GENET and WILSON *v.* REGINAM

COURT OF APPEAL (Ames, Ag. P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 31st, 1964
(Cr. App. Nos. 9/64, 10/64)

[1] **Criminal Law—degrees of complicity—aiding and abetting—aiding and abetting provoked crime not possible:** Where the defence of provocation has been successfully raised to a charge of murder so as to reduce the offence to manslaughter, it is impossible for any third party to be convicted of aiding and abetting the killing (page 43, lines 36–37; page 46, lines 20–22).

[2] **Criminal Law — degrees of complicity — aiding and abetting — two accused alone with deceased at time of death—aiding and abetting as alternative to murder:** Where two accused persons were alone with the deceased at the time of his death, it is unnecessary for the judge to direct that the jury must acquit both accused if they are not satisfied which of them did the act which resulted in the death, because if the jury is satisfied that the act was committed by one of them and was murder, then the other must have aided and abetted (page 41, lines 11–23).

[3] **Criminal Law—murder—multiple offenders—two accused alone with deceased at time of death—aiding and abetting as alternative to murder:** See [2] above.

[4] **Criminal Law—provocation—aiding and abetting provoked crime not possible:** See [1] above.

[5] **Criminal Procedure—defence—evidence of accused—untruthful evidence—weight to be given to untruthfulness:** Where an accused person gives untruthful evidence the case is no different from one in which he gives no evidence at all; in either case the burden remains on the prosecution to prove the guilt of the accused. If upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt (page 45, line 41—page 46, line 6).

[6] **Evidence—burden of proof—criminal cases—burden on prosecution—accused's evidence untruthful—weight to be given to untruthfulness:** See [5] above.

The appellants were charged in the Supreme Court with the murder of the first appellant's daughter and aiding and abetting that murder.

The first appellant's wife left him and he remained in the matrimonial home with his daughter. Subsequently the second appel-

lant came to live with them as his mistress, which caused his daughter some distress. On the night of her death she told the night watchman that she was going to speak to her father about it. She entered her home which was empty but for the two appellants. Later the same night the appellants brought her to a hospital, but she was dead on admission. The first appellant claimed that she must have drunk poison. Post mortem examination showed that she had not taken poison but had died by strangulation. The first appellant then said she must have been strangled by an intruder.

The appellants were charged respectively with the murder of the deceased and with aiding and abetting the murder; the first appellant was convicted of manslaughter and the second of aiding and abetting. Each of them appealed against the conviction. The first appellant appealed on the grounds that (a) the trial judge went beyond what was proper in expressing his own views as to the facts; (b) he failed to put the defence case adequately and properly to the jury; and (c) there was no direction to the jury that when the evidence is circumstantial it must be inconsistent with any other rational conclusion than the guilt of the appellants in order to convict.

Both appellants further alleged misdirection in that the judge directed the jury that if they were satisfied that only the two appellants and the deceased had been present at the time of the killing and they were not satisfied as to which of the appellants had actually attacked the deceased they could say that both appellants were guilty of murder. Secondly, they contended that the judge should have directed the jury that if they were unable to decide which appellant had done the act which resulted in the deceased's death both appellants should be acquitted. They maintained that even if the prosecution's evidence were accepted *in toto* the most that they could be convicted of was manslaughter.

The second appellant maintained that since the first appellant was convicted of manslaughter not murder, because of provocation on the part of the deceased, she could not be guilty of aiding and abetting.

Cases referred to:

(1) *Broadhurst* v. *R.*, [1964] A.C. 441; [1964] 1 All E.R. 111, considered.

(2) *King* v. *R.*, [1962] A.C. 199; [1962] 1 All E.R. 816, distinguished.

(3) *R.* v. *Abbott*, [1955] 2 All E.R. 899; (1955), 99 Sol. Jo. 544, distinguished.

(4) *R.* v. *Hancox* (1913), 8 Cr. App. R. 193, applied.

(5) *R.* v. *Mensah* (1941), 7 W.A.C.A. 212, distinguished.

