

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 23, 25 & 37 of 1976

BEFORE: The Hon. Mr. Justice Leacroft Robinson, President
The Hon. Mr. Justice Lincoln Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.

R. v. CLIFTON IRWING
LLOYD WILLIAMS
VINCENT O'SULLIVAN

Ray Taylor and Dorothy Lightbourne for applicant Clifton Irwing.
B. Macaulay, Q.C. and Earle Delinger for applicant Lloyd Williams.
B. Macaulay, Q.C. and Richard Small for applicant Vincent O'Sullivan.
Chester Orr, Q.C. and Mrs. S. Lewis for the Crown.

Heard: 15th, 16th, 17th, 18th, 19th November, 1976
13th, 14th, 16th, 17th December, 1976
& 12th January, 1977

LEACROFT ROBINSON, P.:

The applicants herein were three of four persons who were tried together in the Home Circuit Court by Smith, C.J., and a jury for the murder of Vernon James. On 22nd March, 1976, the jury returned verdicts of guilty of murder in respect of the three applicants. The fourth person was acquitted. The applicants applied for leave to appeal against their convictions and on the 10th January, 1977, this Court, having treated the applications as appeals, dismissed the appeals and intimated that it would in due

course put its reasons for so doing in writing. This it now does.

On the night of the 23rd February, 1975, the late Mr. Vernon James and his wife Olive retired to bed at about 10.30 p.m. and were listening to the radio. Their bedroom was on the first floor of their three-storey home consisting of a ground floor, and two other floors. On the first floor there were in addition to the bedroom, a study and two balconies. The study had two doors, one leading to the staircase, and the other into the bedroom. Their house had previously been securely locked up and the lights had been turned off. While listening to the radio sounds were heard on the ground floor of their house and sometime later there was heard a loud bang on the study door which opened on the staircase. Next followed the entry through the door leading from the study to their bedroom of five men. Each carried a flashlight. Four carried long knives and one had a gun. Mrs. James was ordered to turn on the bedroom lights and she complied.

The four men with the knives took up their position two on either side of the bed and the one with the gun positioned himself at the foot of the bed. Thus encircling the James', and pointing the knives and gun at them, the one with the gun assumed the role of chief spokesman. In language intermingled with a line of badwords, he demanded money and revolver. He was told that they had no guns and no revolver and where was to be found what money they had in the house. The chief spokesman then retorted that they had heard that Mr. James had a chest with money. Both Mr. and Mrs. James replied that they did not have a chest whereupon they were set upon by all the five men who started beating and chopping them. They were both dragged out of the bed by all the five men and all the five men started kicking them. Mrs. James was kicked several times in her stomach; she was kicked on her breast; eleven of her teeth were knocked out; both her ears were chopped. During all this exercise all the five men kept insisting that the James' did have a chest and a revolver in the house.

Mrs. James was accused by them of being very stubborn and told that if she did not give up the chest and revolver she would be killed. In the meantime Mr. James was receiving similar treatment from the five men. They alternated between beating Mr. James and Mrs. James. As Mrs. James put it, "They set upon him after me and they were from one to the other."

There were five doors in the James' bedroom. Mrs. James tried to escape through some of those doors and each time she approached a door she received a chop in her head from one or other of the five men.

As for the money in the house, Mrs. James had told the men that what money they had in the house was in her handbag in the adjoining bathroom. She was told to get it and, accompanied by one of the men, she went into the bathroom, opened her handbag, took out and handed to him cheques amounting to \$650.00 and cash amounting to \$200.00. He took the cash and threw the cheques on the floor. Between the bedroom and the bathroom one or other of the men pulled off all the jewellery which Mrs. James was wearing. These included a chain, her wedding rings and a bracelet. They also took two watches which were on the bathroom dresser.

When Mrs. James returned to the bedroom after handing over the money to one of the men, she saw her husband sitting on the floor beside the vanity dresser. He was bleeding all over and was still being beaten. They also resumed beating her, and she too was bleeding profusely. Mr. James was groaning, was told not to groan and the more he groaned the more blows they reigned on him.

While all this was going on, the men proceeded to tear up the mattress on the bed declaring as they did so that money was in the mattress. They then started smashing up all the bedroom furniture with a big beam which they had brought into the room with them. They tore down the drapes that covered the windows in the room and found Mr. James' shot-gun behind those drapes. The one with the gun took hold of the shot-gun and hit Mrs. James in her head with the barrel of the gun, declaring as he did so that she was

" a lying so and so." (All their conversation was intermingled with filthy language). The force of that hit caused the handle of the shot-gun to break.

The wanton destruction of persons and property in the James' bedroom that night continued until someone called from downstairs a warning that a police car was approaching - apparently there was a sixth man who had remained on the ground floor on look-out duty. On that warning note, all five men ran out of the bedroom, down the stairs and across the road from the house.

