

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CASE NO: ANUHCR 2018/0080

BETWEEN:

THE KING

and

MIKHAIL GOMES

Appearances:

Mr. Oris Sullivan and Mr. Cedric Dyer, Counsel for the Crown
Mr. Lawrence Daniels, Counsel for the Defendant

Before: The Honourable Mr Justice Colin Williams

2023: January 20th, 23rd, 24th, 25th, 26th, 27th, 30th, 31st,
February 1st, 2nd, 3rd, 7th, 13th, 14th, 15th, 17th,

RULING

- [1] **WILLIAMS, J.:** Counsel, Mr. Lawrence Daniels, contends that his client, Mr. Mikhail Gomes, who is charged with the murder of Ms. Vincia James, does not have a case to answer.
- [2] The learned Prosecutor, Mr. Oris Sullivan, submits that the Crown has established a *prima facie* case against the defendant, Mr. Gomes, based exclusively on circumstantial evidence.
- [3] The Crown lead evidence during fifteen trial days from 24 witness – ten of whom were by way of Notice of Additional Evidence. There were visits to two locations where witnesses saw Mr Gomes' vehicle in April 2017 and another visit to where one witness said he saw Ms. James on Friday, the 7th April, 2017 sometime between 11:30 am and 1:30 pm.

The Submission

- [4] Mr. Daniels submitted that the Crown has failed to prove the essential element of murder. Counsel for the Defendant further submitted that none of the witnesses for the Crown have been able to establish that Mr. Gomes committed the offence for which he stands trial.
- [5] Mr. Daniels grounded that part of his submission on the first limb of **R v Galbraith** [1981] 2 All ER 1060 at page 1042 letter B where Lord Lane, CJ, said:

“How then should the judge approach a submission of ‘no case’? (1) If there is no evidence that the crime has been committed by the defendant, there is no difficulty, the judge will of course stop the case.”

- [6] Counsel Daniels in his submission also spoke in terms which appeared to be a reliance on the second limb of Galbraith. He stated that the evidence was “so tenuous, so weak, that a jury properly directed could not return a verdict of guilty.”

The Response

- [7] The Prosecutor, Mr. Sullivan, stressed that the starting point for a submission of ‘no case to answer’ must always be whether there is evidence to go before the jury. Mr Sullivan noted that: “If there is some evidence that a jury properly directed may convict, the judge must leave the case to the jury.”
- [8] Mr. Sullivan accepted that no witness has seen Ms. James dead; there was no death certificate, no post mortem examination and no DNA evidence confirming the death. He contended however: “That is not the test.”
- [9] Mr. Sullivan noted that the Crown’s case was based on circumstantial evidence and that a jury may convict on circumstantial evidence.

Background

- [10] In 2017, Ms. Vincia James resided at New Winthropes with her mother, Ms. Jeriann Haywood. The other members of the household were her brother, Mr. Omari James and her 7-year-old son, Master Jayden Ricketts. Ms. James’ elder sister, Ms. Cymone Hughes, also lived in New Winthropes but not at the same house where Ms. James resided.
- [11] Ms. James worked at the Dixie Betting Company at Old Parham Road.
- [12] Mr. Gomes and Ms. James had what Ms. Haywood and Ms. Hughes described as an “on-and-off relationship.” Up to sometime in 2016 Mr. Gomes was a regular visitor to the house where Ms. James resided. Mr Gomes once had keys that gave him access to where Ms. James resided.
- [13] There was an argument between Ms. James and Mr. Gomes sometime in 2016, following which Ms. James asked Mr. Gomes to leave the house and return the keys. The keys were not returned at that time. Then at about 4:00 am the day following the request for the return of the keys, there was an altercation in Ms. James’ bedroom with Mr. Gomes. Ms. Haywood went to the bedroom. Ms. James informed her mother that Mr. Gomes was choking her. Mr. Gomes said that it was Ms. James who first assaulted him. Ms. James made a report to the Coolidge Police Station. Ms. James asked that Mr. Gomes be warned and told not to have contact with her.