(6) *R.* v. *Mills* (1935), 25 Cr. App. R. 138, applied.

(7) *R.* v. *Richardson* (1785), 1 Leach 387; 168 E.R. 296, distinguished.

Edmondson and *Barlatt* for the first appellant;
C. N. Rogers-Wright for the second appellant;
B. Macaulay, Q.C., Att.-Gen., D. M. A. Macaulay and *M. Cole* for the Crown.

AMES, Ag. P., delivering the judgment of the court:

In February of this year the appellants were tried on the following charge:

"*Statement of Offence*: Murder.

Particulars of Offence: Lucien Victor Genet, on the 4th day of November, 1962 at "Roseville," King Tom, in the Freetown Police District in the Western Area of Sierra Leone murdered Annick Genet. Rosetta Ayo Wilson, on the same date was present, aiding, abetting and assisting the said Lucien Victor Genet to commit the said crime."

The verdict of the jury was recorded as follows:

"Jury return verdict:

Verdict on murder—first accused: Not unanimous;
second accused: Not unanimous.

Manslaughter—first accused: Guilty (unanimous);
second accused: Guilty of aiding, abetting and assisting (unanimous)."

The first accused, whom we shall call the first appellant, was sentenced to five years' imprisonment and the second accused, whom we shall call the second appellant, to three years' imprisonment. Each of them has appealed against the conviction (and neither against the sentence).

The first appellant's grounds of appeal included three which can be very shortly disposed of. One was that the learned trial judge went beyond what was proper in expressing his own views as to the facts; the second was that he failed to put the defence case adequately and properly to the jury; and the third was that there was no direction to the jury that when the evidence is circumstantial it must be inconsistent with any rational conclusion other than the guilt of the appellants. We find no substance in any of these grounds.

The first appellant has two grounds alleging misdirection, and the

second appellant has two also, and as they are the same two instances they can be considered together. One alleged misdirection is:

> "If you are satisfied that she was attacked in that room and that the only people there were the three of them, and you are not satisfied which of them attacked her, then you can say that both of them are guilty of murder. If you feel that at the time she was attacked, whichever of them attacked her did an act which was voluntary and unlawful and one which was likely to cause the deceased grievous bodily harm, then the prosecution would have established their case."

And the other is:

> "The law goes further than that and says that where you are satisfied on the evidence that either of them attacked Annick that night in that room, but you are not satisfied which one of them attacked her, then you can return a general verdict of guilty of murder against both. I will read out to you para. 4134 of the 35th edition of *Archbold's Criminal Pleading, Evidence & Practice* (1962). [This he did.] When you come to consider your verdict, that is the law you have to apply in this case."

The deceased, the daughter of the first appellant, met her death on Sunday, November 4th, 1962. She was dead when examined on her arrival at the hospital by the night superintendent and nurses at about 11.05 p.m. At the hospital the appellants put forward the theory that she had taken poison or something which had made her vomit. A few days later the police knew that the post mortem examination showed that the cause of death was strangulation. When, on November 9th, the appellants were told of this, they put forward the theory that she had been strangled by an intruder. The verdict of the jury showed that they rejected both these theories.

The house where the first appellant and the deceased lived has three floors. The deceased's bedroom was on the bottom floor; the middle floor was the parlour, dining room and telephone room, and the first appellant's bedroom was on the top floor. The first appellant's wife (the mother of the deceased) has been away from Sierra Leone since October 1959. There are two beds in the first appellant's bedroom, one of which, although euphemistically called his spare bed, was used by the second appellant, who is his mistress and has lived in the house since some time after March 1962 (although she also has a dwelling place elsewhere in Freetown).

The case for the prosecution was, and it was abundantly supported

by the evidence, that the deceased was strangled in the first appellant's bedroom, that there was no one else in the bedroom at the time except the two appellants and the deceased, that the different explanations put forward by the appellants were proved to be untrue (the evidence of the chemical analyst was that no poison was found in the body, and the evidence of the medical witnesses was that the strangulation was such that it could not have been self inflicted and that the details put forward in the intruder theory were impossible) and that consequently in the absence of any credible explanation the irresistible inference was that both were guilty of the murder of the girl.

