

Ellis Taibo

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 26th March 1996

Present at the hearing:-

Lord Keith of Kinkel
Lord Browne-Wilkinson
Lord Mustill
Lord Steyn
Sir Brian Hutton

[Delivered by Lord Mustill]

During the morning of Wednesday, 14th August 1991 the body of Jill Osborne ("the deceased") was discovered at the house in the outskirts of Dangriga in Belize where she had been living with Albert Valerio. She had been murdered, the cause of death being a massive wound to the throat, and her clothing was disarranged in a manner suggesting a sexual assault. The house had been ransacked and some small items of jewellery were missing. At first, Albert Valerio was suspected of the murder and detained, but it soon became clear that he could not have been responsible. Some days later, Ellis Taibo was arrested and charged with the murder. At the conclusion of a trial during July 1992 he was found guilty and sentenced to death. After an unsuccessful appeal to the Court of Appeal of Belize, he brings this further appeal by special leave.

Although several grounds of appeal have been advanced, two are by far the most important. First, that the evidence for the prosecution fell short of a prima facie case, so that the trial judge should have directed an acquittal. Secondly, that even if there

was just enough to go to the jury particular care should have been, but in the event was not, taken in the summing-up to point out the various weaknesses in the evidence for the prosecution. The scope of the issues need only be stated in this way to show that the appeal is of a kind which the Board will not usually entertain and that the nature of the complaints calls for a more detailed examination of the evidence than would normally be appropriate.

I. The Case for the Prosecution.

It is useful to begin by setting out the opening statement of counsel for the prosecution as recorded in the note of the trial judge.

"Mr. Foreman and members of the jury as the Registrar rightly read to you the accused has been charged with the crime of murder. I will give you brief facts of the case prosecution hopes to prove. On the 14th August 1991 sometime after 10 in the morning Jill Osborne was found dead in a house at No. 21 Howard Street, Southern Foreshore, here in Dangriga.

She has been found with a slash on the neck - 5 ins. in length - a knife with what appear to be blood was found very near this body. Police came in to investigate - body taken to Belize City mortuary where body was identified by former VSO Director Elizabeth Fish.

Ellis Taibo had come to Dangriga the day before about 7 o'clock had return back after 8 the following day. When he came to Dangriga was seen wearing a red shirt which was identified as found not far from the house where the lady was killed. On returning back was found wearing a greenish shirt which was identified as belonging to this lady.

On this evidence the Crown is relying to prove that this lady is dead and on this evidence we are saying that it was Ellis Taibo who intentionally caused the death of Jill Osborne. Our case is being prosecuted relying on circumstantial evidence there is no direct evidence."

Thus, counsel for the prosecution very fairly acknowledged from the outset that there was none of the direct evidence against the appellant which often founds a prosecution for murder. No witness spoke to having seen the appellant in the vicinity of the house on the night of the murder. The knife which inflicted the fatal wound was not said to have belonged to the appellant or to have been seen in his possession. Finger-print impressions were sought, but there were none to connect the appellant with the scene of the crime. Bodily samples were taken from the deceased

and the appellant, but they were inconclusive. So also were tests on the crucial items of clothing. The missing jewellery was not traced to the appellant. In statements taken by the police the appellant made no admissions of any kind.

Counsel's opening address clearly shows that the case for the prosecution was initially founded on evidence and inferences about two items of clothing: a "red shirt" and "greenish shirt": initially, because the case was to be reinforced at the last moment by another important item of evidence, given by a man named Francisco Valerio. The expressions "red shirt" and "greenish shirt" have been placed in quotation marks for two reasons. Not one but two, and conceivably three, red shirts were described in evidence, and according to different accounts there may have been two green shirts (or two shirts of a greenish blue colour). Moreover, the word "shirt" was used at the trial to denote two different styles of garment: a shirt with a collar, and a collarless T-shirt.

II. Chronology: Undisputed Facts.

The order of events is important.

(i) On 8th August 1991 Albert Valerio left the house at 21 Howard Street to go camping with his Scout troop. The deceased remained at Dangriga.

