

Malcolm Forde

Appellant

v.

The Queen

Respondent

FROM
THE COURT OF APPEAL OF BARBADOS

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE
22ND MARCH 1988, DELIVERED THE 26TH APRIL 1988

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD HAVERS
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD GOFF OF CHIEVELEY

[Delivered by Lord Ackner]

On 4th November 1982 the appellant was convicted in the High Court before Worrell J. and a jury of murdering Winifred Greaves ("the deceased"). The Court of Appeal of Barbados (Douglas C.J., Rocheford J. and Husbands J.) on 30th July 1984 refused an application to call fresh evidence and dismissed the appeal. The appellant appealed to Her Majesty in Council by special leave. On 22nd March 1988 their Lordships, having heard the appeal, decided humbly to advise Her Majesty that the appeal ought to be dismissed for reasons to be delivered later. This they now do.

The appellant was tried with one other man, Clifford Andrew Boxhill. He too was convicted of murder and his appeal was also dismissed by the Court of Appeal on 30th July 1984. He did not seek leave to call fresh evidence nor has he sought leave to appeal against the decision of the Court of Appeal dismissing his appeal. The case for the Crown was a simple one. In the late afternoon of 9th July 1982 Ianthe Bradshaw, who lived opposite the deceased, when looking through the louvre windows in her house saw the appellant and Boxhill, who were well known to

her, sitting under a coconut tree in or close to the kitchen garden of the deceased. The deceased was working in her kitchen garden at the time. Shortly afterwards she saw Boxhill strike the deceased on her head with a collins, a cutting instrument used in field work, with the result that she fell to the ground. At that time the appellant was standing nearby. The two men then dragged the deceased to a nearby canefield. The prosecution's case against the appellant was that he aided and abetted Boxhill in killing the deceased. Apart from the evidence of Bradshaw, the prosecution relied upon a written confession of the appellant, which was in the following terms:-

"Yesterday evening I left home and did walking coming down de road and I see Clifford Boxhill coming through a line wid a collins in he hand and he tell me, come and go for some mangoes in de back of where he live. I went wid he and pick de mangoes and then sit down under de tree. I see Miss Greaves who live side of he in she ground forking and Clifford say he gine kill she and I ask he for what, and he say she call de Police for he and that she too malicious, we left and went inside ground and Clifford tak de collins and lash she in she head and she fall down and me and Clifford pull she down in de ground and we cover she up wid trash and then cover up de blood wid some dirt and then I ran and left he."

The defence was an alibi, namely the appellant was at the material time in the company of one Junior Spooner and that he had nothing at all to do with the killing of the deceased. He did not give evidence, but made an unsworn statement from the dock. He maintained that the confession revealing his participation in the crime had been obtained improperly as a result of violence by the police. Junior Spooner was called as a witness to support his alibi.

By their verdict the jury must be taken to have accepted the evidence of Bradshaw and the accuracy of the confession and to have rejected the evidence of Junior Spooner.

Fresh Evidence

Mr. Lashley, the appellant's attorney, who had appeared for the appellant at the trial, when opening the appeal before the Court of Appeal in Barbados sought leave to call fresh evidence viz. the evidence of Cyrilene Dorson and David Farrell, each of whom had provided the Court of Appeal with an affidavit. Mr. Farrell's affidavit is of no great significance. He is a prison officer who used to see Patrick

Greaves from time to time when he was an inmate in the Glen Dairy Prison serving his sentence for larceny in 1983. Greaves was the grandson of the deceased, aged 15 years at the time of the trial and who gave somewhat limited and rather muddled evidence. According to Mr. Farrell, about a month after his release, he heard Patrick Greaves saying that when he passed the cells in which Boxhill and the appellant were detained he used to laugh at them, and when asked by Farrell why he had laughed, he said because they were in prison for something they did not do.

