The Court of Appeal for Bermuda

CRIMINAL APPEAL No 13 of 2013

Between:

NORRIS SIMPSON

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mrs. Simone Smith-Bean, Smith Bean & Co., for the Appellant
Ms. Cindy Clarke and Ms. Takiyah Burgess, Department of Public Prosecutions, for the Respondent

Date of Hearing: **29 February & 1 March 2016**

Date of Decision: **18 March 2016**

Date of Reasons: **25 May 2016**

REASONS

1. Early in the morning of 2 September 2011 the body of Ida James was found lying in a pool of blood on the kitchen floor of 32 Berry Road, Paget where she lived. She had been brutally murdered some time during the previous night. She was last known to be alive at 6:53 on the previous evening when she spoke to a friend on the telephone. She lived alone and had suffered 60 stab wounds, four broken ribs and a blunt force head injury. There were defensive wounds to both arms. The cause of death was blood loss. On 1 February 2013 following a trial before Simmons J and a jury the appellant was convicted by a majority of ten to two of her murder.

2. The discovery of the body was made by Mrs. Mahajan who immediately called her husband. He flagged down an off duty policeman, Robert Cardwell, who called for the appropriate emergency services.
3. The deceased's property is a single dwelling with three entrance doors. There was no sign of forced entry. The external kitchen door was closed but unlocked; the interior one slightly ajar.
4. The appellant was a tenant of the deceased and lived at 70 North Shore Road, Pembroke. So too were the Mahajans who lived at the same address. On the evening of 1 September 2011 the deceased went to No. 70 to collect the rent but the Mahajans did not have it readily available which is why Mrs. Mahajan went with it to the deceased's the next morning.
5. That afternoon the police went to 70 North Shore Road to interview the tenants. They interviewed the appellant at that stage as a witness. He said he'd given her $800 rent but she had given him $50 back. He said he did maintenance work for her and frequented her house. He was arrested and taken to Hamilton Police Station.
6. On examination it was noticed that he had a cut to his little finger that appeared to have been caused by a pointed sharp object such as the tip of a knife. The injury appeared fresh. Nail clipping and scrapings were taken from the fingers of both hands and were sent for analysis. Other injuries noted included minor lacerations and scratches on his hands and arms, abrasions of the shins and some bruises. The appellant attributed his long, dirty fingernails to the use of polyurethane at work.
7. The appellant's room was searched on 2 September and among other things a blue "Tucker's Point" cap was discovered with a small piece of flesh like substance on the front.

The Case against the Appellant

8. The case against the appellant was built on circumstantial evidence, the main aspects of which were as follows. His nail clippings revealed not only his DNA but also that of the deceased on both hands. Forensic testing of the Tucker's Point cap identified the deceased's DNA profile on fatty tissue found on it. A note written by the deceased to the appellant was found in his bedroom. It

related to unpaid rent and suggested some discord between them. The appellant's explanation for the cut on his little finger was refuted by other evidence and there was evidence that he was constantly borrowing money and was concerned that he was unable to pay his landlady.

The Defence Case

9. The appellant gave evidence. He said there was no issue over money with the deceased and no motive for murder. He got on well with her and did work at her property. Indeed he had met her at Gorham's on the afternoon of 1 September. The police were in breach of the Police and Criminal Evidence Act 2006 in their search of his premises. The fatty tissue on the cap he argued could have been a plant or an innocent transfer and his account for the cut on his finger was true. The deceased's DNA could have got under his nails when he visited her house two weeks before her death.

The Complaints against Counsel

10. Central to the appeal is the contention that Mr. Attridge, who appeared for the appellant at the trial, did so incompetently. There were factual issues between them as to what occurred. We heard evidence from both of them. We unhesitatingly preferred that of Mr. Attridge.
11. The appellant's first ground of complaint is that Mr. Attridge did not elicit from him during his evidence in chief that he had an intimate relationship with the deceased and that they were intimate on 1 September. Mr. Attridge said the decision was the appellant's. This, it was contended, would have provided an explanation for how the deceased's DNA was on the material taken from his nails. Mr. Attridge's response was that this point was indeed raised by the appellant and discussed with him by both his counsel, Mr. Attridge and Mr. Richardson. Grave concerns were expressed by Mr. Richardson in particular as to whether it was wise to introduce this evidence. The deceased was of standing and high esteem locally and there was concern about the effect its introduction might have on the jury. The matter, according to Mr. Attridge, was discussed on two or possibly three occasions, Mr. Attridge making the point that the decision was ultimately that of the appellant. The appellant was alive to the