(ii) For a few months before Tuesday, 13th August the appellant had been living with Jane Cruz in Seine Beight, a village of about one thousand inhabitants. On that day they quarrelled, and the appellant left her house. During the evening he set off in the direction of Dangriga. He was wearing mauve shorts.

(iii) The deceased was murdered in the early hours of Wednesday, 14th August. Her body was discovered at about 10.00 a.m., and a detachment of police under the command of Sergeant E. Itza was summoned. Upon arrival they found that the clothing of the deceased was disarranged, and that her face was covered with T-shirts and a sheet. There was blood on the fabrics and there was a big blood spot (or pool) on the floor. Drawers in the bedroom had been pulled open and there was an empty purse on the bed. A knife with what appeared to be bloodstains was found in an adjacent room.

Sgt. Itza immediately set his men to searching the neighbourhood, and one of them (PC Arzu) found a red "shirt" (or a T-shirt) by the roadside about 100 yards or feet from the house.

During the afternoon, Albert Valerio was arrested up-country and detained overnight.

Finally, the appellant arrived in Seine Beight and went to the house of Rita Maxima. He was observed by Jane Cruz from her kitchen window.

(iv) On Thursday, 15th August the police took Albert Valerio to Dangriga, where there was an important interview at which he was shown some coloured T-shirts.

(v) On the morning of the following day, Friday, 16th August, Constable Guzman and Sgt. Itza went to Seine Beight. According to their evidence they searched the house of one Martin Valerio, and found two pairs of shorts, one of them mauve, and a light green "sport shirt". Nobody else was present. The house was unlocked. Later they found the appellant working on the house of Joseph Augustine, and arrested him.

(vi) On 20th August, the appellant made a statement under caution in which he explained that he was friends with Albert Valerio, and had three times visited the house where Valerio lived with the deceased. The most recent was on the evening of Sunday, 11th August. When he visited Dangriga again on Tuesday, 13th August, he did not go to the house, but after passing the evening in the town spent the night in a partly completed building and then hitch-hiked back to Seine Beight. He was wearing light mauve shorts and a greenish colour shirt.

(vii) During August 1991 the body of the deceased was brought back to England. A post-mortem was carried out. The results are not in evidence.

(viii) At some time before December 1991 a senior officer of the Belize police took a number of exhibits to the United Kingdom for examination by the Forensic Scientific Laboratory for DNA and other tests. These included swabs, blood samples and clothing. According to the evidence of Detective Inspector Robinson, an officer from the Hampshire Police seconded to assist the Belize police, the clothing included the red shirt found by PC Arzu, a red T-shirt with the label Memo, possibly another red T-shirt, a light blue T-shirt (perhaps a T-shirt elsewhere described as green), and a pair of mauve shorts. All the exhibits were brought back to Belize for the trial, except for the semen and blood samples which (according to the Inspector) "proved nothing".

III. The Red Shirt.

In his opening address counsel for the prosecution asserted that: "When he [the appellant] came to Dangriga was seen wearing a red shirt which was identified as found not far from the house where the lady was killed". This must be a reference to the shirt found by PC Arzu on the road not far from the house. There was a

conflict of evidence between Arzu and Sgt. Itza about whether Arzu had been instructed to look for a red T-shirt. The former said that he had, the latter that he had not. There was also uncertainty about whether PC Arzu had identified the garment as a shirt or a T-shirt. At all events when the trial arrived PC Arzu identified a garment Exhibit A as the shirt which he had found; but he did so only "by the shade of the colour".

Another witness spoke to Exhibit A, namely Jane Cruz. She said that she had bought a red shirt, marked with a fox in the front and a manufacturer's label "J.C. Penny" at the neck. When shown Exhibit A she said that it resembled the shirt which she had given to the appellant. J.C. Penny is the name of an American manufacturer whose products are sold in very large quantities world-wide.

Plainly, the prosecution was inviting the jury to find that the appellant had worn the red shirt which PC Arzu found when he committed the offence, and had then discarded it when running away, presumably because it bore marks of the crime. Unfortunately the pathologist who gave evidence of the post-mortem in Belize was not asked to say whether the infliction of this large throat wound would have projected blood towards the attacker, and the pathologist who conducted the post mortem in England did not give evidence. The purpose of sending the shirt to England for examination must have been to see whether it bore stains of blood, and particularly blood of the deceased. The nil return suggests that there may have been none of significance, in which case it is hard to see why the perpetrator should have thrown the shirt away.

