THE STATE v. ALI KASSENA
[1962] 1 GLR 144

Division:	IN THE SUPREME COURT
Date:	9TH MARCH, 1962
Before:	VAN LARE, ADUMUA-BOSSMAN AND CRABBE, JJ.S.C.

Criminal law—Practice and procedure—Duty of trial judge where submission of no case to answer is made at the close of prosecution's case—Standard of proof—Criminal Procedure Code, 1960 (Act 30) ss. 173 and 271.

HEADNOTES

In a trial on indictment it is the duty of the trial judge to decide under section 271 of the Criminal Procedure Code, 1960, whether there is any evidence to be left with the jury. It is the business of the judge, as an expert who has a mind trained to make examinations of the sort, to test the chain of evidence for weak links before he sends it to the jury. Where the evidence is circumstantial the law requires a particularly high standard of proof.

Where therefore, the trial court ruled that there was a case for the accused to answer on a charge of murder, because (1) there was evidence of hostile intentions on the part of the accused towards the deceased; (2) the deceased was found dead the same night after a quarrel with the accused; and (3) and the clothes and palms of the accused were stained with blood,

Held:

(1) the learned judge failed to discharge his duty under section, 271 of the Criminal Procedure Code for the following reasons:

  (a) there was no satisfactory proof of the accused's alleged expression of intention to kill the deceased;

  (b) on the evidence and in the circumstances of this case, it was extremely difficult to hold that it was the accused and the accused alone who had the opportunity of lying in wait to inflict harm on the deceased and thereby murder him;

  (c) where the prosecution seeks to rely on the allegation that human blood was found on the clothes of the accused, it is incumbent upon them to prove also that the blood was that of the deceased, otherwise they fail completely in establishing a nexus between the accused and the killing. R. v. Onufrejczyk (1955) 39 Cr. App. R. 1 cited;

(2) an inference of guilt does not necessarily flow from false or conflicting explanations given by the accused, especially where a person of humble station in life seeks to render his explanation more plausible or acceptable. R. v. Wattam (1952) 36 Cr. App. R. 72 cited:

(3) it is dangerous in jury cases to leave to the jury evidence which amounts to suspicion only as there is the fear that they may "put a multitude of suspicions together and make proof out of it." Dicta of Devlin J., as he then was, in R. v. Atter, The Times, March 22, 1956 approved and applied.

CASES REFERRED TO

(1) Paratt v. Blunt and Cornfoot (1847) 9 L.T. (o.s.) 103; 2 Cox C.C. 242

(2) Practice Direction, The Times, February 10, 1962

(3) Armah v. The State [1961] G.L.R. 136

(4) R. v. Abbott (1955) 39 Cr. App. R. 141

(5) Caswell v. Powell Duffryn Associated Collieries [1940] A.C. 152,H.L.

(6) Avery v. Bowden (1856) 6 El. & Bl. 953; 119 E.R. 1119

(7) Ryder v. Wombwell (1868) L.R. 4 Exch. 32

(8) Re Hobson (1823) 1 Lewin 261; 168 E.R. 1033

(9) Bater v. Bater [1951] P. 35

(10) R. v. Onufrejczyk (1955) 39 Cr. App. R. 1

(11) R. v. Dwyer and Ferguson [1925] 2 K.B. 799

(12) R. v. Wattam (1952) 36 Cr. App. R. 72

(13) R. v. Haslam (1926) 19 Cr. App. R. 163

(14) R. v. Jellyman (1921) 16 Cr. App. R. 43

(15) R. v. Atter, The Times, March 22, 1956

NATURE OF PROCEEDINGS

APPEAL against conviction for murder before Apaloo, J. sitting with a jury at the High Court, Kumasi, on the 28th August, 1961.

COUNSEL

Adumua-Bossman for the appellant.

K. Dua Sakyi, D.P.P. with him Sekyi for the respondent (the State).

JUDGMENT OF CRABBE J.S.C.

Crabbe J.S.C. delivered the judgment of the court. The appellant was convicted before Apaloo, J. sitting with a jury at the Criminal Session of the High Court at Kumasi on the 28th August, 1961, for the murder of one Puayaga Grunshie. Against this conviction he has appealed to this court.

