

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 9/85

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

REGINA V. ANDY STAINROD

Mr. Dennis Morrison and Mr. Delroy Chuck for the applicant

Miss J. Strawe for the Crown

July 9 and September 24, 1986

Carberry J.A.:

The applicant was convicted in the St. James Circuit Court on the 29th January, 1985 before Patterson J. and a jury for the murder of Jasper Vernon "on either the 28th or 29th day of November, 1983".

He had been jointly charged with one Winston Wright: the trial lasted some seven days, at the end of which the applicant was convicted of the capital charge, and the co-accused was convicted of manslaughter, and sentenced to ten years imprisonment.

Counsel for the applicant (Wright did not appeal) who appeared before us conceded that they were unable to find any grounds of appeal that could be argued before us with any hope of success. We agreed with this view so candidly expressed, and accordingly leave to appeal was refused and the conviction and sentence affirmed.

Prudence however dictates that we should make some short observations on the case, which had in it some items of interest, and we do so now.

All the parties involved lived within an area in which there were three contiguous small villages, Orange Sign and Herlock, all some few miles from Montego Bay, in the parish of St. James. They knew and were known to each other, and no discernable motive for the murder was ever disclosed. The evidence offered rested largely on reports of what the deceased himself had to say as to how he had come by his injuries.

The deceased was by way of being a small shopkeeper in the district. The applicant Stainrod, Andy Stainrod, had grown with the deceased (and some of the witnesses) in this area, and the deceased and the applicant were reputed to be good friends who moved together, ate and cooked together, and played dominoes together. Winston Wright also lived and grew up in the area, and was said to be a visiting lover of a cousin of Stainrod, who lived at Stainrod's house. He sometimes slept there, though he lived elsewhere with his mother. One witness did suggest that about a month prior to the fatal incident a coolness had developed between the deceased Jasper Vernon and his close friend Andy Stainrod, but no particular reason was ever advanced for this estrangement, if such there was.

The events with which the case is concerned took place on the night of the 28th November, 1983, at or about 9:00 p.m.

A witness named Roy Clarke whose house featured as a convenient landmark or point of reference, stated that he went home from work, having passed Stainrod and four other persons whom he did not recognize sitting on a wall. Stainrod had begged him for a light for his cigarette and he had obliged. Inferentially he did not then see Winston Wright.

Having arrived home Clarke turned on his verandah light (a 100 watt bulb), entered his home and turned on his inside lights and lit a cigarette.

Clarke then heard a "rastling" (wrestling) going on outside on the road, then he heard the sound of running footsteps, then he heard two gunshots, then heard a voice he did not then recognize calling to him for help from just outside his verandah.

Because of the gunshots he hesitated for sometime to go outside and see what had happened. When he did do so he found a body face down by his house. He cautiously turned it over with his foot and then recognized that it was Jasper Vernon. He had been seriously wounded, and had been hit by the blast of a shot gun fired at a fairly close range. Clarke now recognized that it was Jasper's voice that he had heard prior to this.

At this stage there arose a prolonged argument on behalf of the defence who objected to the witness stating what Jasper had said as being hearsay and inadmissible, while the crown argued for its admissibility as being part of the res gestae. After anxious consideration of Teper v. R. (1952) A.C. 480, and the later case of Ratten v. R. (1972) A.C. 378 Patterson J. ruled that the proposed evidence was admissible as part of the res gestae.

Clarke then related that prior to the gunshots, during the wrestling, he heard Vernon say "Andy, what you want to kill me for?"

Having found Jasper Vernon in this critical position outside his house, Clarke and others took him to the Cornwall Regional Hospital in Montego Bay, where he was admitted and emergency surgery carried out on him, alas without success. He died later on the 28th or in the early hours of the 29th November, 1983.

While he was at the hospital in the casualty ward or area, two policemen received news of Vernon's admission and hastened to the hospital to interview him. The first to arrive was Inspector Steadman Roche who got to the hospital at about 9:30 p.m. and going to the casualty department heard a voice which he later discovered was that of Jasper Vernon, groaning and calling out aloud: "Look how Andy do me! Me and Andy live so good and him shoot me. Me can't live."

The Inspector found that the deceased was in a parlous condition, with clear shot gun wounds to chest and abdomen, hands strapped to the bed, "on the drip", with wounds oozing visibly. The Inspector was in uniform and conducted a brief interview with the deceased.