It was essentially upon the affidavit of Cyrilene Dorson that the application was based. She deposed that sometime between September 1983 and January 1984 she had a conversation with Patrick Greaves in which he said "Man, Cyrilene the Police does beat people real bad". He then went on to explain how he had been living with his grandmother after being released from a Government Industrial School (he had been convicted of larceny of some sheep). Paragraph 9 of the affidavit then reads as follows:-

"He continued saying that the day before his Grandmother died he saw her counting some money and he saw where she put it. He said he wanted the money and the morning she died she gave him some money and sent him to Howard's Supermarket in Jackson. He said he went down the road for a short while and then went back home. He had a piece of iron and went to look for his Grandmother. When he came back she was over in the ground weeding and when he started to approach her she was backing him. When he got to her he hit her in the back of her neck with the piece of iron. I asked him whether it was true he hit her with a piece of iron and it came over the air that her throat was cut. He then asked me if I were listening to him or not. I said 'Alright'. He said he went for a cutlass then and he cut her throat. He said that his Grandmother had two rings on her finger and he was going to place the ring fingers on a stone to cut off the fingers to get the rings but when he held her fingers and pulled them the rings came off. I inquired where the rings were now and he said his brother has them. He went on to say that he dragged his Grandmother into some bushes covered her up and the blood stains. Afterwards he said he went into the house and took up the money and went to Bush Hall. After spending some time in Bush Hall he went back to Jackson and went to the house and came out and asked his neighbours if they saw his Grandmother. They said no.

After that he said he called the Police and with the help of the Police they started to look for his Grandmother. After finding her when he was being questioned the Police asked him if he saw anyone about there and he told the Police he saw two boys. Sometime after the Police held two boys and asked him if he recognised the two boys and he said he recognised them to be the boys he saw. He said he did not know how the Police got the two boys since he did not see anyone around at the time he did the act."

No statement from, let alone an affidavit by, Patrick Greaves admitting that he had in fact killed his grandmother or made the statements alleged by Miss Dorson or behaved in the manner described by Mr. Farrell was put before the Court of Appeal. Indeed the Court of Appeal were never informed whether or not any approach had been made to Patrick Greaves with a view to his giving further evidence. No application was made to the Court of Appeal for him to attend before the Court for examination. Clearly the Court has a power to make such an order under section 29 of the Criminal Appeal Act 1981, which follows the terms of section 23 of the English Criminal Appeal Act 1968. However to make such an order, in default of an application, would be a very unusual course for the court to take. Patrick Greaves, before giving any evidence that might have incriminated him, would have had to have been warned and told of his entitlement to remain silent. That he would have availed himself of such an option is by no means theoretical, since on some date after 1983 he was charged with a murder and by the time the application for special leave was made, some two years ago he had been convicted of murder.

The Court of Appeal in a written judgment given on 30th July 1984 dismissed the application to call the evidence of Dorson and Farrell, essentially on the basis that that evidence was inadmissible, as being hearsay evidence, and therefore could not be admitted under section 29 of the Act. Miss Goddard Q.C., who appeared before their Lordships for the appellant, accepted that that decision was entirely correct. She however contended that the Court of Appeal should have ordered the attendance of Greaves for examination before the Court, and if he had denied the conversations with Dorson and Farrell, then their evidence would have been admissible to impugn his credit, being evidence of a previous inconsistent statement admissible under section 4 of the Criminal Procedure Act 1865.

The Court of Appeal, however, considered their general discretionary power under the section to receive further evidence, where it is plainly made out that this is necessary or expedient in the

interest of justice. Again, Miss Goddard very fairly conceded that her client could not ask for more favourable treatment, when considering the exercise of this discretion, than for the court to assume that there had been placed before it a statement from Greaves making the admissions set out in paragraph 9 quoted above in Dorson's affidavit, and then for the Court of Appeal to ask itself the vital question - is such evidence credible, in the sense that it is well capable of belief? In considering whether to exercise its general discretionary power, this is precisely the question which the Court of Appeal asked itself and for the following reason concluded that Greaves' confession could not be considered as capable of belief. At the trial the prosecution called Dr. Ramulu, a forensic pathologist who saw the body at about 10.30 p.m. on 9th July and carried out a post mortem on 12th July. In his report he referred to four lacerations in the head and to two fractured ribs. He ascribed the cause of death to the first laceration, which involved a depressed fracture to the skull. The injuries could have been caused by any blunt instrument. As regards bleeding, he said "there would be considerable bleeding from the injuries in the head". As the Court of Appeal pointed out, Dr. Ramulu gave no evidence of finding any incised wound in the area of the throat of the deceased as one would expect if her throat had been cut with a cutlass, as the confession attributed to Greaves alleges. It was on this basis that the Court of Appeal concluded that if Greaves gave such evidence, it would not be credible.