There was another red garment, a T-shirt not a "shirt", which according to the evidence of Albert Valerio he had been shown during his interview on 15th August (the day after the murder). It had then borne stains resembling blood, and resembled one which he had seen at No. 21 Howard Street. This was one of the garments sent to England for examination. According to Inspector Robinson it carried the label MEMO. Whether this was the same shirt as the one which was shown to the deceased's daughter and Albert Valerio at the trial, and stated to resemble one owned by the deceased is not clear; there is no reference in the notes of evidence to the shirt being bloodstained. This need not be pursued, for it is clear that a collarless T-shirt can have no relevance to the prosecution's case that the appellant was wearing a J.C. Penny shirt when he left for Seine Beight and was not wearing it when he came back. What did matter, for the purpose of explaining the case to the jury, was that: (i) PC Arzu identified the shirt Exhibit A only by its colour. (ii) He did not say that there were blood-stains on it. (iii) There were marks

resembling blood on the red T-shirt found under the head of the deceased, but this was not the shirt which the appellant was said to have been wearing when he left Seine Beight on the evening before the murder. (iv) Both shirts were sent for examination in England but no positive result was reported.

IV. The Green Shirt.

The case for the prosecution was stated in opening as follows: "On returning back [to Seine Beight from Dangriga] was found wearing a greenish shirt which was identified as belonging to this lady". Although it was not explained by the prosecution at the trial just how this shirt was said to be relevant, no doubt the jury was asked to infer that the appellant, having committed a murder which involved bloodshed, and fearing that his clothing bore traces of it, took a green shirt from the deceased's house and put it on after he had thrown away his red J.C. Penny shirt. Evidently no such precaution was needed as regards the mauve shorts which he was undoubtedly still wearing when he returned to Seine Beight on Wednesday, 14th August. Since the green shirt was plainly crucial to the case as opened to the jury by the prosecutor, the evidence about it must be examined in detail.

In order of time, the evidence relates first to an occasion when the deceased was on holiday in England during July 1991 and went shopping with her daughter in Chichester. According to the daughter:-

"She bought mainly T-shirts among other clothing. They were MEMO brand T-shirts which appear on the label on the back. She bought about 4 ... they were all MEMO brand T-shirts. There was one sort of red in colour; 1 which was a light blue-green in colour; and that's all I can remember".

At the trial the daughter was shown a red and a greenish blue T-shirt, and said that they were like the ones her mother had bought. Evidence was also called from the Sales Manager of MEMO fashions. He stated that their goods were sold only in Europe. There were about nine colours of the type of shirt in question, including red, turquoise blue and green. The witness produced examples of the turquoise blue and green T-shirts. On being shown the garments which had been produced to the daughter he identified them as having been manufactured by his company.

Turning to the evidence of a particular green or blue or greenish-blue T-shirt, the first event in order of time was described by Jane Cruz. This young woman said that during the morning of the day after her quarrel with the appellant (i.e. the morning after

the murder) she had observed his arrival at Seine Beight in a pick-up truck. He was 50 yards away. He was wearing a blue shirt and the same mauve shorts as before. He went into the kitchen of Rita Maxima, and came out shortly afterwards in a brown long-sleeve shirt. She said that the appellant did not own a blue or green shirt, but she was familiar with the brown long-sleeve shirt. On being shown a garment with the exhibit number "D.G.3" the witness said that it resembled the blue shirt. Pressed in cross-examination she accepted that she could not say whether it was the same shirt as the one which she claimed to have seen the appellant wearing on his return to Seine Beight.

The next event said to have involved such a T-shirt took place during Albert Valerio's interview with the police on 15th August, when he was still in police custody. His account in evidence was as follows:-

"At the Police Station, Dangriga, the Police showed me some exhibits for me to identify. They were T-shirts, about 4, blue, green, mauve and pink T-shirts. The green T-shirt had 3 buttons to the front, directly under the chin. Also that green T-shirt had the scent of a Yardley Lavender perfume that we both used at home; myself and Jill Osborne. It was dirty. In addition to that the T-shirt was a female T-shirt because for the female T-shirt the buttons are placed on the left side and for the male it would be on the right. It didn't have any collar. The brand of the shirt is a MEMO placed in the back of the shirt.