In order to appreciate the way in which the various questions in this appeal arise it is necessary to state in broad outline the case as presented by the prosecution. The evidence for the prosecution was that in the afternoon of the 12th February, 1961, the appellant and the deceased met at a dance in the house of the chief of the Grunshie community in Kumasi. When the dance came to an end at about 9 p.m. a quarrel arose between the appellant and the deceased in the chief's house as a result of the exception which the appellant took to the amorous advances which the deceased was making towards his (appellant's) brother's wife. Shortly after this the deceased left the chief's house with three of the prosecution witnesses, and after a brief stop at the house of one of them for a meal these three witnesses accompanied the deceased to his house. It was alleged by the witnesses that the appellant also came to the deceased's house and tried to engage the deceased in a fight, but they were separated.

The evidence as to whether the appellant or the deceased left the house first is rather confused, but

both of them went out of the house one after the other. It is certain that one woman in the house (the fifth witness for the prosecution) led the appellant out of the house, and he walked along the only direct public road to his house at New Tafo.

The deceased, it was alleged by his friends, the prosecution witnesses, left the house alone and without telling anyone where he was going, although his own mother P.W.4 testified that he and his companions left the house together. This incident in the house of the deceased took place at about 9.30 p.m. Later in the same evening at about 10.30 p.m. the dead body of the deceased was found lying on the road along which the appellant had passed to his house earlier in the evening and about 150 to 200 yards from his (deceased's) house. According to the evidence one has to pass by a number of houses from the deceased's house to go to the scene where the dead body lay. The scene of the crime was more than half a mile but less than a mile distant from the house of the appellant. A report was consequently made to the police at about 11.20 p.m.

The appellant was naturally the only person suspected, and after further preliminary enquiries the inspector in charge of the Asawasi Police Station took the Grunshie chief and other policemen to the house of the appellant. At the house the accused was found asleep in his room with his wife and child. He was aroused from his sleep and he promptly denied a suggestion that he had killed the deceased. The police conducted a search of his room and in a corner of the room was found a bush shirt and a pair of trousers which the appellant had worn during the evening. The appellant was arrested and taken to the police station and when the bush shirt and pair of shorts were examined by the inspector in his presence, blood stains were found on each of them. The appellant was asked by the inspector to account for these blood stains but he said he did not know how they came to be on his clothes. Under cross-examination, however, and this should be particularly noted, the inspector changed his story and said that the appellant gave two explanations. The first was that he bought the clothes with the blood stains on them, and the second that the stains were due to mosquito bites. In the palm of the appellant the inspector also found minute blood spots but he asked no questions about this. The appellant had a plaster on his forehead but the inspector could not remember what the appellant told him when he asked about this plaster. On the next day, i.e. the 13th February, 1961, the appellant was cautioned and he volunteered a statement which was tendered in evidence as part of the case for the prosecution, and which, in view of the problem that arose at the end of the prosecution's case, is set out in full, as follows:

> "I know Puayaga Grunshie — now alleged to be deceased. He is my countryman. I knew him since a year ago. There was no trouble between the two of us. I remember yesterday being Sunday at about 7.30 p.m. I visited the house of Chief Grunshie by name Aklia Grunshie at Zabon Zongo. When I visited the house I met Puayaga Grunshie playing with my brother Akyaa's wife. I do not know the name of the woman. She came to Kumasi from my town on or about two months ago. The attitude shown to my brother's wife by Puayaga was not fair to me. I therefore warned Puayaga not to play with a married woman in such manner. He took offence in my talking and started to abuse me. I was not satisfied with the attitude of Puayaga towards me as well. I thought it wise to report such conduct to Chief Grunshie. Chief Grunshie called Puayaga and advised him not to abuse me again. At the chief 's house I was then wearing trousers and a bush shirt which were later found in my room by policemen who visited my house to arrest me. The dresses are now in possession of the police. Puayaga Grunshie left the chief's house for his house. I later followed to the mother of Puayaga's house to inform him what happened between myself and Puayaga. I cannot say whether at the chief's house Puayaga was walking in company with any friend. On my arrival at Puayaga mother's house I saw many people including Puayaga and his mother. I reported the conduct of Puayaga to his mother. The mother advised me not to mind Puayaga but to leave matters as settled. Having taken the advice of the mother I left the house. Puayaga was left at the house when I went out. One Akijiwah who is staying