Their Lordships agree with the Court of Appeal and would add two further grounds for concluding that the alleged confession is not credible. According to Dorson, Greaves said that the morning she died she gave him some money and sent him to Howard's supermarket in Jackson. He said he went down the road for a short while and then went back home. It was then that he killed his grandmother. Again, it is clear on the medical evidence that the deceased met her death in the late afternoon of 9th July. There can be no question that she died on the morning of that day. Further, according to paragraph 9 of Dorson's affidavit, it was Greaves who told the police that he saw two men and that later he was asked by the police to identify them and he did so. When he was called to give evidence by the Prosecution, he was asked no questions at all about whether he had seen either of the accused at or near his grandmother's kitchen garden, or whether he had identified later two men in police custody. It was only as a result of cross-examination by Mr. Lashley that he said that he saw the appellant under the mango tree, when he came back from the supermarket round about 6.00 p.m.

Their Lordships accordingly conclude that the Court of Appeal were fully justified in rejecting the application to call fresh evidence.

Their Lordships now come to a most unsatisfactory feature of this appeal. Their Lordships have been told that the several grounds set out in the notice of appeal were argued and rejected by the Court of Appeal. There is not with their Lordships' papers a judgment of the Court of Appeal dealing with the grounds of appeal and the Court's reasons for rejecting them. There is not even the order of the Court dismissing the appeal. However, there has been put before their Lordships certain correspondence in 1985, although nothing later. In a letter dated 16th July 1985 written by Mr. Lashley to his London agents, he states that the Court of Appeal gave an oral judgment in respect of grounds 2 to 8 of the grounds of appeal and only a written judgment in respect of ground 1, which was the application to call fresh evidence. He said he was seeking to try and obtain from the shorthand writer what exactly was said orally in respect of those grounds. On 26th July Mr. Shepherd, an attorney-at-law, who had led Mr. Lashley in the appeal, wrote to the Registrar of the Supreme Court of Barbados stating that a shorthand writer was present took a note of the oral judgment and requesting a transcript. The last letter before their Lordships, dated 23rd September 1985 from Mr. Lashley to his London agents, recorded that the Registrar's clerk had not so far found a note of the oral judgment but that he was to have a final word on the subject with the Registrar. Their Lordships were not told whether Mr. Lashley spoke again to the Registrar and if so with what result. There appears to have been a total inactivity thereafter.

Notwithstanding this regrettable lack not only of a note of the oral judgment of the Court of Appeal but even of the very order which that Court made, their Lordships allowed Miss Goddard to argue the grounds of appeal against the conviction which apparently were urged before the Court of Appeal. Like the Court of Appeal, their Lordships did not consider that any of these grounds had any validity and they set out quite shortly their reasons for rejecting them:-

1. The time of death.

Dr. Ramulu was not asked to consider the approximate time of death until Mr. Lashley raised the question in cross-examination. He expressed the view that the woman died at about 4.30 p.m. The learned judge in a careful and painstaking summing-up, to which their Lordships would like to pay tribute, reminded the jury that the doctor had concluded that time of death

was about 4.30 p.m., but he went on to suggest to the jury that the death occurred somewhere between 4.30 p.m. and 6.30 p.m. Miss Goddard maintained that the learned judge was not entitled to make that suggestion and that he was limited to the evidence given by the doctor. Their Lordships cannot agree. The eye witness put the time between 5.30 p.m. and 6.00 p.m. and said that "it was dark at the time". As previously stated, Greaves gave evidence that he came back from the supermarket at around 6.00 p.m. and that his grandmother was not there. All the times were approximate and the judge was fully entitled to suggest the bracket of between 4.30 p.m. and 6.30 p.m.

2. Failure to direct the jury as to the problems of identification in accordance with the principles laid down in *R. v. Turnbull*.

Although this was not a "fleeting glance" case, the judge read out an appropriate extract from the *Turnbull* judgment, focussed the jury's consideration on how long the witness had the accused under observation, from what distance, in what light, whether her view was impeded and the length of her acquaintanceship with the accused. He properly summarised the evidence on all these matters. This complaint is totally without foundation.