concerns and elected to omit it from his proof of evidence. We accept that the subject of the relationship with the deceased was raised with Mr. Attridge and Mr. Richardson at an early stage. It was also discussed again before Ms. Zuleger, the prosecution DNA expert, was cross examined. As Mr. Attridge pointed out, if the subject was going to be raised by the appellant in his evidence he would have to raise with Ms. Zuleger in cross-examination the possibility of this being the reason for the deceased's DNA being found on the scrapings taken from under his nails. There is also the point that the subject of the deceased's DNA under his nails was raised in cross-examination of the appellant more than once so he had ample opportunity to mention the possibility of it having got there in consequence of his intimate relationship with the deceased had he wished to do so. In our view it would have been the height of folly to have introduced this evidence into the case. The subject was discussed and the appellant accepted counsel's advice not to do so.

12. The next ground of complaint is that, contrary to the appellant's instructions, Mr. Attridge did not call any expert forensic witness to counter the prosecution's case. It was argued that this was relevant in four respects:

    - To negative Ms. Johnson's evidence that the assailant may have been wearing a fabric glove;
    - In relation to the degree to which the conduct of the investigators conformed to good practice;
    - The extent to which the conduct of the investigators left open a window of opportunity for the tissue found on the appellant's cap to have been transferred inadvertently;
    - To establish that intimate touching by the appellant could account for the deceased's DNA under his fingernails.

13. We have already covered the last of these respects. As to the first three, Mr. Attridge's response is as follows. He has no recollection of the appellant making any complaint in respect of these aspects of the case and the way in which it was handled either before, during, or immediately after the trial. Nor was any specific complaint or request made about the need to call expert evidence on

behalf of the defence. Mr. Attridge points out that the reality was that there was little dispute between the prosecution experts and the opinions obtained by the defence. There were two main aspects: the tissue on the cap and the DNA under the appellant's fingernails.

14. Mr. Attridge exhibited to his affidavit an email from Dr. Duncan Woods of Keith Borer Consultants dated 14 January 2013 in which he said this:

> "Adipose tissue is the layer of fatty cells under the skin and it is common for smears of this to be deposited along knife blades used in stabbings and for fragments (sometimes combined with skin) to be removed when the blade is withdrawn. I would anticipate such small pieces of adipose tissue to be more common when serrated blades are used but as far as I am aware there is no specific research on this. It is not the type of transfer one would expect other than in circumstances of some form of fairly serious injury to the donor, which in effect rules out transfer by some previous interaction between Mr Simpson and Ms James (i.e. prior to the attack on her at her home). As you correctly point out this does nothing to assist with the mechanism by which this piece of adipose tissue transferred from the scene to the cap.
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> This does appear to have become [one] of those fairly rare cases where a large forensic effort becomes 'boiled down' to a single forensic link between defendant and scene, where the value of the tests is clear (i.e. adipose tissue from the deceased) but the transfer mechanism is not. Generally this would shine an unforgiving spotlight on the police scene examination methods and particularly the merits of using methods that subsequently prove that indirect contaminant transfer was impossible rather than leave a 'window of opportunity' as DC Henry appeals to have done."

15. Ms. Christopher, who had represented the appellant before Mr. Attridge, had earlier commissioned a report from Dr. Woods and this had been produced in

October 2012. The appellant's complaint must be seen in the light not that counsel failed to instruct an expert but that no expert evidence was called.

16. On the issue that Ms. Johnson thought that the assailant may have been wearing a fabric glove, the defence could have called contrary evidence from Dr. Woods. He did not share Ms. Johnson's opinion and saw no evidence to suggest the presence of a gloved hand. Mr. Attridge said that he and Mr. Richardson took the view that it was not in the appellant's interest to call contrary expert evidence because an assailant wearing a glove would arguably be less likely to have the deceased's DNA on his nail clippings and scrapings and less likely to sustain an injury to his little finger. This was pre-eminently the kind of judgment call that often had to be made by defence counsel in criminal trials. The decision was not only understandable but, in this Court's view, the correct one.