This interview and the words already mentioned formed the topic of another prolonged argument between defence counsel, who argued for their exclusion as hearsay evidence, and crown counsel who argued for admissibility on the ground that they constituted the dying declaration of a victim of homicide, and were admissible as such. Once again the authorities on this common-law exception to the hearsay rule were anxiously canvassed, including the Privy Council decision on an appeal from Jamaica, Nembhard v. Regina (1982) 74 Cr. App. R. 144; (1982) 1 All E.R. 183. Further, and this was most unusual and we think unnecessary, the defence counsel were able to persuade the trial judge to have a voir dire on the circumstances attending the Inspector's interview with the deceased.

In our experience while it is customary to have a voir dire when the crown seeks to put in an alleged confession that the defence challenges as not being voluntary or to have been extorted by force or fraud it was unusual to have a voir dire on the admissibility of a dying declaration: though, if the jury's absence is requested by the defence and acceded to by the judge in the exercise of his discretion, no complaint can be made: Aderson (1929) 21 Cr. App. R. 178 at 183.

Be that as it may, Patterson J. correctly decided to admit the evidence, and Inspector Roche testified that having discovered the name of the victim from him the victim, said to him:

"Inspector, a domino me just play and deh go home and I meet Andy with one long gun and two more men. Them back me up.... him back me up. Me and Andy wrestle and one of them mek fi chop me and me run off and Andy fire two shots after me and the last one catch me and do me so. Inspector me can't live, me must dead."

The Inspector states that he asked the deceased for Andy's right name and where he was living and where he could find him. The victim replied that his name was Andy Stainrod and he lived in the same area that he (the victim) lived in.

The Inspector asked him for the names of the other two men, and the deceased replied:

"Me nuh know them name Inspector. But one short one weh live with Andy, and walk about with him all the while, him one did deh. Ah him mek fe chop me. But me never see the other one good as him never come up good in a de light."

The crown argued that this was a clear reference to the accused Winston Wright, who was a constant visitor to Stainrod's cousin at Stainrod's house, while the defence observed that Wright was so well known to the deceased that he was unlikely not to know his name. This and other issues were clearly left to the jury.

It should be added that Det. Actg. Cpl. Brown arrived at the hospital soon after Inspector Roche and confirmed the substance of the dying declaration.

While these events were taking place at the Cornwall Regional Hospital, back in the district the evidence showed that both Stainrod and Wright had turned up at neighbouring homes, separately but in succession, and that each had claimed to have been held up by three gunmen at some little distance from the spot at which Jasper Vernon had been shot. The crown argued that the accounts that they gave to their neighbours and subsequently to the police, (namely Det. Actg. Cpl. Brown who went next day to the hospital and found that Vernon had since died, and subsequently went to the district to seek the alleged attackers whom he detained and subsequently arrested for the murder) contained such discrepancies as to suggest that their story was a concocted effort to persuade people that they were not Jasper Vernon's attackers, but had themselves been attacked by the same three men. There was also a suggestion, never substantiated by firm evidence, that at least two other persons in that district had

also been attacked and robbed that night by three gunmen, not the accused.

For their part, the accused chose in this case to make unsworn statements from the prisoner's dock, to the same effect as the stories previously outlined, that is that they themselves had separately been attacked in the same area that same night by three gunmen from whom they had narrowly managed to escape.

In short then the only real evidence against the applicant and the co-accused consisted in the statements made by the deceased, first when bawling out for help during the attack (see Clarke's evidence), and subsequently to Inspector Roche at the Cornwall Regional Hospital (see the evidence of Roche and Brown).

The learned trial judge anxiously reviewed the evidence in his summing-up, advising the jury that they had to be satisfied that the deceased had been correctly reported, and then by inviting them to consider with the greatest care whether given the lighting conditions in the area, the time of the attack, and the deceased's familiarity with his attackers, he had indeed had the opportunity to identify them and had he done so correctly: he explored the nature of the deceased's reported statements in the light of the directions laid down by this Court in The Queen v. Oliver Whyllie (1978) 25 W.I.R. 430; 15 J.L.R. 163.

As regards Winston Wright the trial judge also gave careful directions on the effect of the doctrine of common design. The jury appears to have acted on these directions in finding Wright guilty only of manslaughter.

It has been clear ever since Teper v. Regina (supra) if not before, that it is possible for a jury to convict on the evidence as to identity disclosed in a dying declaration, and the jury did so here.

The anxious scrutiny of counsel for the accused failed to find any arguable ground of appeal on behalf of the applicant, and accordingly leave to appeal was refused.