Q. - If this shirt was shown to you would you be able to identify it?

A. - For sure.

Shown Exh D.G.3. This is blue shirt MEMO brand with 3 buttons and made in Bangladesh. This is the shirt the Police showed to me.

... Jill Osborne ... had 4 MEMO brands T-shirts. The colours of those 4 were blue, green, mauve and pink. This shirt Exh. D.G.3 resembles one that Jill Osborne had in the house ..."

Finally, there was the evidence of PC Guzman who had been stationed at Seine Beight for about a month. According to this witness the appellant, together with Joseph Augustine, was living in the house of Martin Valerio. This was in conflict with the evidence of Jane Cruz to the effect that the appellant had been living with her until the quarrel on 13th August, and indeed had also said when describing the events of 14th August that he was

living at the house of Rita Maxima. PC Guzman described in his evidence how on Friday, 16th August he had, on the instructions of Sgt. Itza, searched the house of Martin Valerio, and had found one "sport shirt" and two pairs of shorts, one of them mauve. The shirt was light green in colour, with three buttons at the front and a MEMO mark at the back. "The shirt was wet - also it had some red spots". It was dirty. The shorts were also wet and dirty. PC Guzman brought the items down to Dangriga, apparently on the following day (17th August), and they were subsequently produced by him at the trial. The garment was described in the note of evidence as "the blue shirt" and was given the exhibit mark "D.G.3".

V. Francisco Valerio.

The trial began on Tuesday, 21st July 1992. By Monday, 27th July the evidence of Sgt. Itza was in progress. At the close of proceedings that afternoon the prosecutor raised with the court the possibility of calling a further witness, Francisco Valerio. He had not been a witness before the Magistrate, nor had any notice of additional evidence been given. The trial judge properly indicated that he would not allow the witness to be called without adequate time being given to the defence. The gist of the evidence to be given was furnished to counsel for the defence, and on Monday morning the prosecutor formally applied that the evidence should be led. The judge acceded to the application, and Francisco Valerio gave evidence as follows. Almost at the outset there was this exchange:-

"DPP: On the 13th of August last year between the hours of 8:30 ...?"

MR. SAMPSON: Objection: you are leading this witness.

COURT: Except for the date. Question must not be leading.

DPP: On the 13th August late last year part of the day where were you?"

The witness continued by saying that between 7.30 and 8.00 p.m. on that day (that is to say, the evening before the death of the deceased) he met the appellant. The latter called to him across the street, asking for Albert Valerio. The witness told him that Albert was not in Dangriga. "He further told me he could go and sleep at Albert's house because he Albert and the deceased are friends". The witness added that the appellant was wearing a red shirt, a sports shirt with buttons, and light short pants.

That was the sum of the case for the prosecution. After the submission of no case by the appellant had been rejected he made an unsworn statement from the dock. This was on the lines of the statement which he had given to the police not long after the murder. He had gone down to Dangriga in the pick-up truck. He had not spoken to Francisco Valerio. After spending some time in Dangriga he rested in an uncompleted house. On the following morning he took a series of lifts back to Seine Beight, where he went to work on a building. No evidence was called for the defence.

V. Subsidiary Complaints.

Before considering the two principal grounds of appeal it is convenient to deal with certain other grounds. The first relates to the explanations given by the judge in his direction to the jury as to the burden of proof. In the opinion of the Board there is no substance in this complaint. The relevant passages might perhaps have been clearer, but taking the direction as a whole the jury can have been left in no doubt that it was for the prosecution to satisfy them of guilt so that they were sure beyond reasonable doubt.