> in the same house with Puayaga led me half-way to my house. I took the direction Krofofrom towards

> northwards. Akijiwah followed me as far as to the lorry road getting to the road leading to my house before she returned home. I arrived at my house about 8.30 p.m. I met my wife lying on a mat in my room. She was not asleep at the time. She did not ask me anything. On Sundays when I go out I at times return home at about 8 p.m. or even at 10 p.m. but my wife would not ask me any questions. As soon as I departed with Akijiwah I continued straight to my house. I did not pass anywhere. Yesterday evening I failed to take my bath because I felt weary as I took part in my country dance at Zongo. The blood stains found in my palm was due to my playing a drum. Something cut me whilst playing a drum. The blood spots found in my dresses were found since I bought them from a second-hand dealer at about four months ago. I have no trouble with Chief Grunshie, Aklia Grunshie neither any of the Grunshie subjects in Kumasi here. I do not know anything about the allegation. I have not stabbed anybody to death. I was surprised to hear of the death of Puayaga Grunshie. Also I was surprised to be arrested for murdering Puayaga Grunshie. I did not see Puayaga Grunshie anywhere since I left his mother's house. I did not take any drink on Sunday being the 12th February, 1961. There was a plaster on my forehead when I visited the chief Grunshie's house on the 12th February, 1961. I put plaster on my forehead since a week ago."

On the same day the pathologist of the Kumasi Central Hospital, Dr. R. A. Joshi, performed a post mortem examination on the body of the deceased, and his findings established that the deceased died as a result of injuries caused partly by a blunt and partly by a sharp instrument. He took specimen of blood from the deceased's heart during the post mortem examination, and also a specimen from the appellant. He also scraped the minute red spots in the palm of the appellant. He then sent the blood specimen to the specialist pathologist at the Medical Research Institute at Accra for classification. The evidence of the senior pathologist is as follows:

> "On the 15th February, 1961 I received from Corporal D. S. Danso certain specimens for examination. They were labelled 'A', 'B', 'C' and 'D'. 'A' was stated to be scrapping from palm of accused, 'B' was stated to be blood of accused, 'C' the blood of deceased Puayaga Grunshie and 'D' was clothing, shirt and trousers. The blood labelled 'B' belong to group 'O' and was rhesus positive. The scrappings from the palm and the specimen labelled 'C' and stains on clothings gave positive test for human blood but I was unable to group them. I could not classify the others for two reasons. The first is the blood group substance may have deteriorated or that the blood in fact belonged to group 'O'. The majority of people have group 'O' grouping. I am quite certain about the fact that all the specimens are human blood."

This was the state of the evidence in support of the charge in the indictment at the close of the case for the prosecution when counsel for the defence submitted that there was no case for the accused to answer. The grounds for the submissions were mainly that (1) the whole case was based on suspicion and bare possibilities and (2) there were serious conflicts in the evidence. These submissions were, however, rejected by the learned trial judge who ruled as follows:

> "There is of course no eye witness account of the act resulting in the death of the deceased but in my opinion this is not a sine qua non. There is evidence that accused showed hostile intentions towards deceased and followed him up to his house. The deceased was found dead the same night that accused was alleged to have threatened him. The clothes and palms of the accused were found to be stained with human blood. In these circumstances I do not think I would be justified to withdraw the case from the jury. In my opinion a prima facie case of murder has been made against the accused. The submission of no case is overruled and the accused is called upon to make his defence to the offence charged."

The case then proceeded and at the end the jury unanimously found the appellant guilty of murder.

In this appeal it has been ably argued that the refusal to withdraw the case from the jury was an error in law and therefore the subsequent conviction of the appellant was invalid.

There is in general no case to answer unless there is "such evidence, that if the jury found in favour of the party for whom it was offered, the court would not upset the judgment": Paratt v. Blunt and Cornfoot.1(1) In a very recent case,2(2) Lord Parker, C.J., made the following practice direction where a submission of no case to answer is made at the close of the prosecution's case:

> "Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

Though this direction is only a guide to justices we think that it has a very important bearing on the problem which arises in this case.

