Supreme Court

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 73/81

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

JUNIOR BURTON V. REGINA

Mr. F.M.G. Phipps, Q.C., and Mr. Arthur Williams (Jnr.) for the Appellant.

Mr. D. Wilcott for the Crown.

January 11, 1982.

KERR, J.A.:

This application for leave to appeal from a conviction in the St. Catherine Circuit Court before Chambers, J. and a jury for the crime of murder, is being treated as a hearing of the appeal.

The deceased, Pauline Hudson, known to her friends and relatives as "Cherry", was the girlfriend of the appellant. On the 4th of July, 1980, deceased, her sister, Angella Hudson, attended the cinema with others. While there, they were joined by the appellant, Junior Burton, who gave her, or shared with her a dragon stout. That after the cinema, somewhere along the way, the deceased and the accused parted from Angella and deceased went to the accused man's home. It was not unusual for accused and deceased to sleep together at the home of the mother of the deceased or at his home.

The evidence of Mr. McDonald - Mr. Theophilus McDonald, was to the effect that on the following morning, Saturday the 5th of July, he saw both accused and deceased on a track about six chains from the home of the accused, in loving embrace. The dead body of the deceased was next seen on July 15, in a pit about thirty feet deep, about six chains from the house of the deceased, but not in the same direction in which she was seen on the Saturday morning.

The body, according to the mother, Louise Hudson, was covered with sticks and bushes, only the hand could be seen from above, and, according to the doctor who performed the post-mortem on the 16th, she died from exposure.

The Crown's case, therefore, rested entirely on circumstantial evidence, and sought to establish guilt firstly on the evidence of Angella Hudson, her sister, that occasionally they used to quarrel and fight and the accused once threatened that he would kill her because she was keeping another man with him; secondly, the fact that on the 5th or 6th, he made certain enquiries as to the whereabouts of Pauline, saying that she had left to buy medication for his toothache and to visit the hairdresser at Braeton, but that they - the relatives - the mother and the sister - were of the view that she would not have gone to the hairdresser because of the old shoes which she was then wearing.

In his defence, the appellant said that they had slept together, that she had left the Saturday morning saying she was going to the hairdresser and he had asked her to buy capsules for his toothache and that, he had walked part of the way with her, and that when she left they were on happy terms with each other. He had not seen her since that morning and he made enquiries from her relatives.

Before us, the complaint was, firstly that the verdict was unreasonable and cannot be supported, having regard to the evidence. Mr. Phipps, in the course of his submission, pointed out to us that the circumstances were far from proving with the required degree of certainty (a) that she died from other than natural causes or (b) that death was caused by the appellant.

The doctor, in his post-mortem examination, apparently took a very casual view of the matter. There is no evidence that he made dissections. There is no evidence that he found on the body any marks of violence. All that he said he saw was that she had been eaten

by maggots, which could have taken about ten days to reach that stage, and he hazarded no more than a guess that there was the possibility of strangulation. However, he frankly admitted to the judge he did not examine the bones of the neck nor did he give any basis for suggesting she was strangled. In the absence of any marks of violence, in the absence of any evidence indicating how she got into this pit, in our view, it cannot be said with any degree of certainty that she was either injured by some other person before she went in there or that she was injured by falling in there.

As regards the accused being implicated we would like to draw attention to the fact that at the period closest to her disappearance, the evidence pointed to accused and deceased being on very friendly terms. There is no evidence as to the date of the last quarrel between them, and whether or not there was any cause for the breakdown of the reconciliation that was so obvious.

The other complaint by Mr. Phipps, which is so self-evident, is that the judge directed the jury on self-defence and provocation. In our view, those issues do not arise in this case and his directions can only tend to confuse the jury. Moreover, in his view of the evidence, at page 98, the judge posed a number of questions that, in our view, was inclined to lead them into the trackless realms of unreasonable conjecture.

> "The intention to really kill or inflict serious bodily harm is to be inferred from the sworn or the unsworn statement from the accused, the type of death the deceased died from. At least, the doctor says it was from exposure but there is a possibility of strangulation. Was the person strangled and put in that pit and died and recovered, stretching out hand, and couldn't go any further from the thirty-foot pit, with bushes and stones over her? It is a matter for you, members of the jury."

In our view, there was no evidence from which the inference of strangulation could be drawn. He continued:

> "It is for you to say whether the intention existed in the accused or not, and in this regard, as there is no evidence from an eye witness that the accused expressed the intention close to the time of death, possibly just the general threats time and again. Did he mean it, or was it just a casual boyfriend and girlfriend threat? If there is no evidence of that, you cannot draw any inference that there was any intention expressed to kill. It is possible to find the required intention proved merely from the act done. In other words, if you believe that the accused put that girl in the pit and exposed her to death, and from what the doctor described to you as her condition, having due regard to his defence, would any ordinary, responsible person, doing an act of that sort, realise that it would necessarily result in death or necessarily result in really serious bodily injury?"

In our view, these directions were clearly confusing and we do not think, on the totality of the evidence, the Crown had satisfactorily established that this appellant caused the death of the deceased. In the circumstances, as Crown Counsel properly admitted, the evidence as to the cause of death was such as to be insufficient to support this verdict. The appeal is allowed, conviction quashed and judgment and verdict of acquittal entered.

Before parting with this appeal, we would like to urge that in a case of this nature, a pathologist be called upon to examine and pronounce the cause of death. It is a disservice to justice to ask the general practitioner who is not experienced and not versed in these matters to deal with a case of this nature. We hope that our observations on this aspect of the matter will be communicated to the proper authorities.