3. Two of the photographs were inadmissible and should not have been admitted in evidence.

Photograph number 12 was taken through the louvre window and shows the back yard of the house and the deceased's kitchen garden beyond. Photograph number 13 is a view taken in the opposite direction from the deceased's kitchen garden, with the louvre window of Bradshaw's kitchen approximately in the centre of the background. The complaint apparently is that the photographs were not put to Bradshaw. A police photographer was merely called to give formal evidence that he had taken the photographs. Their Lordships cannot understand the basis of this complaint. As regards photograph number 12, it is common ground that it was taken through the louvre windows. It was not stated in evidence that this was the precise view that Bradshaw had. She was never challenged that she would have any difficulty in seeing, through this window, the deceased's kitchen garden. The judge in his summing up, when dealing with the photographs, said that they had been put before the jury to give them "some idea of the scene of the locality in which the crime is alleged to have taken place". He said that they might "find photograph number 12 very important, because that gives you an idea of the louvre window in the shedroof of Ianthe Bradshaw, and that is the window which she said that she looked through when she saw

the two accused in the kitchen garden of the deceased, and when she saw the accused Boxhill strike the deceased with a collins". As regards photograph number 13, he explained to them that that gave them an idea of the locality, a view from the kitchen garden of the deceased to the louvre window in Bradshaw's house. Once more this complaint has no foundation.

4. The trial judge failed to direct the jury adequately as to the law relating to aiding and abetting.

The judge read a short passage from the 38th Edition of Archbold and then emphasised to the jury that if a person happens to be present when somebody commits a crime, and takes no part in it, he cannot be guilty of any offence. He read another relevant passage and emphasised once more that mere presence does not make a person guilty of an offence which is committed by somebody else. He told the jury that the Crown must go further and show that the accused did take a part in it, that he was there present with the intention of giving assistance should the occasion arise, and that he actually knew what the person who actually committed the offence was going to do, and he was present aiding and abetting. That was at an early stage in his summing up. Towards the end of his summing up he again returned to the subject, explaining that the Crown's case against the appellant was that he went on to the deceased's land with the accused Boxhill with, according to his own confession, full knowledge that Boxhill intended to kill the deceased. He asked the jury to consider why he accompanied Boxhill - why did he not leave Boxhill when he knew what Boxhill's intentions were? Miss Goddard urged before their Lordships that there was no evidence that the appellant in any way encouraged Boxhill to kill the deceased. This submission totally overlooks that the appellant's action in accompanying Boxhill after he had announced his intention to kill the deceased could well be, and no doubt was interpreted as, his approving Boxhill's proposed attack. This ground too has no substance.

5. The judge should have explained to the jury that if the appellant might have believed that Boxhill was only going to frighten the accused, he should not be convicted of murder but only manslaughter.

The learned judge in a careful direction explained that if they thought that Boxhill might, as he had said in his confession, have only intended to frighten the deceased, then they should only convict him of manslaughter and in those circumstances the appellant also could only be convicted of manslaughter. Miss Goddard's complaint was that the judge should have additionally directed the jury that

whatever Boxhill intended, if the appellant thought that all that he proposed to do was to frighten the deceased, then the appellant could only be convicted of manslaughter. In their Lordships' opinion, this is a vain attempt to pluck a defence out of the air and then to complain of the failure of the judge to require a jury to consider it. There is no suggestion in the appellant's confession that Boxhill said anything about intending to frighten the deceased. He said in terms that he was going to kill her. The appellant's defence was that he was not present when the killing took place. He was elsewhere. There was thus not a scintilla of evidence to base a suggestion to the jury that, if they rejected the alibi defence, the appellant might have thought Boxhill's intention was merely to frighten the deceased.

6. The judge failed to warn the jury that the confession of Boxhill could not corroborate the evidence of the witness Bradshaw.

At an early stage in his summing up the judge told the jury in the clearest terms that any statement which Boxhill gave to the police was only evidence against Boxhill. It did not implicate the appellant. The statement could only be evidence against the maker of that statement. That direction in itself was quite sufficient. There was no need for it to be repeated in relation to Bradshaw's evidence.

Miss Goddard, in the appellant's case, under the general heading that the review of the evidence by the judge was inadequate, identified two or three specific matters. Their Lordships do not propose to add unnecessarily to the length of this judgment by dealing with these, since Miss Goddard fairly concluded that, if none of her other grounds succeeded, these criticisms, even if accepted, would not carry the appeal.

Having considered the various grounds of appeal, it seems tolerably clear to their Lordships that it was the application to call fresh evidence, upon which the main argument in the Court of Appeal centred. This no doubt accounts for the Court of Appeal providing a written judgment giving its reasons for dismissing that application. The lack of substance in the substantive grounds of appeal may well have resulted, not only in the rejection of those submissions by an oral judgment but in a summary form.