Now this is somewhat similar to the case for the prosecution in *R.* v. *Mills* (6) which the learned Attorney-General cited to us. There, the case for the prosecution was that a child entered the house of the two Mills, that she was killed by an intentional violent blow on the head given by someone, that the only two persons in the house at the time were the two Mills and that the next day both Mills tried to burn the body to destroy evidence of the crime, and that there was an absence of any credible explanation. The Attorney-General submitted that the instant case was stronger than the *Mills* case. The act of trying to burn the body may have its equivalent here in the successive stories of sickness, suicide and an intruder put forward by the appellants to conceal the real cause of death: but the deceased was taken to the hospital, which has no equivalent in the *Mills* case. In that case, the Court of Criminal Appeal held (25 Cr. App. R. at 143) that—

> ". . . on the facts proved by the prosecution, there was a case to go to the jury, on which it would be open to them to find that, if the facts relied upon by the prosecution were established beyond reasonable doubt to their satisfaction, murder had been committed by both appellants."

But in the result, one conviction was quashed because the defence of one of them, that he was not in the house at the time, had not been put to the jury.

For the first appellant it was argued that *R.* v. *Mills* was a 1935 decision, and that since then there have been the cases of *R.* v. *Abbott* (3) and *King* v. *R.* (2), decisions of the Court of Criminal Appeal and the Privy Council respectively, and *R.* v. *Mensah* (5). These three are easily distinguished. We see no reason to think that *R.* v. *Mills* is no longer good law, and should not be followed.

Another point made for the first appellant refers to the second

alleged misdirection, in which the learned judge read para. 4134 of *Archbold* to the jury. In the extract set out by the appellants, it could be inferred that there was no need of proof that the one was encouraging the other (or vice versa). But the sentence immediately before the extract (which was also included in the second appellant's ground for completeness) made it quite clear that there was need of such proof, and so does the passage from *Archbold* (*op. cit.*, para. 4134) which was read twice, and so do the 31 lines in the summing-up of the learned judge next following the readings. We see no substance in these grounds alleging misdirection.

Another ground of appeal of the first appellant was that the learned trial judge failed to direct the jury that it was their duty to acquit both accused if they were not satisfied as to which of the two (if either) did the act which resulted in the deceased's death. It is correct that the learned judge nowhere directed the jury to that effect, but it was not necessary. So long as he was speaking of the charge of murder, it did not matter. If the jury found the facts to be as alleged in the case for the prosecution (which they did, except as to malice aforethought) including the untruthful (as the jury must have found them to be) theories put forward by each of them in explanation, it did not matter because one or other would have been principal in the first degree and the other would have been aider and abettor.

But when the judge came to deal with the question of manslaughter, he said:

> "The defence is entitled to show that the act was done without malice. They need not go into the witness box to show that. It can be elicited from the lips of the prosecution witnesses, that is, if you are so satisfied that Annick was killed and she was attacked by either of these accused or both of them, either of them aiding, abetting and assisting [*sic*]. You cannot go further if you do not find that to be the case."

Manslaughter was not the defence of the first appellant, but Mr. Rogers-Wright for the second appellant had submitted that even if the jury accepted the case for the prosecution the most that they could do would be to find the appellants guilty of manslaughter. The learned judge directed the jury as follows:

> "If you find it was the first accused who attacked her and he attacked her on the spur of the moment; that he was an ordinary individual; and that what the deceased did put him in a state of mind where he lost control of himself and did the act

without any time to cool down: then he will be guilty of manslaughter. And although the second accused was present in that room you must be satisfied—the evidence must lead you to no other conclusion than that—she actively encouraged him to do the act. You may feel that if, according to the medical evidence, the act was so sudden that within two minutes everything was practically finished, you may feel that the second accused had no opportunity of offering any encouragement. But that is entirely a matter for you. If that is the case, the second accused cannot be guilty of aiding and abetting —she is entitled to be acquitted."