The second complaint does have substance. The start of the examination-in-chief of Francisco Valerio has already been quoted. The dates must be recalled. In his statement under caution the appellant had spoken of a visit to the house of Albert Valerio on the evening of 11th August. He also accepted that he had been in Dangriga on Tuesday, 13th August, the evening before the murder, but denied that he had been to Albert Valerio's house, or had spoken that evening to Francisco Valerio. Plainly, in the evidence of the latter that when he met the appellant the latter was asking for Albert Valerio the date was crucial: whether the meeting occurred a few hours before the murder, or two days previously. Yet prosecuting counsel began by leading the witness on the date. This should not have happened, and the appellant has a justifiable complaint, but it is of no great weight, for it would have taken only a little more thought for the witness to be taken into a sequence of questions which would undoubtedly have brought the date into view. It is unrealistic to suppose that the substance of the evidence was altered by the fact that the question was wrongly expressed.

The third and final complaint is much the strongest. There was no dispute that Albert Valerio and the appellant knew each other, and each side relied on this fact; the prosecution because it was consistent with the evidence of Francisco Valerio about what the appellant had said on the evening of 13th August, and the appellant because it explained why he had been at the house on the Sunday evening. The previous acquaintance could have

been proved by formal admission, or through a short series of questions to Francisco Valerio. Instead, counsel first caused Albert Valerio to state "I know Lynham Prison. I got to know the appellant in this area", and then went on to put in evidence the appellant's written statement under caution where he had said that: "I got to know Albert from Lynham where I was serving a term. His father was a prison officer there". Under section 51 of the Evidence Code of Belize (c. 75) evidence of the bad character of a defendant may be adduced only if certain conditions are satisfied, which was not the case here. The appellant maintains that this breach of an important rule was too serious for the judge to deal with (as not infrequently happens) by passing it over in silence, in the hope that the jury would not notice. It is also said, rightly, that this is not a case where an appellate court can disregard an apparent irregularity by treating it as a matter within the discretion of the trial judge, with which the court should not lightly interfere, since there is nothing in the record to suggest that the trial judge had the point in mind at all.

Whilst this is a substantial complaint, which their Lordships take into account when forming their opinion on the appeal as a whole, it is not in their view sufficient in itself to compromise the verdict. This was a particularly brutal murder, and the bare knowledge that the appellant had previously committed some unknown kind of crime could not have led the jury to be sure of a verdict about which they might otherwise have been in doubt.

VII. The Submission of No Case to Answer.

The evidence given at the trial did not measure up to the brief opening address already quoted. The red shirt found by the roadside, which on the case for the prosecution must have been worn at the time of the murder and discarded because it bore traces of the murder (for there could have been no other reason), was not on examination found to bear such traces. Also, it was not "identified", as the prosecution suggested, as the appellant's shirt since when Jane Cruz was pressed she could say only that it resembled his shirt; and it was a garment made by a manufacturer with large world-wide sales.

More importantly, the evidence about the green (or blue or turquoise) shirt was seriously flawed. This shirt was central. If it belonged to the deceased, and if the appellant had it in his possession after the murder, there were strong grounds for inferring, since he had given no alternative explanation, that he had taken it from the house on the night of the murder. But there were problems about both aspects of the argument. The evidence about where the appellant was living after he left Jane Cruz was unsatisfactory, and it was at least possible that the shirt had been put in the house of Martin Valerio by someone else.

Much more important was the flaw in the evidence about the ownership of D.G.3. The confident identification of this shirt as the one which belonged to the deceased, coupled with the telling detail about the scent of Yardley's Lavender, must have made a great impression on the jury. Yet the evidence was wrong, for the shirt subsequently exhibited as D.G.3 was not brought from Seine Beight to Dangriga until one, or possibly two, days after Valerio's interview with the police. Either the deceased had two green T-shirts (a proposition which nobody had advanced) and the police had for some reason and on some occasion obtained the one which had no connection with the murder and shown it to Valerio; or the latter had muddled the identification with a later occasion of which he did not speak, in spite of the fact that the first interview took place after he was detained under suspicion of murder, an event which must surely have lodged clearly in his mind.

