

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 110/83

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Ross, J.A.
The Hon. Mr. Justice Campbell, J.A.

R. v. NORMAN JOHNSON

Mr. D. Daly for the Applicant

Mr. Howard Cooke for the Crown

June 20, July 17, 1985

ROSS, J.A.

On June 20, 1985, we heard the application for leave to appeal and refused it. At the time we promised to put in writing our reasons for so doing. This we now do.

On November 3, 1983, the applicant was convicted of the murder of Anthony Young on January 21, 1983. At the trial the case for the prosecution was based mainly on the evidence of Pauline McKay, an eye-witness to the incident in which Anthony Young was killed.

In January 1983, Miss McKay was living in Vineyard Town, St. Andrew at 2A First Avenue about a chain away from the house where the deceased who was her boyfriend lived with his mother. At about 10.00 p.m. on January 19, 1983, Miss McKay was at home and heard gunshots coming from the direction of a gully which ran behind her home. She left and went towards the home of her boyfriend; arriving there she saw under a street light near the house her boyfriend, the applicant Norman Johnson and another man. The applicant and the other man each held a gun.

When Miss McKay came up to the three men the applicant whom she had known for over twenty years was speaking to the deceased. She held her boyfriend's hand and told him to come with her and both of them walked away. As they were walking away the applicant said that he is going away but when he returned it was going to be "dread." After the applicant spoke he stepped off, then turned back and fired shots in the direction of the deceased and Miss McKay. The deceased was struck by one of the shots and fell to the ground, after which the applicant and the other man ran away.

The deceased was taken to the Kingston Public Hospital where he was admitted and died on the 21st January, 1983. The post-mortem examination of the body by Dr. Ramu revealed that there was an entry wound caused by a firearm to the right side of the abdomen and that the bullet passed through the liver, stomach, intestines and kidney, and came out below the shoulder region on the right side of the back. From his examination Dr. Ramu concluded that death was due to peritonitis resulting from gunshot injury to the abdomen.

At the trial the applicant testified that on the night in question he went from his home to the corner where a crowd had gathered. In the crowd he saw several persons whom he knew including the deceased Anthony Young and his brother Colin. They both had guns and Colin was hitting another young man named Chris in the head with his gun. He spoke to Colin telling him he should not hit Chris and Colin replied that he should mind his own business. The applicant walked away and shortly after he heard gunshots. On hearing the shots he ran home. The following day he heard that the deceased had been shot.

Mr. Daly was granted leave to argue an additional ground of appeal filed on 18th June, 1985, and he abandoned the grounds filed earlier. The ground of appeal argued was;

3.

"1. That the learned trial judge failed to put the defence adequately before the jury in that:

- (a) he omitted to direct the jury that the accused had, in effect, denied that the sole eye-witness for the prosecution, Pauline McKay, was present during the incident in which the deceased was shot and killed (see pp 36 and 40 of the transcript of the notes of evidence) and that the defence was, consequently, saying that her evidence was a complete fabrication and should be rejected;
- (b) he omitted to point out to the jury that the evidence of the said witness Pauline McKay that the deceased was shot in the back by the accused while he was walking away was contradicted by the evidence of Dr. Ramu as disclosed in his deposition (p. 25) that the bullet which killed the deceased entered his body from in front and exited at the back. He further failed to direct the jury that they should examine this contradiction in the context of the defence that the said witness was not present and that if they did not believe or doubted that she was present, they should acquit the accused."

Mr. Daly submitted that the learned trial judge should have put to the jury the case for the defence that the sole eye-witness, Miss McKay, was not present when the deceased was shot, although he agreed that the way in which the cross-examination was conducted it might have appeared that the defence had conceded that the eye-witness was present. He further pointed out that the applicant in his evidence at the trial stated that he did not see Pauline McKay at the scene that night.

The submission is not supported by the evidence. The questions put to the witness in cross-examination were based on the assumption that the witness was present at the scene. The first question in cross-examination was:

4.

"Miss McKay, you heard gunshots while you were at your home and you went towards where the gunshots were coming from, that is so?"

to which the answer was in the affirmative. Shortly after the witness was asked:

"Now, you mention that you saw the accused, another man and your boyfriend, wasn't there other persons around?"

and again the answer was in the affirmative.

Throughout the cross-examination it was never suggested to the witness that she was not present at the scene of the murder. It is not therefore surprising that the learned trial judge did not tell the jury that the defence was saying that Miss McKay was not present at the scene, since that was never put to her as a part of the case for the defence.

What is more, when the applicant gave evidence, he was not asked in examination-in-chief, and he did not say, whether or not the witness Pauline McKay was present. It was left to Crown Counsel to ask in cross-examination whether he saw Pauline McKay at the scene that night and his reply was that he did not see her; this reply can only mean that he is unable to say positively whether or not she was present, he can only say that he did not see her. There was therefore no evidence from the defence that the witness was not present, as even if his evidence was accepted he was merely saying that he did not see Miss McKay but that she could have been present.