That passage is followed by another, putting it the other way round as to the part of each accused. He did not direct them as to what they should do, if they found that it all happened so suddenly that there was not time for one to aid and abet the other and they could not decide which killed the deceased.

Counsel for defence, between them, cited cases to us which are but modern instances of the 1785 case of *R.* v. *Richardson* (7), which was also cited. There two men were charged together with highway robbery. The evidence was that they waylaid a man who told them that he only had 2½d. One of the two said that if that was all a man had, he should not be robbed and went away; but the other remained and robbed him of this 2½d. The victim could not say which did which. "One of them is certainly guilty, but which of them personally does not appear" (1 Leach at 387; 168 E.R. at 296) and both of them were acquitted.

That, so counsel for the appellants argued, is the situation here, and the argument can be considered together with the ground of appeal of each, that the verdict is unreasonable and such as cannot be supported having regard to the evidence.

The reply of the learned Attorney-General to that argument is this: The judge left the question of manslaughter to the jury on two alternative bases, the one of killing unlawfully and without malice aforethought and without intention to do grievous bodily harm; the other of killing upon provocation. In the former there can be an aider and abettor of the principal. A jury does not state the findings of facts on which its verdict is founded. A court of appeal does not speculate as to what facts a jury found. The principle stated in *R.* v. *Mills* (6) applies equally to manslaughter. Consequently, the finding of the jury was supported, if they found it on the first of the two alternatives. It would not be if they found it on the second.

Therefore this court must assume that they found it on the first, and the finding must be upheld unless "obviously and palpably wrong" (*Hancox's* case (4) (8 Cr. App. R. at 197)), which *R.* v. *Mills* shows it was not.

We would agree with the argument, if we could agree with its first premise. We read the summing-up of the learned judge as leaving to the jury only the question of killing upon provocation, and with respect we think that was proper in the state of the evidence, if the jury found neither malice aforethought nor intention to cause grievous bodily harm.

Early in his summing-up about manslaughter, the judge said: "The most simple way I can put it to you is this: Did the accused do the act on the spur of the moment without any chance whatsoever to think. . . . ?"

and a few lines later comes this: "Was the conduct of the deceased likely to cause a reasonable person to lose his self-control, so as not to become master of himself at the time he, or she, did the act ?" When reviewing the evidence relative to manslaughter, he said:

> "The deceased had gone to the watchman, according to the prosecution's case, and would seem to have indicated, you may think, that she had got to the limit of her depression, as she said to the watchman: 'I am going to die tonight and I am going to tell my father so.' To use Mr. Rogers-Wright's language, she then burst into the room in which both accused had retired and had gone to bed and were, as the defence says, in bed with the lights out. If you accept the evidence of the doctor that shortly afterwards she became unconscious and slumped, it is for you in those circumstances to make up your minds. You are men of the world; picture in your mind's eye what happened in that room. Ask yourselves: 'If the deceased burst into that room probably in that state of mind in which she had left the watchman, if you accept the watchman's evidence that she invaded the privacy of her father, is that the act which is likely to cause an ordinary person to lose complete control of himself and to attack on the spur of the moment ?' "

It is not speculation on our part to conclude that the finding of manslaughter was a finding of unlawful killing upon provocation.

We must now examine the evidence. Was it such as to warrant any reasonable jury finding the first appellant guilty of manslaughter, and must they have reached the same conclusion if they had been directed

that, if unable to decide which of the two was guilty, both must be acquitted?

It is not necessary to set out the evidence common to the case of each appellant which went to show that one or other of them must be guilty, but, to start with, only that which went to show that it was the first appellant who was the guilty one. Unfortunately, we were not helped much in this respect. The arguments for the appellants proceeded on the assumption that there was no evidence which pointed to one rather than the other, and the argument of the respondent that it sufficiently established their case against both.