These were serious weaknesses in the case for the prosecution, but they were not necessarily fatal. The indicators of possible guilt had to be added together. The red shirt was of common manufacture, but its presence thrown away on the road not far from the scene suggested a connection with the murder, and there was evidence that the appellant had been wearing a similar shirt not long before the crime. The story of the green shirt was unsatisfactory, but if the jury accepted that a MEMO green shirt was found in a place lived in by the appellant obvious questions arose about how a garment sold only in Europe could have found its way to a small village in Central America; and the jury might not have been impressed by the suggestion that it was accounted for by the British military presence in Belize. Finally, there was the evidence of Francisco Valerio. If the jury believed him, the appellant had in mind to spend the night at a house where he was friendly with the cohabitant of the deceased. All in all, although the case against the appellant was thin, and perhaps very thin, if the jury found the evidence of Jane Cruz, Guzman and Francisco Valerio to be truthful and reliable there was material on which a jury could, without irrationality, be satisfied of guilt. This being so, the judge was not only entitled but required to let the trial proceed: *Reg. v. Galbraith* [1981] 1 W.L.R. 1039.

There remains the second major issue. The prosecution case was not only weak but confusing, and confusing in a way which tended to obscure its weakness. As the story unfolded through the evidence of successive witnesses, it would have been natural for the jury to lose track of the crucial dates, and of the problems with the identification of the shirts. The careful arguments addressed on this appeal have enabled the evidence, so far as it went, to be arranged in an orderly manner. But a

mistake would be understandable; a mistake of a kind which, their Lordships must respectfully point out, was made by the Court of Appeal itself in stating that Albert Valerio had identified "for sure" Exhibit D.G.3 as the deceased's green T-shirt, whereas Valerio could not have been shown D.G.3 on the occasion which he described. The same mistake was made in the closing address for the Crown, when it was stated that after finding D.G.3 PC Guzman had taken it to Sgt. Itza, who had shown it to Valerio on the occasion of inspecting the four T-shirts, which as already seen could not have happened. The error was compounded when the trial judge quoted verbatim from the opening for the Crown, which did not correspond with the evidence actually given.

The purpose of their Lordships in emphasising the evidence on D.G.3 is not to dwell on a mistake which, without the chronological analysis provided to the Board, would be wholly understandable, but to illustrate the need for the trial judge to explain to the jury why the simple case presented to them by the prosecution might be open to doubt. After the most careful study their Lordships have concluded that such an explanation cannot be found in the summing-up actually delivered. Little purpose would be served in going through it line by line. It must be emphasised at once that there is no question here of the direction being unbalanced, in the sense of favouring one side to the prejudice of the other. Although there were features of the summing-up, as there were of the trial, which are open to criticism, that kind of unfairness cannot be suggested here. Nor can it be said that the judge's account of the evidence was inaccurate. But in a marginal case such as this the evidence needed to be scrutinised, and not simply rehearsed, if a verdict founded on it was to be safe. This did not happen here, and their Lordships feel bound to conclude that the verdict cannot stand.

This conclusion makes it unnecessary to discuss a further question, arising from the direction to the jury on the nature of circumstantial evidence. The learned judge correctly explained in accordance with long-established law that a series of facts, none of which in isolation directly connects an accused person with an offence, may nevertheless when taken together justify an inference of guilt. Whilst the task of deciding whether to draw such an inference is well within the compass of a jury, and is regularly performed at criminal trials, there can be an element of risk unless the jury has clearly in mind that the facts relied on must really be facts, and not simply unproved assertions of fact: for otherwise the inference will be built on sand. This is something which a jury might easily overlook, believing that what must be added together when considering whether to draw the inference of guilt is the evidence given, rather than such facts if any as are established by that evidence. In appropriate cases it may be necessary to warn the jury against falling into this trap.

In the present instance this aspect of the matter was not explored in depth before the Board, and since the appeal has been decided on other grounds their Lordships will not attempt a formulation of the circumstances and manner in which the jury should be directed upon it, or whether in this particular instance the summing-up as delivered gave the necessary guidance.

One question remains, namely what order should now be made. There are obvious objections to a retrial. Prominent among them are the fact that the case turns upon detailed recollections of events which happened some years ago, and the long period during which the appellant has been under sentence of death. These factors may not however be decisive, and their Lordships think it right that the Court of Appeal of Belize should have an opportunity to decide what course will now best serve the interests of justice. Accordingly they will humbly advise Her Majesty that the conviction should be set aside and the matter remitted to the Court of Appeal to consider whether the prosecution should be permitted, if so advised, to proceed to a retrial.