17. The second and third points relate to the possibility of inadvertent transfer of the adipose tissue onto the appellant's cap. In short, bad practice on the part of the investigating officers gave rise to the opportunity or greater opportunity for inadvertent transfer that would not otherwise have existed. Mr. Attridge told us that these issues were fully explored in cross-examination of the prosecution witness and that his cross-examination was guided by Dr. Woods' views. The opportunity for cross contamination is a question of fact to be established from the evidence and Mr. Attridge dealt with this appropriately. He established what he required from the prosecution witnesses and there was no need to call Dr. Woods. Mr. Attridge in giving his evidence to us made the pertinent point that Dr. Woods could go no further than to say that in his expert opinion the possibility of inadvertent transfer existed. The mechanism for possible transfer depended on the factual evidence. There was nothing additional Dr. Woods could add by giving evidence and it is often the case that points carry greater weight with the jury when emerging in cross-examination rather than being re-emphasised by a defence witness. Mr. Attridge thinks it is likely the topic was discussed with the appellant but had no specific recollection. In our view Mr. Attridge acted entirely appropriately.

18. Next it is said that defence counsel were at fault for failing to procure any analysis of forensic material obtained during the police investigation. It is

contended that the obvious candidates were the adipose tissue on the appellant's cap, the swabs of blood from the crime scene and various bloodstained articles recovered from the appellant's room.

19. Mr. Attridge had no recollection of the appellant asking counsel to have forensic material analysed save possibly in early discussion relating to shoe print impressions and some material found at the scene and on the appellant's clothing. Both these points were, however resolved by the Crown in favour of the appellant. The appellant's sneakers were excluded as making the shoeprint impression and the material did not have a molecular match.

20. As to the adipose tissue, concerns were initially raised with the prosecution as to what it was when it tested presumptively for blood and was confirmed to match the deceased's DNA. Further tests were carried out on the tissue which confirmed it was adipose tissue. In the light of Dr. Woods email of 14 January 2013 the point was not pursued further. In any event, as post trial enquiries have revealed, there was no further tissue remaining to test.

21. During the further tests it was found that the adipose tissue was contaminated with what could have been black fingerprint powder. Unsurprisingly, the defence made much of this as supporting their case of indirect transfer along with the absence of other evidence such as blood spatter on the cap. We accept Mr. Attridge's evidence that the point was fully explored before the jury.

22. There is a further complaint that the defence should have taken steps to have swabs from the scene and the appellant's room, that apparently contained blood, analysed. The position at trial was that there was no forensic evidence to connect the appellant with the scene except the adipose tissue and the nail clippings. Defence counsel cannot be criticised for failing to take costly steps that would in all likelihood not have added to the evidence in the case. It is of note that counsel who acted for the appellant for a time after the trial but eventually did not represent him on the hearing of the appeal did order further tests on swabs taken at the scene. These were examined by an expert, Orla Sower, with a view to her giving fresh evidence. Unsurprisingly various samples matched the DNA profile of the deceased. A very small number of low level DNA components were present suggesting possible presence of DNA from someone else in some of the samples but they contained too little information for any

meaningful comparison. In short, the swabs yielded nothing of evidential significance. It was also contended that the defence should have had DNA analysis of blood stained articles recovered from the appellant's room. It is difficult to see how this could have assisted the defence's case. The prosecution's case was that he cut his finger with a knife during the course of the killing. Mr. Attridge says that the appellant's instructions were that he cut his finger at work when he jumped off a truck and that he used part of a brown paper bag and/or piece of cloth to bandage the cut. However, when he gave evidence he said he put plumber's tap on it and the cut was minor.

23. One other point made by the appellant relates to a manilla envelope found by the police in the appellant's car. The appellant contends that this was the envelope in which he gave the deceased money to save for him. Had this been adduced in evidence it would have shown that there was more than just a landlord and tenant relationship between the deceased and the appellant and that this would undermine the Crown's theory as to motive. Mr. Attridge says he never asked for or was provided with the envelope or a copy. There was nothing in his instructions to suggest that it was relevant or that the appellant was saving money in this way. There was no money in the envelope.

24. Mr. Attridge is an experienced counsel and so is Mr. Richardson who assisted Mr. Attridge in the defence case. Mr. Attridge's affidavit concludes with the statement that Mr. Richardson had been sent an electronic copy of the draft and that he confirms that it accords with his recollection. In the course of a criminal defence counsel has to make many judgment calls often at short notice, for example in deciding whether or not to adopt a particular line of cross-examination with a witness. We are not persuaded that any of the decisions of Mr. Attridge were wrong, let alone so wrong as to give rise to the risk of a wrongful conviction. There is nothing in our view in any of the appellant's complaints about Mr. Attridge's conduct of the trial. It should be clearly understood that the appeal process is not an opportunity for a minute examination of decisions taken by defence counsel at the trial.