There were therefore two completely different accounts of what happened at the scene of the murder, one given by the prosecution and the other by the applicant. In his summing-up the learned trial judge after reviewing the evidence for the prosecution and defence told the jury:

"Having heard the story or the evidence of the accused, if you accept it, if you believe it, then you must find him not guilty. If you are in doubt whether to accept the story or reject it, not certain, then you must accept his story and acquit. If you reject his story, do not accept it at all, you cannot because you reject it say he must be guilty, you have to look carefully at the evidence the prosecution has presented, examine it with care, and ask yourself the question, am I satisfied and I feel sure of his guilt? When you can answer that question yes, I am satisfied, I feel sure of his guilt, only then can you return a verdict adverse to the accused."

In so directing the jury the learned trial judge quite fairly and quite adequately put to the jury the defence of the applicant as it arose on the evidence at the trial. As pointed out above it was never suggested to the witness McKay that she was not present at the scene and the applicant could say only that he did not see her at the scene, not that she was not present. The learned trial judge could not therefore have properly given the direction that the applicant had denied her presence at the scene and was saying that her evidence was a complete fabrication and should be rejected.

The second limb of the ground of appeal is that the learned trial judge failed to put the defence adequately to the jury when he omitted to point out to them that the evidence of McKay that the deceased was shot in the back by the accused while he was walking away was contradicted by the evidence of Dr. Ramu that the bullet which killed the deceased entered his body from the front and exited at the back.

Mr. Daly submitted that there was evidence for the prosecution from which it could be said that the deceased's back was turned towards the accused when Miss McKay heard the shots and looked around; that it was clearly a question of fact for the jury to say whether that evidence was consistent with the bullet entering the deceased from the front and exiting from the back; that Miss McKay's

evidence was inconsistent with the evidence of Dr. Ramu that the bullet entered from the front, passed through the body and exited from the back.

Further, Mr. Daly said that the learned trial judge did not put to the jury the essence of the defence that if they found Dr. Ramu's evidence of the infliction of the injury inconsistent with Miss McKay's evidence as to how the deceased was shot, then they were entitled to reject her evidence. On the contrary he urged that the learned trial judge had glossed over the main issue raised by the defence: that her evidence was inconsistent with the the medical evidence; instead the learned trial judge had suggested that it was not really an issue at all, and had virtually deprived the applicant of his defence.

It is instructive to look at the evidence of Miss McKay on this aspect of the case. In examination-in-chief she said that after the shots were fired by the applicant, the deceased fell to the ground and she noticed that he was bleeding from his back. Then in cross examination this exchange took place between the witness and defence attorney.

Q. Was your boyfriend shot in the back?

A. Yes, I don't know exactly because it go through, I don't know if is back from front, but he was bleeding from his back when he fell.

Q. I am asking you was he shot in the back?

A. I think so, yes, he was shot in the back.

Q. Now you came along, an argument was going on and did you see this accused man turn his back and move to go away?

A. He did not turn his back, he stepped off.

Q. He stepped off backwards or did he turn?

A. He stepped off sideways because he was going in that direction."

7.

Again, at the end of the cross-examination we had these questions and answers:

"Q. And you are certain that whilst they were facing each other and then you took your boyfriend by his hand and held on to his hand, both of you walking away, at no time your boyfriend turned around again?

A. No, he did not turn around.

Q. He continued walking away from the accused person?

A. Yes."

Then in re-examination we had this:

Q. While you were looking back, can you say whether your boyfriend at any stage turned around like he was looking back?

A. No, he did not turn around, he was walking.

Q. Now when you hear the sound of shots firing, at that point in time, can you say whether your boyfriend looked around or turned around at that stage?

A. No, I couldn't say, at that stage I couldn't tell."

When a discrepancy arises in the evidence for the prosecution the first consideration is whether such discrepancy is slight or serious; if it is a slight discrepancy then the jury need not trouble itself about it. Where, however, there appears a discrepancy as in the present instance, then the jury should look to see whether it is real or merely apparent and if it is real to consider the nature and extent and whether or not there is an explanation of the discrepancy arising on the evidence, ^{it} is a matter for the jury to decide whether they find such explanation satisfactory.

From the evidence of Miss McKay we are of the view that she merely concluded that the deceased was shot in the back because she saw blood flowing from a wound in his back. When the deceased and herself were walking away from the applicant and the firing started she did not see the deceased turn around and look behind him. As far as Miss McKay is concerned this is not surprising as one would expect her to be looking at the man who was firing the shots. The evidence is that several shots were fired and the

natural reaction to hearing shots being fired behind one is to look around to see where the shots are coming from and who is firing them.

Taking all these factors into consideration, with respect to the apparent inconsistency between Miss McKay's evidence and that given by Dr. Ramo. It was open to the jury to accept as a reasonable explanation her concluding that a wound on the deceased's back meant that he was shot from the back when the wound was an exit wound, and the ^{high} probability that the deceased turned around to look when the firing started behind him. The discrepancy is more apparent than real. This explanation for the apparent discrepancy must have commended itself to the jury.

Having considered the grounds of appeal and the submissions which were as usual ably put forward by Mr. Daly on behalf of the applicant, for the reasons set out above, we decided that the defence had been adequately put to the jury and that the application for leave to appeal should be refused.