- [14] Following that incident, Ms. Haywood told Mr. Gomes not to come back to the house. Ms. Haywood never saw him at the house again, neither did she ever see him with Ms. James.
- [15] Ms. Haywood suspected that Ms. James was still seeing Mr. Gomes.
- [16] On Friday 7th April, 2017 Ms. James went to work for the 6:00 am shift. Her shift would normally last for 8-hours, with an hour for lunch. Ms. Haywood did not see her daughter before Ms. James left for work. Ms. Haywood however spoke with Ms. James on the telephone after 8:00 am on that day.
- [17] Ms. James had a doctor's appointment with her son, Jayden, scheduled for 2:00 pm that Friday 7th April, 2017. Ms. James was last seen at her work place around 1:00 pm.
- [18] Jayden's father, Mr. Ryan Rickets, was to transport Jayden from school to the doctor's office to meet Ms. James. Ms. James never turned up for the doctor's appointment.
- [19] Ms. Haywood had an appointment in town that Friday afternoon and she and Ms. James also had a plan to meet up after their respective engagements. Ms. Haywood called Ms. James' telephone number after 2:00 pm that Friday 7th April, 2017 but no one answered. Ms. Haywood continued to call the number throughout the Friday afternoon and into the evening. Those calls too were unanswered.
- [20] Ms. Haywood found it strange that Ms. James did not answer the phone or return the calls. Ms. Haywood said that Ms. James, when she was at work, would call back using the work phone.
- [21] After Ms. Haywood did not get through to Ms. James, she also made calls to Mr. Gomes' cell phone. Those calls were not answered.
- [22] At about 10:00 o'clock that night, Ms. Haywood reported to the police that Ms. James was missing.
- [23] Sometime after 2:00 am on Saturday the 8th April, 2017 Ms. Haywood went with her other daughter, Ms. Hughes, and her son, Mr. James, to Mr. Rickets' home in the quest to find Ms. James. Mr. Rickets said he did not know of Ms. James' whereabouts. Ms. Haywood, Ms. Hughes, Mr. James and Mr. Rickets then journeyed to Mr. Gomes' home; but Mr Gomes was not there.
- [24] At about 6:00 am on Saturday the 8th of April 2017, Mr Gomes returned a call to Ms. Haywood. Mr Gomes said that he just got home and his mother informed him that Ms. James could not be found. Ms. Haywood started to cry. Ms. Hughes took the phone. Ms. Hughes posed a number of questions to Mr. Gomes about Ms. James.
- [25] About half an hour after the telephone call, Ms. Hughes contacted Mr. Gomes via Facebook Messenger. She engaged the Defendant in a conversation regarding Ms. James.
- [26] At 7:00 am on Saturday the 8th April, 2017 the police went to Mr. Gomes' home. The police detained Mr. Gomes for questioning. The police also removed Mr. Gomes' vehicle from his home and took it to the Police Headquarters for forensic examination.