25. Before the start of the appeal the appellant made an application to adduce fresh evidence. This application was diffuse in nature and presented in the form of an amended skeleton argument. The application should have stated

precisely what fresh evidence was sought to be adduced and the basis upon which it was said to be admissible. In the event it quickly became apparent that the application was little more than a complaint about the way in which the defence case had been handled at the trial. Accordingly we have dealt with it in that context. In summary the fresh evidence sought was in three forms:

- DNA analysis results
- Expert opinion
- Documentary evidence

26. The DNA analysis added nothing to the evidence at the trial. Ms. Sower's evidence went no further than identifying the deceased as the main source of the blood on the samples she examined. Dr. Duncan Woods was available to the defence at the trial. Indeed there was a pre-trial report from him. No fresh documentary evidence has become available. It was all available at the trial. The threshold for introducing fresh evidence is not crossed. See *Dial and Dottin v The State* [2005] 65 WIR 210, per Lord Brown of Eaton–under-Heywood at Para 31.

Other Grounds of Appeal

27. A different division of this Court on 18 June 2015 gave the appellant leave to amend his grounds of appeal to include certain grounds but refused leave on others. We have already covered the grounds involving the conduct of counsel.

Non-Disclosure of CCTV Footage

28. There are two aspects of this. The first relates to Gorham's Ltd and Masters Ltd on 1 September 2011 and the second to C-Mart on the morning after the murder. The complaint is that the investigating officers failed to obtain, and make available to the defence, CCTV footage from Gorham's Ltd and Masters Ltd relating to the afternoon of 1 September 2011. Secondly, having obtained CCTV footage from C-Mart relating to the following morning they failed to make it available to the defence and then lost it so that it was not available at the trial.
29. This issue was the subject of two formal admissions at the trial as follows:

> "On 23 January 2012 DC 929 Cheryl Beach gave evidence in this case, that during the course of the investigation, police seized CCTV footage from Masters and Gorham's Ltd. As a result of a request for disclosure from counsel for the Defendant it was established that this evidence from DC Beach was not correct. Police did not seize CCTV footage from either Masters or Gorham's Ltd."
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> "The police did seize and view CCTV footage from C-Mart on North Shore Road in Pembroke Parish but nothing of evidential value was seen in that C-Mart CCTV footage. The disc containing the CCTV footage cannot not be found by the police and cannot therefore be disclosed to the defence."

30. The appellant's evidence was that he had arranged to meet the deceased at Gorham's on the afternoon of 1 September. He did meet her there and they went into the light section with a view to purchasing motion detectors but no purchase was made because the job needed to be measured up. They went outside to her car. He gave her $800 rent money and asked if she could do him a favour by driving him to Masters and then Point. She agreed and eventually dropped him off at Gorham's where he had left his bike.
31. The prosecution did not dispute that the appellant had been to Gorham's or Masters or that he had met the deceased at Gorham's. They did dispute that she had given him a lift and that he had paid her $800.
32. The investigating officers were not obliged to obtain CCTV footage from either Gorham's or Masters. A number of shopping receipts were found in the appellant's car all dated 1 September 2011. They included one from Gorham's for the relevant time. These receipts supported the appellant's account that he was looking for various items, including security features that she had asked him to install at her property.
33. As to C-Mart on the morning after the murder, again the appellant was not challenged on the evidence that he went there. It is unfortunate that the footage was lost. The argument is that the footage might have shown that the appellant's cap had no adipose tissue on it and that therefore it could not have been transmitted there during the course of the killing. However, there was a

formal admission at the trial that the footage contained nothing of evidential value.

34. There is, in our view, nothing in either of these grounds of appeal.

Inadvertent Transfer of the Tissue to the Cap

35. The complaint is that the judge effectively told the jury on a number of occasions that they could rule out inadvertent transfer of the tissue to the cap. Ms. Smith-Bean took a more fundamental point for the appellant, although it was not among the grounds for which leave had been given. She submitted the evidence of the adipose tissue on the cap should not have been admitted at all. First she argued because the search of the appellant's room was unlawful the result of the search should not have been admitted and secondly that the tissue had been contaminated by particles of black powder.

