1938) 70 Can CC 205] in my view, is not an authority which supports the proposition that a trial judge sitting with a jury may, on a motion for a directed verdict of acquittal on the basis of there being no evidence to submit to the jury, *weigh the evidence with a view to determining whether the Crown has, at the close of its case, proved the essential averments in the charge beyond a reasonable doubt.*" [*emphasis supplied*]

In the recent case, *R v Monteleone* (1982) 67 Can CC (2d) 489, Lacourciere JA speaking for the Ontario Court of Appeal said (at page 497):

> "In my opinion, there was sufficient prima facie evidence to justify a dismissal of the motion for a directed verdict of acquittal. *The weight to be given to the evidence and the inferences to be drawn from it were for the jury alone.* If they accepted the opinion of the Crown's experts and drew adverse inferences from all the circumstances including the respondent's extraordinary statement to Ins Maclean, the inference of the guilt of the respondent was one which a reasonable jury properly directed *might make.* The question whether a reasonable jury *would make* a finding of guilt on this evidence is not a question of law for this court." [*emphasis supplied*]

In both *Heywood and Nash* and *Monteleone* the trial judge, after weighing the evidence, directed a verdict of acquittal on the basis of submissions that the evidence adduced by the Crown was insufficient to warrant the case being sent to the jury. Counsel had made what in our jurisdiction are called "no

"The possibility of accident was referred to in the summing-up, which has not been attacked. *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.*" [*emphasis supplied*]

In the instant matter where the view could be reached that there are circumstances strikingly similar to those in *Nash*, I would echo Lord Alverstone CJ's sentiments, although I think that I ought to say that the circumstantial proof here appears to be greater. In this connection one can profitably study also the circumstances in *Outar v The State* (see also *R v Cavendish* [1961] 2 All ER 856, called therein "a borderline case").

My answer to the question under reference would therefore be that in point of law the trial judge fell into fundamental error when he concluded that the circumstantial evidence in its total and cumulative effect could not justify an inference of guilt by a properly charged jury acting reasonably. He ought to have overruled the "no case" submissions made on Mitchell's behalf and submitted the case to the jury for their determination of his guilt or innocence.

No-one could ever tell what the result would have been if the case had been sent to the jury but (in my judgment), in any event, justice miscarried, as it appeared to have done also in another case out of which arose *Director of Public Prosecutions' Reference (No 2 of 1980)* (1981) 29 WIR 154. In my opinion, there can be a miscarriage of justice in relation to and affecting the State just as there can be one in relation to the accused. It is a grievous state of affairs which in either case ought to be deprecated. For this reason Parliament may wish to consider whether the law ought not to be amended to give this court the power to order a new trial where, as in this case, the court is satisfied that the case ought to have been sent to the jury. In Canada and the Commonwealth of Dominica there is such provision (see sections 605(1)(*a*) and 613(4)(*b*)(ii) of the Criminal Code (Canada) and section 37(2) and (3) of the West Indies Associated States Supreme Court (Dominica) Act 1969, as inserted by section 4 of the West Indies Associated States Supreme Court (Dominica) (Amendment) Act 1981).

Postscript

It is unfortunate that the portion of the trial judge's decision on this matter which has reached us does not deal at all with the reasons why he upheld the "no case" submissions. It really contains an abstract disquisition on the law. Although not strictly necessary for the resolution of the questions herein, his reasons may, nevertheless, have been useful and helpful. It is not therefore that the judge's reasons were not considered and evaluated; rather, they are not known.

Fung-A-Fatt JA. I have had the opportunity of reading the excellent judgment of Massiah C and I agree with the reasons, conclusions and views expressed therein. I can add nothing useful to it.

to a conclusion that the defendant is guilty, it is the duty of the trial judge to send the matter to the jury for their consideration (see page 1062).

The test enunciated in *Hookoomchand's* case has been approved by this court in *The State v Harris* (1974) 22 WIR 41 and in *The State v Gowkarran Persaud, Jowalla Persaud and Boodram* (1976) 24 WIR 97.

In this matter under reference, Massiah C has painstakingly pointed out the telling circumstances put forward by the State which, in my view, might lead any reasonable jury inexorably to the almost irresistible inference that Mitchell brutally murdered the deceased during the early morning hours of Sunday 7th February 1982. What the trial judge did here was to usurp the functions of the jury and, as a result, a *grave injustice* was caused to the State. Justice is a two-edged sword which should work equally for the prosecution as it does for the defence.

I entirely agree with the view expressed by Massiah C that the time is now ripe for legislation in this country similar to that enacted in Canada under the Canadian Criminal Code, where an appellate court has the power to order a new trial where (as clearly here) the court is satisfied that the case ought to have been sent to the jury for their consideration.

A disquieting aspect of this reference is the lengthy document that was submitted to this court in *instalments* purporting to be the trial judge's reasons for ruling as he did. This document in fact is devoid of any such reasons and amounts to nothing less than a rambling and rather disjointed purported legal exposition of various aspects of the criminal law both substantive and adjectival.

The answer to the question put by the Director of Public Prosecutions must, accordingly, be emphatically answered in the negative.