

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 112/77

BEFORE: THE HON. MR. JUSTICE KERR J.A.
THE HON. MR. JUSTICE MELVILLE J.A.
THE HON. MR. JUSTICE ROME J.A. (A.G.)

R. v. FLORENCE BISH

Horace Edwards Q.C., and R. Codlin for the Appellant

Horace Marsh for the Crown

January 17, 18, February 28, 1978

ROME J.A. (A.G.)

We announced on the 18th January, 1978, that we would treat the application herein as the hearing of the appeal, we allowed the appeal and promised that our reasons would be put in writing. This we now proceed to do.

Florence Bish was convicted in the Home Circuit Court for the murder of Norman Watson. The learned Chief Justice told the jury that the case presented some very strange features and we might add some inexplicable features especially with regard to the police investigations. October 31, 1976, was a Sunday. On that day at about 12.30 p.m., Stanford Scott and Derworth Gayle were in the vicinity of a tavern at the intersection of Barry Street and Princess Street. These two men swore that they saw a man and the applicant walking side by side on the sidewalk down Princess Street towards Barry Street. Their evidence differed considerably in detail as to exactly what occurred when the two people reached in the vicinity of where they were standing, but they both testified to hearing the applicant speak in a boisterous manner in addressing the man who was walking with her. According to Mr. Scott, the applicant said: "Rase, you didn't sleep a yard

last night, it going to be hell between me and you." The man did not reply and then she continued: "Where is the money that the pickney then give me." Mr. Gayle's account of the words used was to this effect. The applicant said: "You don't come home last night" and later "I wonder if my pickney then money loss." Whatever were the exact words used, both witnesses testified that as soon as the applicant finished speaking she felt within her bosom and brought forth something wrapped in a piece of cloth. She used this something to stab the man in his chest, then she threw it under a car parked nearby. When retrieved by Special Constable Scarlett, the thing, was seen to be a knife and coated with what appeared to be blood. Messrs. Scott and Gayle said that the man was stabbed in the left breast and both witnesses said the stabbed man fell to the ground although there was great difference between them as to exactly where he fell. The wounded man was removed from the scene in an ambulance.

The applicant in her defence said she was set upon by three men who attempted to rob her. One man thumped her in her eye causing an injury which manifested itself in severe swelling and was treated by a doctor while she was in custody. That same man was in the act of tearing off her blouse to get at her money which he knew to be there as earlier that day he had asked her to make change and in obliging she had inadvertently indicated to him where her treasure lay. It was her evidence that in her hand she had a kitchen knife which she had been using to peel oranges and on her head was her market basket. When the man was robbing her she chucked him away with her hand and was unable to say if by accident the knife caught him. She joined issue with the prosecution witnesses about the words allegedly used by her and strongly denied that she was the aggressor and that the man who was wounded was passive throughout.

This appeal does not turn on any of the facts outlined above.

There was admittedly an encounter between the applicant and a man but in order to support the charge of murder the prosecution had a duty to prove that the man whom the applicant wounded died as a result of those injuries.

The learned Chief Justice saw this issue clearly and directed the jury that:-

"There is no really direct evidence connecting the man who got the stab there at Barry Street, with Norman Watson, none whatever..... Nobody who saw that the man there at Barry Street, have come to say it is the same man, Mr. Norman Watson, on whom Dr. DePass performed the operation. So of course, the prosecution has to prove the death of the particular person there and prove that the accused is the person who killed him."

The Chief Justice then invited the jury to consider the evidence of Louis Lloyd, the brother of Norman Watson as being evidence from which they could draw the inference that the man stabbed at Barry and Princess Streets was Norman Watson. Unfortunately the evidence which the Chief Justice attributed to Louis Lloyd was not in fact given by him. Mr. Lloyd's evidence was that he saw his brother alive on the morning of 31st October, 1976, and not again until he went to the morgue on the 2nd November when he identified the dead body to Dr. DePass. It was therefore an important misdirection on the evidence when the learned Chief Justice told the jury that:-

"First of all, Mr. Louis Lloyd, the brother of the deceased told you that he went to the hospital on the 31st October. He had seen his brother in the morning and on the 31st October, he went to the hospital and saw his brother lying there in the casualty ward in the casualty area and he saw him with a wound in his chest, left chest. I don't recall what time he said he went, but the time would be about the time which would co-incide with the time which the witnesses gave as to when the incident occurred at Barry Street."

The learned Chief Justice correctly reminded the jury that there was no evidence that the man wounded at the corner of Barry Street and Princess Street was taken to the Kingston Public Hospital. Sergeant Grant did go to the Kingston Public Hospital on the 31st October where he saw a

man whom he did not know with a wound in the left chest. On the 1st November, Sergeant Grant saw the dead body of this same man in the hospital morgue but the Sergeant did not attend the post-mortem examination on the 2nd November and was unable to give any assistance as to the identity of the body upon which Dr. DePass performed the post-mortem examination. It was alleged by Sergeant Grant that he interviewed the applicant on the 1st November. He told her that the man she had stabbed at Barry Street on the Sunday was dead. She allegedly replied: "Yes sir, him should a dead long time." In the context of the defence, this statement if made, could have but one meaning, viz., this dastardly robber who attacked her did not deserve to live. It certainly could not be evidence providing the link between whoever was stabbed at Barry Street and a man Norman Watson upon whose body a post-mortem examination was performed on the 2nd November.

Mr. Edwards in a clear and concise argument demonstrated how essential it is for the prosecution to prove the actus reus in a criminal case. With a modicum of effort the police could have ensured that Special Constable Scarlett be present at the post-mortem examination. He best of all could provide the evidential link between the injured man and Norman Watson. The two men who stood in front of the tavern knew neither the man nor the woman between whom they observed the act of violence. Intelligent investigations could easily discover whether the deceased and Norman Watson had a relationship with each other and if any credence could be given to the talk of children. It is not to be forgotten that the applicant appeared to be a decrepit sixty year old woman while Norman Watson was a man in his early forties.

Throughout his summing-up the learned Chief Justice repeatedly drew the jury's attention to the necessity to be satisfied that the man on whom the doctor performed the post-mortem examination was the man who received the

stab at Barry Street. We are clearly of the opinion that had the learned Chief Justice correctly appreciated the evidence of Louis Lloyd he would have withdrawn the case from the jury. For the guidance of prosecutors we can do no better than to quote a passage from the 3rd Edition of Wilkenson's Road Traffic Offences at p. 114:-

"The prosecution should be careful to see that there is evidence of the death of the actual victim, i.e., **it** may not suffice for a police witness to say that John Smith was knocked down by a car on a Sunday and removed to hospital and then for a doctor to say that John Smith died there on Monday. There must be evidence to show that the two John Smiths are the same person."

We considered that in this case the interests of justice dictated that a new trial be not ordered as without the introduction of new and additional evidence any further trial would be bound to fail. For these reasons the appeal was allowed, the conviction quashed and the sentence set aside.