The legal position after a ruling on the submission of no case was stated by this court in Armah v. The State.3(3) It was said:

> "The principles are well settled and the authorities numerous in respect of the points in issue, and we may here give a resumé of a few which in our view have clearly enunciated the principles. The law on these points does not appear to be in doubt. If at the close of the case for the prosecution counsel's submissions are over-ruled on the ground that a prima facie case has been made against the accused who is called upon to enter into his defence but refused to offer any defence he can be properly convicted upon the evidence given by the prosecution of the offences charged — R. v. Akinpelu Ajani and Others (3 W.A.C.A. 3.)

In the case of R. v. Abbott (39 Cr. App. R. 141), it was held that where there is no evidence against the appellant at the close of the case for the prosecution, it is the duty of the judge to withdraw the case against him from the jury and upon failure or omission to do so if the case proceeds and there is a conviction it must be quashed."

In this appeal great reliance has been placed on R. v. Abbott (supra), but in this country the position at the conclusion of the case for the prosecution is governed by express statutory provisions. Thus section 173 of the Criminal Procedure Code, 19604(4) reads:

> "If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him."

Section 271 of the Act also reads as follows:

> "The Judge may consider at the conclusion of the case for the prosecution whether there is any case for submission to the jury, and if the Judge is of opinion that there is no evidence that the accused has committed any offence of which he could be lawfully convicted on the indictment upon which he is being tried, the Judge shall forthwith direct the jury to enter a verdict of not guilty and shall acquit the accused."

We think that the variation in the language of the two sections is deliberate, and it underlines the functions of a judge in a summary trial and trial by jury. As Devlin J. wrote in his book Trial by Jury, page 64:

> " . . . there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence . . . It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is."

Section 173 is concerned with summary trials where the judge decides both questions of law and fact. It is for the judge in a summary trial to weigh the evidence and then decide whether from the facts proved the guilt of the accused can be inferred. Evidence is said to be sufficient when it is of such probative force as to convince and which if uncontradicted will justify a conviction.

> "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 actually been 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."

Per Lord Wright in Caswell v. Powell Duffryn Associated Collieries Ltd.5(5) Where, therefore, the evidence adduced on behalf of the prosecution fails to take the case out of the realm of conjecture, the evidence is best described as "insufficient". It is the type of evidence which because it cannot convince, cannot be believed, and therefore is incapable of sustaining conviction. In these circumstances it would be wrong in a summary trial to over-rule a submission of no case to answer.

In a trial on indictment it is the duty of the trial judge to decide, under section 271 of Act 30, whether there is any evidence to be left with the jury. If there is none it is his duty to withdraw the case from the jury and direct them to enter a verdict of acquittal and acquit the accused.

What then is the meaning of "no evidence"? In Avery v. Bowden,6(6) Pollock, C.B., said that no evidence to go to the jury meant "where the evidence is such that the Court, had there been no other evidence and the jury had acted upon it, must have set the verdict aside". Again in Ryder v. Wombwell,7(7) Willis, J. said:

> "It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, . . . not whether there is literally no evidence but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

The question which the judge has to consider at the close of the prosecution case in a trial on indictment is "whether the prosecution has given reasonable evidence of the matters in respect of which it has the burden of proof". It is for him as a matter of law to determine whether the evidence adduced has reached that standard of proof prescribed by law; and for the jury to determine whether that standard has in fact been satisfied. In a criminal trial the burden of proof on the prosecution is

very heavy and as Holroyd, J., said in Re Hobson:8(8) "The greater the crime the stronger is the proof required for the purpose of conviction". In a more recent case, Bater v. Bater9(9) Denning, L.J. (as he then was), took the opportunity to express some useful views about the quantum of proof required in a criminal charge. He said:

> "It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard.

As Best, C.J., and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear' . . . a reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to the conclusion. So the phrase 'reasonable doubt' takes the matter no further. It does not say that the degree of probability must be as high as 99 per cent or as low as 51 per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter. In some cases 51 per cent would be enough, but not in others. When this is realised, the phrase reasonable doubt' can be used just as aptly in a civil case . . . as in a criminal case . . . The only difference is that, because of our high regard for the liberty of the individual, a doubt may be regarded as reasonable in the criminal courts, which would not be so in the

civil courts."