What evidence, and absence of evidence where a jury might expect it, was there indicating the first appellant as distinguished from the second? We find the following evidence:

(a) that the deceased was his daughter, and that her mother, his wife, was not at home and that in her absence the second appellant was occupying the wife's bed;

(b) that the deceased, who was 24 years old, was distressed at this, and that after the second appellant came to the house, her (the deceased's) behaviour changed, and she used to spend nights in the garage reading until 4 a.m. and ultimately on the night of Sunday, November 4th, 1962, she left the house for a time, returned and, when she parted from the watchman about 5 to 15 minutes before her death, had said to him: "Ar go die dis net," and: "Ar day go tell papa." (The watchman speaks Creole, not English; and the import of the expression is not that she knew she was going to die that night, but, as the Attorney-General paraphrased it in his opening: "I don't care what the consequences are, I am going to speak to my father to-night.");

(c) that she entered the father's bedroom (presumbably to do so, and with consequences which are known);

(d) that the father allowed the second appellant to go with her to the hospital in the ambulance, while he went in his motor car;

(e) that at the hospital his first statement was to the night superintendent and was that having heard from his sitting room a sound of screaming he went down to the daughter's bedroom and asked her what was the matter, and that she complained of fever and vomiting;

(f) that to Nurse Taylor and to the doctor, he said that he was not there, having been to Wilberforce to attend a service, and he suggested to the doctor that it might be malaria;

(g) an absence of any evidence that at the hospital that night

he was angry with, or made any accusation against, the second appellant, who must have strangled his daughter in his presence unless he himself had done so;

(h) this absence of evidence of any revulsion from the second appellant continued and in January of this year, 1964, the evidence is that she was still in his house;

(i) that on Monday, November 5th, 1962, at 9.30 a.m. two superintendents of police went to his house to make investigations; he repeated the story of having gone down to the daughter's room and finding her vomiting; he took the superintendents to the room; they searched it and having finished they sealed it; he was not then there, having gone upstairs. As they were leaving the house he produced some Nivaquine;

(j) that during the morning hours of November 9th, 1962 the superintendent of police first saw the post mortem report (Exhibit J), and immediately went to him at his office and told him that the cause of death had been found to be strangulation, and asked whether he could make a statement; he replied that he was busy and that the superintendent should call again some time in the afternoon;

(k) that on that afternoon he did make a statement (Exhibit S) in which for the first time he mentioned having heard the daughter shouting "Papa, Papa" in an anguished voice and rushed from his room and met her exhausted at the bottom of the top flight of stairs, and so on;

(l) that on April 8th, 1963, the police again searched the house (their seal was still on the door of the bedroom) and the next day, April 9th, the first appellant was invited to the police headquarters where he made the statement which is Exhibit T;

(m) that on April 19th, 1963, he gave evidence before the coroner which is Exhibit A;

(n) medical and analyst's evidence that the differing statements made by him as to the cause of death were each impossible.

The first appellant did not give evidence at the trial or call any witnesses, and his counsel said that "both accused . . . will rely on the statements already put in evidence,"—namely, those which were untrue in their most material parts.

In the case of *Broadhurst* v. *R.* (1) Lord Devlin, giving the reasons for the Privy Council's decision, said ([1964] A.C. at 457; [1964] 1 All E.R. at 120):

"Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives

no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.

This is the sort of direction which it is at least desirable to give to a jury."

The directions of the judge in the instant case were no less favourable to the appellants.

In our view it cannot be said that the verdict against the first appellant was unreasonable. We are of opinion that the jury had no doubt as to who killed the deceased. Their difficulty was over the difference between murder and manslaughter in relation to that killing. We are of opinion that their verdict must have been the same, had they been directed as to their duty if unable to decide which of the two killed the deceased.

Coming now to the second appellant, we are of opinion that the verdict of the jury as to the first appellant makes their verdict as to the second appellant inconsistent. She was present, of course, in the bedroom: but her first statement on arrival at the hospital (that the father should keep quiet and let her do the talking) and her subsequent statements to the police and the coroner could be no more than an attempt to shield the first appellant.

The result is that the appeal of the first appellant is dismissed and that of the second appellant is allowed, and it is directed that the finding in her case be set aside and a finding of acquittal be entered.

Order accordingly.