Privy Council Appeal No. 20 *of* 1961

Charlotte Daphne King – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF THE WEST INDIES

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH NOVEMBER, 1961

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST.
LORD HODSON.
LORD DEVLIN.
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This was an appeal, by special leave, from the order of the Federal Supreme Court of the West Indies, dated the 4th February, 1961, by which the appellant's appeal against her conviction in the Supreme Court of Barbados was dismissed. The appellant together with one Yarde had been convicted of murder and sentenced to death. At the conclusion of the hearing their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed. Their Lordships now give their reasons.

The appellant and Yarde had been indicted on a charge of murdering one Ernest Peterkin some time between the 20th and 21st of December, 1959. They were twice tried. The original trial which had lasted very many days ended on the 13th May, 1960. Both the appellant and Yarde were convicted. They appealed to the Federal Supreme Court. On the ground that the summing-up had been inadequate the convictions were (on the 22nd July, 1960) set aside and new trials were ordered. The appellant petitioned to Her Majesty in Council for leave to appeal against the order in her case for a new trial. On the 25th October, 1960 her petition was dismissed. The new hearing took place in November 1960. After an eleven day hearing both the appellant and Yarde were found guilty. They again appealed to the Federal Supreme Court. By their judgment dated the 4th February, 1961 the Federal Supreme Court allowed the appeal of Yarde and quashed his conviction: they dismissed the appeal of the appellant. On the 27th April, 1961 she obtained special leave to appeal.

The appellant is a married woman who is separated from her husband. At the time of the second trial her age was 38. In July 1959 she went to keep house for the deceased man Ernest Peterkin who was about 70 years of age and was blind. Before that date she had been friendly with Yarde whose age at the time of the second trial was 20 and according to a statement which she made she and Yarde had often been intimate. After going to Peterkin's house to live she continued her friendship with Yarde who, unknown to Peterkin, used to visit her. In her statement she further said that she often slept with Peterkin in his bed and was intimate with him. On Sunday the 20th December, 1959 Yarde visited the appellant at the house. Peterkin accused her of bringing a man to the house and according to her statement ordered her to leave the house by the next day and throughout that day continued to quarrel. In the evening Yarde returned to the house. At some time which was before 3.0 a.m. on the 21st December Peterkin met his

death. The medical evidence was that he had injuries to his left and right shoulders and to the back of his head: the injuries could have been inflicted by blows from a blunt instrument such as a ripping iron. The cause of death was shock and haemorrhage following the dislocation of the spine and laceration of the brain tissue. There were two incised wounds in the front of the neck which might have been inflicted either before or after death but which would not have caused death. In the statement which she subsequently made the appellant said that Peterkin had held her and attempted to choke her and that Yarde, who was in the room, on seeing what was happening gave Peterkin a blow on the back of his neck with a ripping iron which was in a corner of the house. She said that Peterkin fell and that while he was on the ground he was groaning. She said that Yarde then took the kitchen knife and stabbed him several times about the neck until he stopped making any sound: Yarde, she said, had then left the house with the ripping iron and the knife. Yarde had also made a statement. In it he said that the appellant had called him into the house after he had returned there in the evening and had asked him to hit Peterkin with a crow-bar that she had in her hand: and that on his refusing to take it the appellant had hit Peterkin on the neck with it causing him to fall down. Yarde denied that he had killed Peterkin.

At the trial in November 1960 those respectively representing the appellant and Yarde applied that there should be separate trials and urged that the defence of each involved an attack upon the other. This application was successfully resisted by the Crown on the ground that it was the essence of the case for the Crown that the death had resulted from the joint enterprise of the two accused.

Evidence was called that in the early hours of the 21st December the appellant had roused neighbours and told them that two masked men had broken into the house and had murdered Peterkin by hitting him round his neck with a piece of iron. There was evidence to the effect that the appellant would benefit under the will of Peterkin, that on the 20th December Peterkin was proposing to alter his will and to see his lawyer, that the appellant had invited one witness not to take Peterkin anywhere that day, and that the appellant had made some remark suggesting that Peterkin might not live. There was also evidence to the effect that on the 24th December the appellant in a private conversation had said that it was Yarde who had struck Peterkin down but that she thereafter, not knowing what to do, had cut his throat. There was also some evidence which suggested that on the night of the 21st and on the 22nd the appellant had given signals to Yarde in order to warn him of the presence of the police. The respective statements of the appellant and Yarde were put in evidence.

At the close of the case for the prosecution submissions were made on behalf of the appellant and on behalf of Yarde that they had no case to answer. Neither the appellant nor Yarde gave evidence.

Though the statement of each accused was evidence against him or her (but not of course against the other) the statement of each was of an explicatory nature. There was undoubtedly some direct evidence against the appellant which, if the jury accepted it, was evidence against her of the existence of motive and, always provided that the jury accepted it, there was some evidence against her that it was she who used the knife though it was not suggested that the knife wounds were a cause of death. Apart from such or similar parts of the evidence, the case against each accused either of being the actual killer or of being an accessory or principal or participating party was mainly inferential and circumstantial.