These principles as to the quantum of proof are easy to apply where the evidence is direct. It would appear, however, that where circumstantial evidence has to be considered the law requires a particularly high standard of proof because:

> "There is an anxiety felt as to the detection of crimes, particularly such as are very heinous or peculiar in their circumstances, which often leads witnesses to mistake or exaggerate facts and tribunals to draw rash inferences; and there is also natural to the human mind a tendency to suppose greater order and conformity in things than really exists, and likewise a sort of pride or vanity in drawing conclusions from a number of isolated facts which is apt to deceive the judgment."

See N. W. Sibley, Criminal Appeal and Evidence, page 137. This standard was clearly set in the case of R. v. Onufrejczyk,10(10) where it was said that "the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for".

It is in the light of the foregoing principles that we shall have to examine the evidence and determine whether or not the learned trial judge failed to discharge his duty under section 271 of the Criminal Procedure Code.

The court's ruling was based on three grounds, namely (1) there is evidence of hostile intentions on the part of the appellant towards the deceased; (2) the deceased was found dead the same night after a quarrel with the appellant; and (3) the clothes and palms of the appellant were stained with human blood. Whether or not the case ought to be left to the jury depended on the "reliable strength" or weakness of links in the chain of evidence.

There is no doubt on the evidence that shortly before the discovery of the body of the deceased there had been a quarrel and the manifestation on the part of the appellant of an intention to fight the deceased. As to this fact there was unanimity among the witnesses for the prosecution; but the evidence as to whether the appellant used expressions which

suggested a murderous intention does not appear to us to be so clear. The first witness for the prosecution said that when the appellant arrived at the house of the deceased he threatened to beat and kill the deceased. This witness was however alone in this, and he turned out to be the most discredited of the witnesses for the prosecution. The third witness who was also present in the house of the deceased said that the appellant threatened that he would beat the deceased and "teach him sense". This witness gave evidence of an incident when they were walking from the chief's house towards Dichemso, but neither P.W.1 nor P.W.2 who were with him at the time supported him in this. Indeed, he was unable to identify any of the persons who separated the appellant and the deceased when according to him the accused threatened to beat the deceased on their way towards Dichemso. It is significant to note that this third witness was escorted from prison to give evidence. The evidence of P.W.1 and P.W.3 that the appellant uttered words which suggested an intention to kill is not supported by the evidence of P.W.2, P.W.4 and P.W.5 who were all in the house at the material time. The evidence of P.W.3 of an intention to kill is greatly weakened by the evidence of P.W.4, the mother of the deceased. She said:

> "I asked P.W.3 what the matter was. He said to the hearing of the accused that the accused attempted to fight the deceased at the chief's house but they were separated and that if he assaulted them in Puayaga's house they would beat him. I pleaded with the accused to leave the house. When I said so my sister Kajiwa escorted the accused outdoors."

We think that the omission by P.W.3 to tell P.W.4 that the appellant has threatened to kill her son or "teach him sense" is most significant. The evidence of P.W.5 also discredits the evidence of P.W.1 and P.W.3 as to the intention to kill. She said:

> "When I came out of my room into the compound I saw Ali speaking. He was addressing himself to

> Puayaga and his companions. He was speaking in an angry mood. He was shouting angrily at the boys. I then led the accused and showed him out. I knew Ali before this day. The accused left the deceased and his companions in the house."

In our view first prosecution witness's evidence of the expression by the appellant of an intention to kill was completely discredited by the evidence of the other prosecution witnesses, and there was therefore no satisfactory proof of the alleged expression by the appellant of his intention to kill deceased.

With regard to the second ground of the ruling the crucial question is to determine the person who alone had the opportunity of causing the unlawful harm resulting in the death of the deceased. The evidence reveals that the spot at which the dead body was discovered is a public road, and during the argument in this appeal learned Director of Public Prosecutions conceded, quite properly in our view, that the possibility of someone other than the appellant killing the deceased could not be ruled out. It was established that the area where the murder was committed is the preying-ground of criminals. The evidence of those prosecution witnesses who testified that appellant left the house before the deceased, if accepted, seems to give the impression that when the appellant left the house he went and laid in ambush somewhere along the road for the deceased. But we think it would be mere speculation to draw such an inference from their evidence which in any case is contradicted by the evidence of P.W.4 and P.W.5. The preponderance of the evidence on this issue in our view is in favour of the appellant having left the house before the deceased, and there being no evidence that the appellant knew that deceased would leave

his house alone again at that time of night, we think that in all the circumstances it is difficult to hold that it was the appellant, and the appellant alone, who had the opportunity of lying in wait to inflict harm on the deceased and thereby murder him. This part of the case we consider extremely weak in the chain of evidence.