36. As to the first aspect the judge accepted there had been non-compliance with the statutory provisions for a search. She noted that at vol2 p301 of the transcript that Mr. Attridge was submitting that technical non-compliance by the police should be punished by exclusion of the evidence. The judge, correctly, rejected that submission holding that the issue was one of fairness and the interest of justice. Since there was no harm or prejudice to the defendant the evidence would be admitted. In our judgment the judge correctly exercised her discretion and this Court cannot interfere.

37. The second point on contamination was not taken at the trial, no doubt for the very good reason that it was bound to fail. It was plainly a matter for the jury what if any relevance the black particles had.

38. Turning therefore to the aspects of this ground on which leave to appeal was granted. The thrust of the complaint is that the overall impression created by the summation is that there was virtually no chance for any inadvertent transfer of the tissue in question. The judge touched on the issue of inadvertent transfer on many occasions during the summation. She rightly told the jury to concentrate on the evidence and avoid speculation. It was relevant to consider how many people attended the crime scene and could have been a vehicle for transfer. It is of note that the cap was only discovered on 2 September after Dr. Spriggs had entered the appellant's bedroom. It was

initially upside down and she only noticed the flesh like substance when she turned it over. The substance was on the top of the cap near the "s" of "Tucker's Point". The fact that, when she found it, it was the other way up would diminish the likelihood of inadvertent transfer from the murder scene to the appellant's room. Dr. Spriggs was never at the murder scene. In any event the issues of inadvertent transfer and deliberate plant were both plainly before the jury (Summation pp44-45).

Circumstantial Evidence

39. It is argued that the judge's direction was wrong in that it failed to provide an adequate summary of the defence case as to the disputed evidence, an adequate identification of evidence which might rebut the inference of guilt and an adequate review of the disputed inferences.

40. The judge's direction on circumstantial evidence is at p21 of the summation. She said:

> "This simply means that the prosecution is relying on evidence of various circumstances relating to the crime and the Defendant which they say, when taken together, will lead to the same conclusion that it was the Defendant who committed the crime."

She then gave two examples. First the wound on his finger leading to the conclusion that he used the knife to kill the deceased. Second the financial relationship between the two of them and the fact that he owed her money. She went on:

> "Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does, in fact, prove guilt.
>
> Furthermore, before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case.

> For example, the Defendant said he received the cut to his small finger when he jumped off the back of a truck.
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> He also told us that Ms James understood his financial position.
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> So you will have to judge the reliability or strength of that evidence before you come to a conclusion based on the circumstantial evidence.
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> Those were only examples. You should distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation.
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> Speculation in a case amount to no more than guesswork, of making up theories without good evidence to support them. Neither the prosecution, not the defence, nor you, should do that."

41. The judge returned to the subject at p53 when dealing with the deceased's DNA on the appellant's nail clippings. She said:

> "You must not jump to the conclusion that it does show such support. Remember this is essentially a circumstantial evidence case and you must fairly weigh up the Defendant's evidence concerning contact with Ms James during her life time. And I'll come on to review that in his evidence later."

42. Finally the judge said this at the conclusion of her summation at p191:

> "This is a circumstantial evidence case…
> Circumstantial evidence cases are not unusual. You will recall part of the direction that I gave you was that you must be sure that the evidence that the prosecution rely on in proof of guilt, does, in fact, prove guilt."

In our judgment the judge's direction on circumstantial evidence cannot be faulted.

Lies

43. The grounds of appeal relating to lies, although not abandoned, were not pursued by Mrs. Smith-Bean with any vigour. In short the judge gave the jury an appropriate direction in accordance with the case of *R v Lucas* (1981) 73 Cr

App R 159 (see Summation pp176-177). Later, at p185, the judge referred to the appellant's evidence referring to particular parts of it and reminding the jury that even if they were satisfied he had lied they should not jump to the automatic conclusion of guilt. There is nothing in these grounds.

Conclusion

44. The Crown's case depended on two compelling pieces of circumstantial evidence, adipose tissue from the deceased on his baseball cap and her DNA on his nail clippings. He was unable to provide a credible explanation for either. Additionally there was the injury to his little finger and the evidence that he owed the deceased money and was in financial difficulty. The jury heard the appellant's evidence and were well placed to assess the extent to which it was untrue. They were entitled to convict and there is no reason to suppose the conviction was unsafe. Accordingly we dismissed the appeal.

Signed

Baker, P

Signed

Kay, JA

Signed

Bernard, JA