J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 57/71

BEFORE: The Hon. President
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A.

WESLEY KNIGHT v. REGINA

Mr. R. Alexander for the Crown

Mrs. M. Forte for the Appellant

14th June, 1972

HON. PRESIDENT:

The applicant, Wesley Knight, was convicted on the 1st of June, 1971, at the St. Elizabeth Circuit Court of the murder of David Morgan and sentenced to death. He was charged along with one Lloyd Dixon who was discharged on a 'no case' submission at the end of the prosecution's case.

The crown alleged that following upon an altercation over money the deceased, Morgan, was held by Dixon when the applicant, Knight, pulled a ratchet knife from his pocket and stabbed Morgan in the region of the heart inflicting a wound to the left side of the front of the chest which penetrated the right ventricle or chamber of the heart. Death was due to shock as a result of hemorrhage and to the penetrating wound to the heart.

Evidence for the crown was given by certain eyewitnesses whose evidence conflicted in certain respects in particular as to the exact manner in which the injury was inflicted. But the learned trial judge in a summing up in respect of which learned counsel for the applicant can find no complaint, drew these discrepancies to the attention of the jury and left it to them to assess the evidence in the light of them.

The defence called no evidence whatever but relied on certain suggestions made to the witnesses in cross-examination and counsel's address to the jury. The main suggestion was that the injury had been inflicted in the course of a struggle. For example, at page 39 of the

notes of evidence the doctor was asked: "Q: Now, I observed that you said that the wound, that is, the one to the chest, was caused by a fair amount of force. Now, could that be caused also in a struggle? Is there any possibility, depending on the position of the body? A: Depending on the position of the body, yes, it is not impossible, sir." Again on page 17 counsel put the following questions to the witness, Scarlett: "Q: I am putting it to you that there was some wrestling between Knight and Morgan. A: No, sir. Q: I am putting it to you that when Knight and Morgan - that they were holding up. A: No, sir. Q: And I am putting it to you that the knife was in Knight's right hand. A: No, sir. Q: And I am putting it to you that there was some wrestling, the knife was in his right hand and that is why the knife was able to cut Morgan under his left arm. A: No, sir. Q: I am putting it to you that it was at that time when they were wrestling with Knight's knife in the right hand facing Morgan that it caught Morgan under his left arm. A: No, sir."

The learned trial judge in his summing up left the issue of accident to the jury in the following terms - here I refer to page 89 of the summing up of the learned trial judge - "Then again you must be satisfied that the killing was done without lawful justification or excuse. Mr. Foreman and Members of the Jury, a killing may be excusable where, for example, it is done in self-defence, and, of course, it is also excusable where it is done by misadventure or accident. In other words, if this was a killing in self-defence it would be excusable and the accused would be not guilty of any offence. Again, if you find that, if you were to find that this killing was a result of an accident or misadventure, again, in those circumstances the killing would be excusable and therefore the accused could not be convicted of any offence;" and later on he stated, "But you will have to be satisfied, as I told you, that the killing was not as a result of an accident, because, as I said, if it were the result of an accident then the accused would be not guilty of any offence."

The jury, after a short deliberation, found the applicant guilty. After the verdict and when the allocutus was administered, the applicant informed the court in this manner: "Well, on that day, sir, when the occurred happened, sir, is the man start to lick up mi sister

and I take out mi knife but I never - I flash it to scare him and him go down pon the knife, sir."

Mrs. Forte, the learned attorney for the applicant, has referred to that statement of the applicant, and, incidentally, criticised severely counsel for the defence who conducted the case for the applicant at the trial, in particular his failure to put the allegation that the applicant was then making and call evidence in support of it. In the circumstances, she submitted, the verdict was unsafe and ought not to be allowed to stand.

The court feels, in fairness to counsel at the trial, that he must be presumed to have been acting on instructions given to him by his client. In support of the applicant's statement after the allocutus, the learned attorney for the applicant has sought leave to call additional evidence in this court, and that evidence consists of the opinion of Dr. Noel Marsh, the eminent Jamaican Pathologist, which would support that statement. The principles upon which this court could act in exercising its discretion as to whether to allow that evidence to be given are set out in paragraph 899, Archbold Criminal Pleading Evidence and Practice, Thirty-six Edition at page 314: "It is only in exceptional circumstances and subject to exceptional conditions, that the court is willing to listen to additional evidence. The principles on which the court will exercise its discretion to allow further evidence to be called may be summarised as follows: (i) the evidence must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be credible evidence, that is, well capable of belief; (iv) if the evidence is admitted the court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with other evidence at the trial." We are of the view that the evidence sought to be adduced does not, at any rate, meet with the first of the criteria to which I have referred.

In R. v. Lomas, 1969, 1AER, p.920, a case which was brought to our attention and which was relied on by counsel for the applicant for a different purpose, and one which can readily be distinguished from the instant case, it was stated at page 923, paragraph (g): "This court was most reluctant to allow this fresh evidence to be given" (that was evidence in relation to a pathologist other than the pathologist who had

given evidence for the crown) "The normal case where fresh evidence is tendered and received under this section is on a question of fact, where, for example, some eyewitness or alibi witness not previously available has later been discovered. Although the section in its terms appears wide enough to embrace fresh evidence of scientific or medical opinion, it seems to this court that only in most exceptional cases would it be possible to say that there was any reasonable explanation for not adducing such evidence at the trial, and it is said with force by counsel for the crown that if the defence are content to go into the trial with a somewhat inexperienced pathologist, without asking for an adjournment to secure the assistance of a more experienced pathologist, they should not be allowed in this court to have a second chance. Counsel asked rhetorically, if this application were allowed, where is it to stop?" Later in the judgment reference was made to R. v. Harding, 1936, 25 Criminal Appeal Reports, p.190, and it is stated there: "But just as the Court of Criminal Appeal in R. v. Harding stressed the wholly exceptional nature of the course they took, so we regard this case as an exceptional case depending on its special facts and not as a decision giving any encouragement to similar applications in other cases in the future."

It seems, therefore, in addition to the criterion of exceptional circumstances, additional evidence of a scientific or medical nature should only be allowed to be given "in the most exceptional cases." We are of the view that this case is not of this nature and we accordingly refuse the application.

We have given careful consideration to the points which have been urged so lucidly and succinctly by learned counsel for the applicant, but we find ourselves unable to say at the end of the day that there was any miscarriage of justice which has taken place. In the circumstances, the application for leave to appeal will be refused.