- [27] The police charged Mr. Gomes for unrelated matters. Mr. Gomes was remanded to prison.
- [28] During the course of the police investigations, Mr. Gomes, after being cautioned gave a statement to the police. This was at about 10:30 am on the 8th April, 2017. This first statement was given without Mr. Gomes exercising his right to consult with an attorney.
- [29] The following day, the 9th April, 2017 Assistant Commissioner of Police Nuffield Burnette conducted an interview with Mr. Gomes, commencing at 12:10 pm. On this occasion Mr. Gomes exercised his right to first consult with his lawyer. However, Mr. Gomes went ahead with the interview. The interview proceeded for hours without the lawyer being present. There was one bathroom break during the interview and another break at 4:18 pm when the lawyer arrived “to allow attorney to take instructions privately from client and to read from the interview that was already recorded.” The interview then resumed.
- [30] Two weeks after that interview with ACP Burnette, Mr. Gomes was taken from the prison to Police Headquarters on the 22nd April, 2018. The investigating officer, Sergeant Rohan Gittens, informed Mr. Gomes that he would like to video record and interview him in relation to Ms. James. Sergeant Gittens informed Mr. Gomes that he did not have to answer any of the questions. Mr. Gomes spoke with his legal advisor prior to the commencement of the interview. Mr. Gomes’ response to the questions asked was: “From what I was told, I don’t have to answer, so I’m not answering.”
- [31] The police took Mr. Gomes’ cell phone to the Regional Cyber Investigation Laboratory at the Langford Police Station where it was forensically examined. The call logs and data communications (text messages and WhatsApp conversations) between Mr. Gomes’ phone numbers and the number assigned to Ms. James are extracted and analysed.
- [32] On the 9th May, 2017 Mr. Gomes was formally arrested and charged with the offence of murder of Ms. James.
- [33] Commencing on Saturday the 8th April, 2018 a search party coordinated by an “Inspector Gordon” was established to look for Ms. James. The search party, initially numbered in excess of 150 persons, included members of Ms. James’ family, the police, fire department, defence force and civilian volunteers. By that Saturday evening the search was expanded to include aerial coverage. More persons joined the search party the following day. The search continued for months.
- [34] In October 2022, a hand bag was retrieved from a pond in the North Sound area. That bag contained a number of items, including a Dixie Company card bearing Ms. James’ name and two Sagicor Care Cards – one in Ms. James’ name and the other in the name of her son, Jayden Ricketts.

Committal and Indictment

- [35] The paper committal of Mr. Gomes to stand trial at the High Court was conducted by the District Magistrate, His Honour Mr. C. Cornliffe Clarke, on the 24th May, 2018.

- [36] The Learned Director of Public Prosecutions, Mr. Anthony Armstrong on the 19th October, 2018 indicted Mr. Gomes for: “Murder, contrary to Common Law.”
- [37] The ‘Particulars of Offence’ stated that: “Mikhail Gomes, between the 7th and 22nd days of April, 2017 in Antigua and Barbuda murdered Vincia James.”
- [38] **Blackstone’s Criminal Practice 2017** addresses the ‘Date of the Offence’, at paragraph D11.28:
- “The count should state the date on which the offence occurred insofar as it is known. Normal practice is to give the day of the month, followed by the month, followed by the year... If the precise date is unknown, it is sufficient to allege that the offence occurred ‘on or about’ a specified date, or ‘on a day unknown’ before a specified date... Where the formula ‘on or about’ a date is used, the evidence must show the offence to have been committed ‘within some period that has a reasonable approximation to the date mentioned in the indictment’ (per Sachs, LJ, in **Hartley** [1972] 2 QB 1 at p. 7).”
- “An alternative permitted formulation is ‘on a day between’ two specified dates. If the last-mentioned formula is adopted, the dates specified should be those immediately before the earliest and immediately after the latest date on which the offence could have been committed.”
- [39] Based on the particulars of the Indictment, the Crown’s case was that they could not say precisely which day Ms. James died. However, the Crown alleged that Ms. James died either on Saturday the 8th April, 2017 (at the earliest), or on a day up to and including Friday 21st April, 2017 (the latest).
- [40] Mr. Gomes was in police custody for most of the 21-day period that the Crown alleges Ms. James could have met her death. The testimony from the police is that Mr. Gomes was detained around seven o’clock on the 8th April, 2017; he was then remanded to prison, before being charged for this offence.