Perhaps the most important ground on which the ruling of the learned trial judge is based is that there was blood in appellant's clothes and his palm. These blood stains were discovered only some few hours after the incident in the house of the deceased and in these circumstances one would expect to find fresh blood. Yet P.W.10, the inspector in charge of the investigation, was unable to say on oath that the blood stains were fresh at the time. The recollection of the inspector of the explanation which the accused gave regarding the blood stains was far from perfect. Under examination-in-chief he deposed as follows: "I showed the blood stains to the accused. He said he did not know how they came to be in the clothes." But under cross-examination he changed his evidence and said as follows:

> "I am wrong if I said accused said nothing about the blood stains. He in fact gave two explanations. He said he bought the two clothes with the blood stains on them and again said the stains were due to mosquito bites which he sustained. I am certain accused also said he suffered mosquito bites."

We cannot say whether this volte face of the inspector stemmed out of a desire to secure conviction by all means, but we are surprised that his memory should be so defective on such an important issue in a case he had himself investigated. As Lord Hewart, C.J., said in R. v. Dwyer and Ferguson,11(11) "It is the duty of the police to behave with exemplary fairness".

It would appear, however, that the appellant gave false explanations about the specks of blood found in his palm. But we are of the opinion that an inference of guilt must not necessarily flow from false or conflicting explanations where especially a person of humble station of life seeks to embellish the truth by such circumstances of falsity as might, in his view, render his explanation more plausible and acceptable. The main question is whether any other inference consistent with the innocence of the accused, and not by itself improbable, can be drawn from the false or conflicting explanation, provided the rest of the evidence does not negative this inference. False explanations are by themselves significant, and as Oliver, J. observed in R. v. Wattam:12(12)

> "Those are matters of the greatest significance, but they will not suffice by themselves. There must be something more than the telling of lies to the police before a man is convicted of any crime, let alone murder."

The burden of proof in trial on an indictment for murder is a very high one and the prosecution is not relieved of this burden merely by proving that blood was found in the clothes of the appellant. In this case where the prosecution seeks to rely on the allegation that human blood was found in the clothes of the appellant it was incumbent on them to prove also that the blood was that the deceased or at least of the same group as that of the deceased, otherwise they would have failed completely in establishing a nexus between the appellant and the killing. In this connection we were referred by the Director of Public Prosecutions to the case of R. v. Onufrejczyk (supra), but we think that Onufrejczyk's case is a much stronger case and exemplifies the distinction to which we are endeavouring to draw attention, because in that case the blood stains

found on the wall in the room of the appellant were proved, and, indeed, were admitted by the appellant to be the blood of the deceased. There was, therefore, established in that case, a clear and convincing connection between the killing of the deceased and the appellant. Here all that was proved by the prosecution was that the appellant's clothes were stained with human blood and some minute blood spots were on his palm. These might be completely unconnected with the deceased.

All the facts proved by the prosecution amount to some evidence which may arouse the suspicion of the reasonable man but they do not amount in our view to full proof of the fact in issue. Thus during the argument in R. v. Haslam13(13) where it was contended that there was no evidence against the appellant, counsel for the Crown submitted as follows: "There was some evidence to go to the jury against appellant although it was purely circumstantial and consisted of an accumulation of small details, none of which was very important in itself". It did not appear to the court that it was safe or prudent that the convictions should stand and it allowed the appeal.

During the investigation after his arrest the appellant gave an explanation contained in his cautioned statement that the blood stains found in his dress were there when he bought them from a secondhand dealer about four months earlier. This explanation is substantially the same as that which he gave to the inspector, apart from the slender evidence about mosquito bites which the inspector gave under cross-examination, and in our view it is by no means inconsistent with innocence.