They had spent about an hour or so in the James' bedroom and had left in their wake two seriously injured persons. Mrs. James was practically naked, having been battered, beaten and torn up. She was bleeding profusely from the wounds she had received. They included five chops in her head and damage to both eyes. She had to have a blood transfusion. A piece of her ear was cut off. What remained of Mr. James lay on the floor in a corner of the room in a very poorly condition. He was barely gasping and he died shortly after.

A post-mortem examination performed on the body of Mr. James on the 26th February, 1975, some 64 hours after his death, disclosed multiple injuries to the head. These included four lacerations, five stab wounds and a compound fracture of the skull with accompanying depression of the skull in the region of the fracture. There was also a 1½ inch long stab wound in the chest which penetrated the left chest wall and in the left lung causing a collection of blood in the left thoracic cavity. There was a laceration on the right wrist and multiple small lacerations to the ankles and feet. Death was due to concussion of the brain.

The doctor testified that most of the injuries were inflicted by a sharp instrument such as a knife and that the compound depressed fracture to the head could have been caused by a blow from a dull heavy instrument, such as either of the two

pieces of the shot-gun which was found behind the window drapes in the bedroom. He thought death must have been instantaneous.

This evidence if accepted by the jury established beyond all doubt a clear case of murder on the part of all the participants.

This was a joint enterprise - it was concerted action by all five men in that room. On several occasions during the beatings, more than one of them kept saying that Mrs. James was being stubborn and that she would be killed. There was not a single voice of protest - not one restraining influence. When she eventually escaped onto the north-side bedroom porch and called for "murder" all five men rushed out to her on the porch and with a string of badwords said they were going to kill her because she had no right to be 'hollering' for murder.

If the jury accepted the evidence of Mrs. James as to what took place in the bedroom on that fatal night, the inescapable inference was an intention to kill or to cause serious bodily injury to Mr. and Mrs. James, and the jury's only other concern would have been as to the identity of the participants.

It is in this respect only that their task could be said not to have been an easy one.

Mrs. James was the only living eye-witness. And at a time when both her eyes were still suffering from the battering she had received, when one eye was still closed down and her vision greatly impaired, when, as she herself put it, "My eyes were battered and I was in no condition to attend any identification parade. I could hardly even see then", she was required, against the advice of her doctor and notwithstanding his objections, to attend three identification parades. The reason given her by the police for insisting on her attendance at that time was that "they could not hold the men indefinitely." And so, in bedroom slippers and housecoat, Mrs. James was taken to the Constant Spring Police Station on the 17th March, 1976 where she attended three

identification parades and gave a most pitiable performance at each. The appellant Lloyd Williams was on the first parade. She not only failed to point him out but she pointed out two other persons who the police were satisfied were in no way involved. The appellant Clifton Irving was on the second parade. She not only failed to point him out but she pointed out someone else who the police were satisfied was in no way involved. Another unnamed suspect was on the third parade. She did not point him out but here too she pointed out someone else who the police were satisfied was not involved.

It was bad enough that she was unable to identify these two appellants, but that could be no justification for pointing out the wrong people and so it behoved the learned Chief Justice to direct the jury not only to disregard completely her evidence at the trial as to the identity of Irving and Williams, but also to consider very carefully whether they could safely accept her evidence as to the identity of the other two accused, although the latter two, Vincent O'Sullivan and Delroy Rose, had been pointed out by her at identification parades held later, on the 2nd and 11th June, 1975 respectively, times when she had completely recovered from the injuries to her eyes.

Early in his summing-up, in emphasizing to the jury that they must consider the evidence against each accused separately, the learned Chief Justice told them that -

" It may be that, for instance, the evidence relating to identification by Mrs. James - it may be that you say, well, we don't believe her at all on her visual identification of the accused because of so and so and so, which is a circumstance which goes to the whole root of the identification and which would nullify any identification of any of the accused, and in that case you would say the same reason why you don't think we can rely on her identification of one, for that same reason we don't think we can rely on her identification of another; but apart from that each accused is entitled to have the case against him considered quite separately and distinctly from each of the other accused. In other words, you must look to see whether in the case of each accused there is evidence affecting him and him alone upon which you can say you feel sure that his guilt has been established. "

Thereafter, the learned Chief Justice subjected the entire evidence of Mrs. James to a very critical analysis and reverting to the fiasco of her performance at the first three identification parades, he had this to say, at p. 643 -

" The prosecution would have you say that it is because she was in an unfit physical condition why she made mistakes, but of course it has been said, and perhaps you might think quite sensibly said, if she was not in a proper physical condition she should not have gone at all, and if she went and she wasn't able to see properly then she should have said so rather than point out somebody other than the suspect - a matter which could have had serious consequences if the person pointed out - if there was any aura, even the slightest aura of suspicion hanging around the person pointed out. In other words her conduct in purporting to say she was sure that the people she pointed out were some of her assailants, that is a matter which seriously affects her general credit when it comes to her certainty, as she says she is, that the four accused are four of the five men. This is a matter which you must take very seriously into account. It is a matter which you must take very, very seriously into account. "

And later, at p. 646, he said this -

" having pointed out three or four people who it is admitted were not involved, can you say that on her general credit and her general ability to point out the men in court whether that is seriously affected and eroded by her admission, as to what took place at Constant Spring? These are matters which are of the most serious consequences to her general overall ability to point out anyone of her assailants.