Corpus Delicti

- [41] A not so insignificant issue in this case was the fact that the Crown was unable to produce the body of Ms. James or to say how and when she died. The matter of there not being a trace of a body and someone being charged with the murder has arisen in cases before. In **The King v Horry** [1952] NZLR 111, there is a fulsome elucidation of that issue:

“The statement in **2 Hale’s Pleas of the Crown**, 290 – ‘I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found,’ – has often been cited. It should be noted as was said in the judgment of the six Judges who decided **R v McNicholl** ([1917] 2 IR 557) in the Irish Court of Crown Cases Reserved, that these words do not assert the wholesale proposition that there ought never to be a conviction for murder unless there is proof of the finding of the body, but convey no

more than, in order to convict an accused person upon a charge of murder, there must be proof either of the fact of the murder or of the finding of the dead body. It has been stated in much the same way in both editions of **Halsbury's Laws of England**. In **9 Halsbury's Laws of England**, 2nd Ed. 449, it is said:

'Where no body or part of a body has been found which is proved to be that of the person alleged to have been killed, an accused person should not be convicted of either murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to be killed.'

"The same authority discussing the obligation to prove the *corpus delicti* - i.e., that the offence charge has been committed by someone - 'The *corpus delicti* may be proved by direct evidence or by irresistible grounds of presumption **Evans v Evans**, ([1790] 1 Hg. Con. 35, 105; 161 ER 466, 491),' and states with special reference to murder and manslaughter:

'In charges of murder or manslaughter, a conviction can never, it seems, take place unless the body of the person whom the prisoner is accused of having killed is found or there is evidence, either direct or circumstantial, of the death of the person said to be killed.'"

[42] The British Court of Criminal Appeal in **Regina v Onufrejczyk** [1955] 1 QB 388, at p. 396 reiterated what Oliver J said at the first instance in court:

"It is indeed a grave step to find a murder proved when there is no body, but it is not the law, and I do not believe it has ever been the law – it is certainly not the law today – that if a body can be got rid of so that no trace of it can be found, a murderer who has done so is not to be convicted. That is not the law. But of course, the burden of proving everything against the man is on the Crown. There is no burden on him to disprove anything."

[43] It is clear from the authorities that the absence of a body does not mean that a charge of murder cannot be sustained. The Crown must however adduce evidence to show:

- That the person is dead.
- That the death was caused by a crime.
- That it was the Defendant who committed the crime.

Circumstantial Evidence – The Principles

[44] Given the absence of any direct evidence that Ms. James is dead; and given the absence of any direct evidence that Mr. Gomes caused Ms. James' death; and given the absence of any confession from Mr. Gomes that he unlawfully killed Ms. James, the Crown is dependent on

circumstantial evidence to prove that a crime was committed and that it was the Defendant who committed it.

- [45] In **Gregory August and Alwin Gabb v The Queen** [2018] CCJ 7 (AJ) Sir Dennis Byron, PCCJ, referenced **R v Taylor, Weaver and Donovan** (1928) 21 Cr App R 20 (CA), the authors Adrian Keane and Paul McKeown, of **The Modern Law of Evidence** (11th edn, Oxford 2016) 14 and Pollock CB in **R v Exall** (1866) 4 F&F 922 at 929, as the basis for stating at paragraph [32]:

“It is well established that it is ‘no derogation of evidence to say that it is circumstantial.’ The nature and value of circumstantial evidence have been described as follows:

“Circumstantial evidence is particularly powerful when it provides a variety of facts all of which point to the same conclusion...[it] ‘works by cumulatively, in geometrical progression, eliminating other possibilities’ and has been likened to a rope comprised of several cords:

“One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but the three taken together may create a strong conclusion of guilt with as much certainty as human affairs can require or admit of.”

- [46] Then at paragraph [38] of **August and Gabb**, Sir Dennis Byron said:

“A case built on Circumstantial evidence often amounts to an accumulation of what might otherwise be dismissed as happenstance. The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant’s guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant’s guilt is proved beyond reasonable doubt.... It is not the individual strand that required proof beyond reasonable doubt, but the whole. The cogency of the inference of guilt therefore... built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”

- [47] The authors of **Cox’s Criminal Evidence Handbook 2009-2010** (Cox, Lafontaine Rondinelli. Canada Law Book 2009) cite **Hodge’s Case** (1838), 2 Lewin 227, 168 E.R. 1136, for their statement of the ‘general rule’ of circumstantial evidence that:

“Where the evidence in a trial is wholly circumstantial, before a finding of guilt may be made, the jury must conclude that the circumstances (that is, the facts proved) were not only consistent with an inference of guilt, but also would not lead to any other reasonable inference.”