There was no eye-witness to the commission of the offence and therefore we have ourselves examined very carefully the evidence adduced by the prosecution and we are unable to discover any single fact definitely linking the appellant with the killing of the deceased, and consequently we do not think the circumstantial evidence in this case is so cogent and compelling as to convince a reasonable man. At the close of the case for the prosecution there was no evidence that the blood found on the clothes and palm of the appellant was that of the deceased, and therefore no definite inculpatory fact was proved against the appellant. The accumulation of facts proved amounts to no more than mere suspicion, and however strong suspicion may be, it cannot form the basis for continuing trial after a submission of no case. Thus in R. v. Jellyman,14(14) Trevethin, C.J., said:

> "Roche, J., in dealing with the submission that there was no case to go to the jury, thought that it was a weak case, but that, as it concerned a humble portion of the community, it should be investigated to the dregs. No definite incriminating fact has been proved against the appellant which would leave a reasonable man with no possible conclusion but that he knew what was going on. This Court thinks upon the whole that it cannot be said with certainty that Jellyman was a guilty man at any time. The case was full of suspicion; but suspicion should not have prevailed with the jury."

In R. v Atter15(15) a case tried at the Central Criminal Court, England, before Devlin, J., as he then was, the prosecution relied mainly on the accumulation of small items of circumstantial evidence. The items were: (a) someone murdered the deceased without any proven motive with a weapon which was

never discovered; (b) the accused was with the deceased at about the time of her death and (c) the accused's clothing

when subjected to benzidine test gave a positive reaction to the presence of blood. The expert witness (the principal scientific officer of the Metropolitan Police Laboratory) was not prepared to state that it was human blood, but he went on to make this rather significant statement: "blood can get on to a garment so easily in so many unexplained ways and over such a long period it may cease to be of value". At the close of the case for the prosecution, counsel for the defence submitted that evidence for the prosecution had to be of such a quality that it put the case beyond mere suspicion, and it had to be the kind of evidence which implicated the accused as the person who murdered the deceased. This submission was upheld by the learned judge and he directed the jury to return a verdict of not guilty. He explained that every person accused of a crime had the right to demand that the prosecution's case against him should be proved before he was called upon to defend himself. He continued:

> "Where one has a case where the evidence is purely circumstantial then I must satisfy myself, in my judgment, that there is some piece of evidence that is more than mere suspicion, that there is some piece of evidence which would justify me in saying that points to the accused. You cannot put a multitude of suspicions together and make proof of it. It may be that if you were asked now whether on the evidence you would convict the accused in a case of this sort you would not think it safe to do so, but it is not for me to put that responsibility upon you until after I have discharged mine, and my responsibility is the one that I have stated . . . Having formed the view that I have, I tell you now that as a matter of law there is no evidence on which you can convict, even if you wished to do so."

We are in agreement with these views of Delvin, J. (as he then was), and we think it is dangerous in jury cases to leave to the jury evidence which amounts to suspicion only as there is the fear that they may "put a multitude of suspicions together and make proof out of it".

In all the circumstances we are of the opinion that there was no case to go to the jury and that, with all due respect, the learned trial judge failed to discharge his legal duty under section 271 of the Criminal Code, 1960.

For the above reasons, this court has come to the conclusion that the verdict cannot stand. Therefore the appeal is allowed, the conviction is quashed and the appellant is acquitted and discharged.

DECISION

Appeal allowed.

Conviction quashed.

Endnotes

1 (Popup - Footnote)

1 (1847) 2 Cox C.C. 242.

2 (Popup - Footnote)

2 The Times, February 10, 1962.

3 (Popup - Footnote)

3 [1961] GLR 136 at p. 141.

4 (Popup - Footnote)

4 Act 30.

5 (Popup - Footnote)

5 [1940] A.C. 152 at p. 169, H.L.

6 (Popup - Footnote)

6 (1856) 6 E1.& B1. 953 at p. 972.

7 (Popup - Footnote)

7 (1868) L.R. 4 Exch. 32 at p. 39.

8 (Popup - Footnote)

8 (1823) 1 Lewin 261,

9 (Popup - Footnote)

9 [1951] P. 35 at pp. 36 - 38.

10 (Popup - Footnote)

10 (1955) 39 Cr.App.R. 1.

11 (Popup - Footnote)

11 [1925] 2 K.B. 799 at p. 803.

12 (Popup - Footnote)

12 (1952) 36 Cr. App. R. 72 at p. 76.

13 (Popup - Footnote)

13 (1926) 19 Cr. App. R. 163

14 (Popup - Footnote)

14 (1921) 16 Cr. App. R. 43 at pp. 44-45.

15 (Popup - Footnote)

15 The Times, March 22, 1956.