In a careful and detailed summing-up the learned Judge told the jury that they should consider the evidence against each accused separately and reminded them very clearly that the unsworn statement of the one was not evidence against the other. He said:—" The Crown ask you to convict both because they say the murder was a result of joint agreement or a pre-arranged plan between the two accused to kill Peterkin. Or to put it another way: that they were acting in concert ". He told the jury that it was open to

them to convict both: or to acquit King and convict Yarde: or to convict King and acquit Yarde: or to acquit both. He told them that in order to find both accused guilty they would have to find that there was a joint, pre-arranged agreement to kill Peterkin and he added " If the evidence does not justify you in finding that Peterkin's death was brought about as a result of a concerted plan by King and Yarde, then you cannot possibly convict both of these two accused. You will have to consider which one killed him, and if you cannot make up your minds beyond reasonable doubt as to which one killed, then you will have to acquit both. Of course, the common purpose—the joint agreement to kill—does not have to be entered into hours before the act ". The learned Judge proceeded fully to review and to analyse the evidence affecting the appellant. Having done that he did the same in regard to the evidence affecting Yarde. He then considered the evidence concerning the submission of the Crown that the two accused had had a common design or had acted in concert: in so doing he pointed to what was the evidence against each one but which was not evidence against the other. He advised the jury against drawing the inference of a prearranged plan. He told them over and again that unless they came to the conclusion that there was such a plan they could not possibly convict both accused. In one passage he said:—" So that if you come to the conclusion that there was no pre-conceived plan; no acting in concert; you cannot find both accused guilty. You can only find both accused guilty if you find the accused were acting in concert. If they were not acting in concert, then consider if you can find either guilty and, if so, which one ". Finally he quoted the following words from the judgment of Lord Goddard C. J. in *R.* v. *Abbott* [1955] 2 Q.B. at page 503:—" If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case ".

In considering what was said in *R.* v. *Abbott* reference may also be made to *R.* v. *Richardson and Another* 1 Leach 387 in which case, at page 388, it was said:—" One of them is certainly guilty, but which of them personally does not appear. It is like the Ipswich Case, where five men were indicted for murder; and it appeared, on a special verdict, that it was murder in one, but not in the other four; but it did not appear which of the five had given the blow which caused the death, and the Court thereupon said, that as the man could not be clearly and positively ascertained, all of them must be discharged ".

Having regard to the terms of the summing up there can be no room for doubt that in returning verdicts of guilty against both accused the jury must have decided that they were acting in concert. The view of the jury may have been that it was the appellant that struck the blow or blows that killed Peterkin and that Yarde, being present, had been a party to a plot to kill or being present had aided and abetted. The view of the jury on the other hand may have been that it was Yarde that struck the blow or blows (which according to the learned Judge's view must have been inflicted with some force) and that the appellant was a party to their infliction. The view of the jury may however have been that they could not say which of the two had killed Peterkin but that they considered that both accused were parties to the killing.

Upon the appeal of both accused to the Federal Supreme Court the result, as has been stated, was that Yarde's appeal was allowed and his conviction quashed and the appellant's appeal was dismissed. In the course of the judgment of the Court it was said:—" In those circumstances it would seem proper for the jury to have considered whether King was guilty and then to have looked for evidence of a common design to determine whether Yarde was also guilty. The fact that they found both guilty does not mean that King could only be convicted if there was a common design to commit murder. The case against her did not rest on the existence of a common design ". There is however no way of knowing whether the jury first considered the case against the appellant and then considered whether there

was evidence of a common design so as also to include Yarde in the guilt. It may be that the jury thought that Yarde did the killing and that the appellant was in some way a party to it. It cannot be known however what view the jury formed as to the part played by the one or by the other: nor can it be known what evidence the jury accepted and what they rejected. In his summing-up at the trial the learned Judge had advised the jury to approach some parts of the evidence with caution. While it is quite correct that the case against the appellant did not rest on the existence of a common design the fact remains that she was only found guilty on that basis. The result is that the jury have not expressly found a clear verdict of guilty against the appellant separately and alone and it is not known whether they would have been prepared to do so. The case against Yarde did not rest only on the existence of a common design. It was open to the jury to convict him and him alone. The jury convicted him however on the basis that there was joint implication. The questions whether Yarde's appeal should or should not have succeeded and whether new trials should have been ordered are not before their Lordships but on the judgment of the Federal Supreme Court the matter must now be considered on the basis that the learned Judge at the trial ought to have told the jury that as against Yarde there was no evidence warranting the conclusion that he and the appellant acted in concert. On that basis what would the jury have done? They had been told by the learned Judge " You can only find both accused guilty if you find the accused were acting in concert. If they were not acting in concert, then consider if you can find either guilty and if so which one? "

The jury found both accused guilty which involves a finding that they were acting in concert. Accordingly they were never obliged to consider the individual guilt of each of the accused upon the footing that they were not acting in concert. The Federal Supreme Court has acquitted Yarde so that the finding of the jury that both are guilty no longer stands and it is not possible to ask them how they would have answered the question if it had been limited to the case of King only.

There are no means of knowing what the verdict of the jury would have been had it been ruled and had they been told that they could not hold that Yarde acted in concert with the appellant. There are various possibilities. They might have found that Yarde alone was guilty. They might have found that the appellant alone was guilty. They might have considered that the killing was done by one only (the other not being implicated) but that they could not decide which and so could not have avoided acquitting both. Leaving aside the question whether it could have been held that there was admissible evidence of a common design against the appellant even though there was no such evidence against Yarde the fact remains that had the jury been directed in accordance with the view of the Federal Supreme Court it cannot be said with certainty that the jury must inevitably have convicted the appellant.

In these circumstances their Lordships conclude that it could not be satisfactory to allow the conviction of the appellant to stand. There is the possibility of ordering a new trial. No new trial in Yarde's case was however ordered and he has been acquitted. The appellant has already undergone two trials and their Lordships must consider whether " the interests of justice " now require that a new trial should be ordered. (See regulation 22 (2) of the Federal Supreme Court Regulations 1958.)

Their Lordships have thought not. In the unusual and exceptional circumstances of this case their Lordships have humbly advised Her Majesty that the appeal of the appellant should be allowed.

(84486) Wt. 8233/71 100 1/62 Hw.

In the Privy Council

CHARLOTTE DAPHNE KING

v.

THE QUEEN

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1962