- [48] **Cox's Criminal Evidence Handbook** reiterates the 'totality principle' as it concerns circumstantial evidence, in that: "Every fact need not satisfy the general rule; the facts in their totality must."

Rule in Hodge's Case and McGreevy

- [49] In **Hodge's Case**, the matter went to the jury. A verdict of 'not guilty' was returned by the jury. This was a case in which a woman was robbed and murdered as she returned from the market. The sum that was taken was unknown, neither could "what particular description of coin... [be] ascertained distinctly." The accused person knew her. Shortly before the incident he had been seen near where the murder was committed. Four other persons were in the same lane at about the same time. Sometime later, the accused was seen some miles from the spot burying something which the following day turned out to be money and which corresponded generally as to the amount the murdered woman was supposed to have had in her possession when she left the market. Alderson, B, told the jury that they must be satisfied:

"...not only that those circumstances were consistent with his having committed the act, but that they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

- [50] Alderson B, in **Hodge's Case** told the jury that "the proneness of the human mind to look for – and often slightly to distort the facts in order to establish such a proposition – forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt."

- [51] There have been recent decisions which sought to explain or place a restriction on the **Rule in Hodge's Case**. This can be found, for example, in the Supreme Court of Canada decision in **The Queen v Mitchell** [1965] 1 CCC 155. Notably, the House of Lords in **McGreevy v Director of Public Prosecutions** [1973] 1 WLR 276, concluded at page 286 A, B, that there was "no necessity to lay down a rule which would confine or define or supplement the duty of a judge to make clear to a jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied beyond reasonable doubt."

- [52] Lord Morris of Broth-Y-Gest, in delivering the judgment in **McGreevy**, expounded on the role of the jury in the drawing of inferences when assessing a case based on circumstantial evidence:

"So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary commonsense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of

guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.”

[53] Instead of “beyond all reasonable doubt” the accepted terminology is “so that you are sure.”

The Case of the Missing Bride

[54] The New Zealand case of **The King v Horry** was an appeal against conviction in which the body of the deceased woman was never found and the Crown relied on circumstantial evidence to prove its case. According to the headnote in the Law Reports:

“At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and the accused has made no confession of any participation in the crime. Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: 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.”

[55] Gresson J who delivered the judgment on behalf of the Court of Appeal in **Horry** noted that the same circumstantial evidence which goes to prove the *corpus delicti* may also connect “the person charged with the crime:”

“...‘the same evidence often applies to both the fact of the crime and the individuality of the person who committed it’ [per Johnston J, **Woodgate’s Case** (1877) 2 N.Z. Jur. (N.S.) CA 5]... Either may be proved by circumstantial evidence alone if that evidence is cogent enough... all the circumstances of the case and every part of the conduct of the appellant may be taken into consideration, if there is any reasonable hypothesis consistent with innocence, the charge must fail for lack of proof. The governing principle is that it is not sufficient that the evidence should carry a strong probability of guilt; the inferences proper to be drawn must so clearly and completely overcome all other inferences or hypothesis as to leave no reasonable doubt of guilt...”

[56] The Prosecution in **Horry** marshalled an abundance of facts upon which it persuaded the jury of its circumstantial case. The convicted man married a widow, Eileen Turner, aged 37, on the 11th of July, 1942. They were to get married two weeks earlier, but the wedding was delayed because Mr. Horry asked back for the licence and made alterations regarding his birthplace and mother’s name. After the wedding Eileen was not seen afterwards. Six months after his marriage to Eileen, on the 12th of December, 1942 Mr. Horry married Eunice Geale – with whom he was involved prior to his marriage to Eileen. Investigations revealed that on the 15th April, 1942 – which was before his marriage to Eileen – Mr. Horry sought to open a joint bank account in his name and his “intended