" She said, in answer to Mr. Daley, that it was a horrible ordeal that she went through and he asked her: when you pointed out the men at Constant Spring, did you feel certain those were the men who committed the act? Her answer is: well, I couldn't say. She said she cannot recall if she was certain, and Mr. Daley said, "But would you point out somebody you were not certain of?" She said, "No." There you are members of the jury, you will have to say what you make of it and how this evidence affects what she told you in court here about the four accused and in particular, when you come to consider the identification parade held in relation to the accused O'Sullivan and the accused Rose, you bear this in mind when you are considering whether you can safely rely on her identity of them even though they were pointed out on the parade. "

To the same effect were his directions at pp. 647 and 648. And when he came to deal with the evidence as it related to each accused he told the jury, in relation to the accused Irving that if her dock identification of Irving was the only evidence against him he would not have allowed the case to go to the jury and he directed the jury that they have to "put it aside and say whether independently of that there is other evidence on which you can say you feel sure that his identity has been established. "

In relation to the accused Williams, he gave similar directions and ended them with the following words: "All I said in relation to the accused Irving on this aspect of the case applies equally to the accused Williams. "

As regards the accused O'Sullivan, the learned Chief Justice reiterated and emphasized, more than once, that the jury would have to say whether they could safely rely on Mrs. James' identification of the accused O'Sullivan, bearing in mind what occurred at Constant Spring as well although he was not on parade there.

And he dealt exhaustively with features relating to the identification itself which the defence urged was unsatisfactory and which the learned Chief Justice invited the jury to take seriously into account in deciding whether or not they could safely rely on the identification by Mrs. James.

To the same effect were his directions to the jury in relation to the fourth accused, Delroy Rose, who, like O'Sullivan, stood in peril solely on the visual identification of Mrs. James.

The jury returned a verdict of not guilty in respect of Rose, and a verdict of guilty in respect of O'Sullivan and it was contended in the appeal on behalf of O'Sullivan that the guilty verdict in respect of him was inconsistent with the not guilty verdict in respect of Rose.

There were, however, these difference in the evidence against these two accused.

Firstly, Mrs. James did not identify Rose with any particular act on the night in question. She merely identified him as one of the five men who were in the bedroom and acting together in concert. Not so as regards O'Sullivan. He was singled out or perhaps it would be more correct to say he had singled out himself. O'Sullivan was the person with the gun. He was the one who spoke first. In language intermingled with a line of badwords he demanded money and revolver. He had positioned himself at the foot of the bed and was pointing the revolver at Mr. and Mrs. James as he spoke. The James' were then sitting up in the bed and Mrs. James was looking at him and his revolver. He it was who found Mr. James' shot-gun which was behind the window drapes and he it was who hit Mrs. James in her head with the barrel of that shot-gun. And here was a most telling bit of evidence. When his counsel suggested to Mrs. James in cross-examination that she was mistaken in saying that his client was one of the men who entered her house that night, she enquired of him, "Who is your client sir?" and on being told that he was "O'Sullivan, the third chap from the left," her answer was spontaneous and indeed dramatic. "That one," she replied, "I could never forget."

Shown her deposition which recorded her as saying at the preliminary enquiry that the accused "O'Sullivan was standing at the foot of the bed with a knife, she insisted that she did not say "a knife," that the Resident Magistrate might have made a mistake - that it was "so clear in my mind that it was a gun."

Secondly, there was a conflict of evidence as to what was said by Mrs. James when she pointed out Delroy Rose at the identification parade. She testified that the words she used were "This is the man." The police witness said her words were "This man" and the accused Delroy Rose asserted, albeit in his unsworn statement from the dock, that her words were "I think this is the man." Not so in the case of O'Sullivan although there were other

complaints as to the manner of the identification which were fully and adequately dealt with by the learned Chief Justice in his summing-up.

Thirdly, shortly before the holding of the identification parade in respect of Delroy Rose his photograph had appeared in the Daily News (there was a suggestion but no evidence that it had also appeared on television) and the defence had contended that it was just possible, notwithstanding Mrs. James' denial, that she may have seen Rose's photograph and may have been influenced thereby in identifying him. Not so in the case of O'Sullivan.