wife,” who was named Eunice Geale. Although he was a tailor at a factory and missed work for five days only in three years, he pretended that he was discharged from the British Army and that he was on a secret assignment. He falsely claimed to be from a wealthy family and that he lost his parents and siblings in a bombing raid in England. He informed Eileen’s parents that he was going to Australia and England following the wedding and because of the secret nature of his job they would not be hearing from him nor his bride for three months; he said he would not even be able to inform them when he arrives in Australia. He forbade any pictures to be taken at the wedding. Eileen withdrew all her savings from the bank, sold her property and instructions were given to the solicitors to provide an open cheque which Mr. Horry deposited into his account that he opened three days after the wedding. Eileen’s father received a letter signed “George and Eileen” which spoke of their arrival in Australia and informing him to expect another letter in two months when they are in England. Mr. Horry arranged for those letters to be forwarded to the Eileen’s parents. In December 1942 he visited Eileen’s parents and told them a false story of being on a vessel that was torpedoed by a German submarine; he said he had not seen Eileen since and that he was rescued by a British warship. The story was a total fabrication as there was not even a ship bearing the name that he told them. He told Eileen’s parents that cables were sent to inform them of the sinking of the ship, but they never received any such communication. In February 1943 Eileen’s mother received a letter from Mr Horry which suggested that he was overseas and in which he claimed that he was just informed that Eileen and others lost their lives at sea. One of the stories Mr Horry gave to the police was that Eileen left him the day after they were married in pursuance of an arrangement with him so that she could go off with another man. Mr. Horry said he was paid 650 pounds sterling by Eileen to marry her so she could elope with another man. When the police questioned Mr. Horry, he denied having any of Eileen’s property at his house; but when the police searched his house a year after Eileen was last seen by her family, a suitcase, apparel and a hat box identified as belonging to Eileen were found. There was also an utterance in the presence of the police, when his current wife asked if the former wife turned up he said “That’s impossible; she couldn’t have.”

[57] This case illustrates the cumulative nature of circumstantial evidence. The Prosecution marshalled evidence from a variety of sources, including:

- Mr. Horry’s lies;
- Mr. Horry’s conduct;
- Exhibits recovered from Mr. Horry’s home; and
- Mr. Horry’s words that it was “impossible” for Eileen to turn up.

Onufrejczyk the Pole

[58] **Regina v Onufrejczyk** was a case involving two migrants from Poland – Mr. Onufrejczyk and Mr. Sykut - who were once business partners living in the United Kingdom. The Crown’s case was that Mr. Sykut was murdered in the kitchen of the farmhouse where he lived with Mr. Onufrejczyk. No

trace of Mr. Sykut's body was ever found. There was no direct evidence of Mr. Sykut's death or proof as to how he died.

- [59] The Court of Criminal Appeal in the United Kingdom approved of the statement of the law in **Horry** that in a trial for murder the fact of death can be proved by circumstantial evidence, provided that the jury are warned that the evidence must lead to one conclusion only, notwithstanding that there is no body. The *corpus delicti* may be proved by such circumstances as render the commission of the crime certain and leave the jury with no degree of doubt. The Court held in **Onufrejczyk** that:

“[T]here was evidence from which the jury, after a proper warning that they must first apply their minds to the question whether or not a murder had been committed, might infer that the victim was dead, and, if he was dead, that his death was not a natural one, one that, a *corpus delicti* having been thus established, the evidence was such that the jury were entitled to find the appellant guilty of murder.”

- [60] In the penultimate paragraph of **Onufrejczyk**, Lord Goddard, CJ, at pages 400 – 401, noted that in that case:

“...there was evidence upon which the jury could infer that he did meet his death, and that he was dead; and that if he was dead, the circumstances of the case point to the fact that his death was not a natural one. If that establishes, as it would, *corpus delicti*, the evidence was such that the jury were entitled to find that the appellant murdered his partner.”

- [61] The Crown, in order to prove its case against Mr. Onufrejczyk, relied on the tapestry of circumstantial evidence. Mr. Onufrejczyk and Mr. Sykut jointly operated a farm. It was failing. Mr. Sykut wanted to break off his business relationship and was willing to sell his share in the farm. Mr. Onufrejczyk however was virtually bankrupt; all his efforts to borrow money failed. He considered fraud – finding a valuer who would overvalue the farm so that he might be able to raise more money on a mortgage from the bank. While Mr. Sykut was willing to put the farm up for sale Mr. Onufrejczyk was unable to purchase it. Mr. Sykut disappeared on the 14th of December. Mr. Onufrejczyk penned a letter to a Polish woman saying that he was going to London to take money to Mr. Sykut and that he had given Mr. Sykut most of the money for the farm already. Although he did go to London, where he was seeking to borrow money from various individuals, Mr. Onufrejczyk enlisted the help of a lady to forge documents purporting to be agreements and which had signatures added – purporting to be Mr. Sykut's. Mr. Onufrejczyk also gave multiple contradictory stories to account for Mr. Sykut's disappearance, including that Mr. Sykut was kidnapped. When the Sheriff went to the premises to levy on partnership property, Mr. Onufrejczyk said that Mr. Sykut had gone to seek medical attention elsewhere. Mr. Onufrejczyk also wrote letters saying that Mr. Sykut had returned to Poland and that he would not be seen back in England again. Mr. Onufrejczyk enlisted the help of someone to send registered letters with sheets of paper in them to give the impression he was receiving money, and he asked another person to

impersonate Mr. Sykut on a visit to a solicitor. He tried to bribe a blacksmith to give false information as to when in December Mr. Sykut brought a horse for shoeing. Mr. Onufrejczyk deliberately tried to manufacture evidence about Mr Sykut's life. Minute droplets of Mr. Sykut's blood were found in the farmhouse kitchen.

[62] In this matter against Mr. Onufrejczyk, the Crown in building a powerful circumstantial case against the convicted man:

- Presented evidence of his course of conduct;
- Presented evidence of his falsehoods;
- Presented forensic evidence;
- Presented evidence of motive;
- Presented Mr. Onufrejczyk's comments – such as his assertion that Mr. Sykut will not be seen again in England; and
- The probative evidence related to Mr. Onufrejczyk and not to the deceased.

Basis of Charge

[63] Mr. Sullivan enumerated the different bits of evidence which he contended a jury could rely on to find that Ms. James is dead and that she met a violent death at the hands of Mr. Gomes.

[64] The aspects of the circumstantial evidence identified by the Prosecutor and those which emerge from the evidence can be listed:

- There has been no communication from Ms. James with her family since the 7th of April, 2017. This never happened before and is unusual.
- Multiple telephone calls and messages to Ms. James have gone unanswered.
- It has been almost six years since she last communicated with her son.
- Ms. James has not posted anything on social media since the 7th of April, 2017.
- Mr. Gomes admitted to Ms. James's sister, Ms. Hughes, and the police, that he transported Ms. James to work on the 7th of April, 2017 and also dropped her into town prior to an appointment that she had with a doctor for her son.
- Ms. Gomes acknowledged that Ms. James called him on the telephone sometime prior to her leaving work on the 7th of April, 2017.
- Ms. James never attended the scheduled doctor's appointment for her son.
- Ms. James was seen walking from a car park that is nearby to her work in the direction of a vehicle looking like Mr. Gomes' vehicle that was parked on a nearby road.
- Mr. Gomes has not accounted for a two-hour period between 1:00 pm and 3:00 pm on the 7th of April, 2017.
- The last bit of communication on Ms. James' phone was a text message to Mr. Gomes, (at 8:42 pm) on the 7th of April, 2017.