Having regard, therefore, to the impact which O'Sullivan seemed to have made on Mrs. James on that fatal night, and having regard to the other differences in the evidence relating to these two accused as indicated above, it is quite understandable that the jury, heeding the warning of the learned Chief Justice that they should consider very seriously whether they could safely rely on her identification of O'Sullivan and Rose, could have come to the conclusion that it was unsafe to rely on her identification of Rose but that there were overwhelming reasons which made it perfectly safe to accept her identification of O'Sullivan.

For these reasons we saw no reason whatever to interfere with the verdict of the jury in respect of O'Sullivan and his appeal was accordingly dismissed.

As regards Irving and Williams, it was not contended that there was not evidence, other than the dock identification by Mrs. James, to connect them with the events that took place in the James' house on the night of the 23rd February, 1975.

In the case of Irving, it was conceded that having regard to the evidence which the jury were entitled to accept and which they must have accepted Irving was undoubtedly a party to a common design to rob but it was contended that that common design could not be extended to a common design to murder or use

such violence and inflict such injury as could result in death. In the course of counsel's submissions on Irving's behalf it was further conceded that "It could be contended that the type of offence to which it is clear Irving was a party - that type of offence can reasonably be said to contemplate the use of force - but not extreme force that could result in death" - and that, therefore, "Even if Mrs. James' evidence was accepted as to what took place in the bedroom, manslaughter should have been left to the jury."

In our view, if Mrs. James' evidence was accepted as to what took place in the bedroom, and it is clear that the jury did accept it, there can be no doubt whatever that the participants were guilty of murder and all that was left for the jury's consideration was whether any of the accused were among those persons who invaded the James' house on the occasion of that murder.

In the case of Irving, there was his presence in the area. There were his fingerprints found on the back-rest of a chair in the study adjoining the James' bedroom. There was the watch found on him. And there was his statement made after caution to Inspector Hohn, upon his being told that the watch had been identified by Mrs. James as being a watch stolen from her house on the night of the murder - "Lawd God? You see deh now. A no in me will fe go up deh go kill no one. A me bed me deh and the boy dem come and say me fe go wid dem." There could be no doubt that if that evidence was accepted by the jury, and it was, then Irving's presence and participation had been clearly established and he was a party to the murder.

That a statement had been given to the police by the accused Williams in which the name "Fifi" was mentioned several times, that there was evidence that Irving was also known as "Fifi" and that the learned trial judge appears at one stage of the trial and again at one stage of his summing-up, to have forgotten that bit of evidence did not, in our view, adversely affect the position of

learned
Irving, as the trial judge was at pains to emphasize to the jury, that the statement given by Williams was evidence against Williams only and could not be used as evidence against any of the other accused.

When the statement was first tendered in evidence, the judge told the jury -

" Please understand there is nothing in this statement which mentions anybody else in this case. "

In his summing-up, at p.660 referring to the evidence of Elsa Phillips he told the jury as follows: "She said to him, hi Fifi, apparently he is called Fifi, - what happen, I can't see you."

But at p. 721, in referring to and reviewing the statement by Williams, he had this to say - "..... as I told you at the time when the statement was admitted if there is anything in here - I don't think there is - but if there is anything in here which identifies any of the other accused, this statement cannot be used as any evidence against any of them. If it is evidence at all, it is only evidence against the accused. "

In these circumstances, therefore, no harm could have been done to the appellant Irving by this apparent lapse of memory on the part of the learned trial judge, as was argued on his behalf.

All things considered, we saw no reason to interfere with the verdict of the jury in respect of Irving and his appeal was accordingly dismissed.

Pretty much the same considerations applied to the case of Lloyd Williams. He had given a statement to the police admitting that he was one of a number of men who had invaded the James' house on that fatal night and that he was in the James' bedroom when Mr. James was being beaten, but he claimed that he took no actual part in the beating and that after seeing Mr. James being gun-butted, hit and kicked and after getting his own clothes soiled from the blood which spilled from Mr. James' head in the process, he ran out of the room as he did not like to see anyone murdered.

His counsel asserted that he was not seeking to ask for an acquittal. "I don't seek" he said, "in this appeal to ask for an acquittal. I say on the basis of Williams' statement the only verdict that could properly be returned was manslaughter." And he submitted that the trial judge was wrong in directing the jury that it was a case of murder or nothing.

That this submission was entirely without merit will readily be seen when it is borne in mind that the learned Chief Justice had in fact told the jury that if they accepted the statement of Williams, they should acquit him. It is clear, therefore, that the jury had rejected the statement of Williams, except in so far as it placed him in the James' bedroom at the time of the murder, and having accepted Mrs. James' evidence as to what took place in that bedroom on that occasion, a verdict other than guilty of murder would have been perverse.

For this reason, the appeal of Lloyd Williams, was also dismissed.