- When Mr. Gomes was with another young lady during the night of 7th of April, 2017 he refused to answer calls from Ms. Haywood's telephone number.
- A bag was fished out of a pond in North Sound in early October 2022 and contents in the bag were Ms. James' property.
- There were acts of violence from Mr. Gomes in the past directed towards Ms. James and incidents were reported to the police.
- In a text message from Ms. James to Mr. Gomes, she referred to him as stalking her.

DPP v Varlack

[65] Mr. Sullivan in responding to the submissions on behalf of the Defendant, referred to **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56 (PC).

[66] **Varlack** is regularly cited in relation to circumstantial evidence, the drawing of inferences and the duty of the trial Judge at the 'no case to answer' stage.

[67] Lord Carswell, speaking on behalf of the Board in **Varlack**, said at paragraph 21:

"The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane, CJ, in **R v Galbraith** [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge is equally applicable in cases such as the present, concerned with the drawing of inferences."

[68] Lord Carswell in **Varlack** quoted extensively from a matter in the Supreme Court of South Australia, the judgment of King, CJ, in **Questions of Law Reserved on Acquittal** (No. 2 of 1993) (1993) 61 SASR 1, 5. Lord Carswell at paragraph 22 said it was an accurate statement of the law:

"It follows from the principles as formulated in **Billick** (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence... He is concerned only with whether a reasonable mind

could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence....

“I would re-state the principles, in summary form, as follows... If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.

“A similar statement appears in a recent judgment of the English Court of Appeal, Criminal Division in **R v Jabber** [2006] EWCA Crim 2694 when Moses, LJ, said at paragraph 21:

“The correct approach is to ask whether a reasonable jury properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstance necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude.”

Differentiated Roles

- [69] In a trial by jury, the roles of the judge and the jury remain distinct. While one is the forum of the law, the other is the forum of fact.
- [70] When there is a no case submission, the Judge is called upon to determine whether or not there is a sufficiency of evidence to go before the jury.
- [71] A circumstantial case such as this, requires inferences to be drawn. A Judge cannot usurp the function of the jury by substituting his opinion for any which a juror of the jury may find upon the evidence.
- [72] In similar vein, a Judge cannot abdicate the responsibility of making decisions based on the law and surrender that to the jury.

- [73] Mr. Sullivan in his submissions referred to **R v Patrick Brian Barker**, (1977) 65 Cr App R 287 (1975). The issue in that case had to do with inconsistencies. The Appellate Court confirmed that even where a judge is of the view that the evidence could not support a conviction because of inconsistencies, the matter must still be left to the jury:

“It cannot be too clearly stated that the judge’s obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge’s job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying.”

- [74] The Learned Prosecutor was clearly more interested in the second sentence of the above-quoted extract, which states: “It is not the judge’s job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying.” However, the first sentence is extremely instructive: “...the judge’s obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called.”
- [75] The assessment in this ‘no case to answer’ does not concern itself with inconsistencies. There is no consideration as to whether or not any witness is credible or not; or incapable of being believed; or that the testimony was impugned by cross examination. Underlying the assessment at this stage is that all rational conclusions that could be drawn from the circumstances will be favourable to the Crown.

Conclusion

- [76] Part of the extract quoted earlier from the **Selena Varlack** case bears repeating:

“There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.”

- [77] If all of the inferences are resolved in the manner that the Crown asserts, there is a sufficient basis for a jury to find that Ms. James is dead, or even that she met a violent death.
- [78] In some situations, the circumstantial evidence which establish the *corpus delicti* and the guilt of the accused are often similar. That is not the case here.
- [79] What is absent in the Crown’s case against Mr. Gomes is a sufficiency of circumstances, which, if they are all resolved in the Crown’s favour, would lead to the inescapable conclusion that the

Defendant is guilty of the offence of murder. To successfully resist a 'no case to answer' submission, the circumstances relied upon by the Crown must be of such cogency to lift its case above mere suspicion and provide evidence upon which the forum of fact, properly directed, may properly convict.

[80] Mr. Daniels submission that his client has no case to answer is upheld.

Colin Williams
High Court Judge

By The Court

Registrar