

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 53/86

COR: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

REGINA VS. LENFORD HARRIS

F.M.G. Phipps, Q.C., for the applicant

C. Daye for the Crown

July 1 & 24, 1987

BINGHAM, J.A. (Ag.):

On an indictment the applicant was charged for the murder of Dennis Vassell and tried in the Home Circuit Court on 15th May, 1986 before Patterson J., and a jury. At the conclusion of the hearing he was found guilty on the capital charge and sentenced to death. It is from this conviction that he has now sought leave to appeal. After hearing arguments from learned counsel for the applicant and for the Crown, the Court treated the application for leave to appeal as the hearing of the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal.

We promised at the hearing to put our reasons into writing and this we now do.

The deceased was fatally shot on the night of 3rd August, 1984 while he was seated along with one Sandra Vassell on a sidewalk at the

intersection of Ocean View Avenue and Crescent Road in Kingston 2.

From the facts as they emerged at the trial, at the time of the incident, Sandra Vassell and the deceased were intimate friends. This relationship was formed about one month before the deceased met his untimely end.

About four months prior to the association formed with the deceased, Sandra Vassell and the applicant had enjoyed an intimate relationship, but this association had been broken off after the applicant committed himself and was subject to a period of imprisonment. The reasons for the breaking off of the relationship between the applicant and Sandra Vassell were not a matter of agreement at the trial. As it emerged, however, nothing much turned on this and so no more need to be said of it. What is of importance, however, is that according to Sandra Vassell, after the applicant had been released from his place of confinement, whenever he saw the deceased and herself, he was always molesting them and using the occasion to start some argument with the deceased.

It was somewhat difficult for the parties to avoid meeting each other as they all lived in the same area. The applicant resided at 20 Crescent Road, which leads off Seabreeze Avenue and meets Ocean View Avenue where the deceased lived at one time, and Sandra Vassell lived at 6 Crescent Road.

On the night of 3rd August, 1984 about 9 p.m., according to Miss Vassell, the deceased came to her home and after speaking to her they both left and walked together to the corner of Seabreeze Avenue and Crescent Road. While standing at this intersection, the applicant, along with his brother and a 'friend' came up. Miss Vassell and the deceased then left the intersection and went up Seabreeze Avenue and while walking away the applicant threw a stone at them. The deceased spoke to Sandra Vassell following this incident and she answered him.

Following this conversation, they stopped along Seabreeze Avenue by the intersection with Crescent Road. The applicant then came across the road and started an argument with the deceased. He was heard to utter the following/words: ^{threatening} "How come you (the deceased) have so much mouth? If you ever pass near me gate, see boy, me will just shoot you; me will just shoot you."

Sandra Vassell spoke to the deceased entreating him to leave the scene and they both left and went to the intersection of Crescent Road and Ocean View Avenue where they sat down on the sidewalk. The applicant followed them to this intersection along with the man who Miss Vassell had earlier described as being his 'friend'. The applicant then held onto Miss Vassell's hand saying to her "get up and go home to your bed. You want to be eye-witness tonight?" She ignored this request and remained seated beside the deceased. The applicant and his 'friend' then left the scene.

While Sandra Vassell and the deceased were still seated at this intersection, she suddenly heard the sound of an explosion behind her and on looking around, she saw the applicant and his 'friend' about one foot away. The applicant had a short gun in his hand and the barrel of the gun was pointed at the deceased.

On hearing the explosion and seeing the applicant with the gun, Miss Vassell hurriedly left the scene and ran to the deceased's home on Ocean View Avenue where she made a report to his mother.

Miss Vassell later returned to the scene of the shooting where she saw the deceased lying on the sidewalk. There was a pool of blood at the back of his head. He appeared to be dead.

The police came on the scene later on that night and had the body of the deceased removed. Sandra Vassell accompanied the police to the Elletson Road Police Station where, later that same night, she gave a statement to the investigating officer, Detective Corporal Garnett Williams. As this statement was the subject of the main area of complaint before us

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by Mr. Phipps, no comment will be made of its contents at this stage. Suffice it to say that under cross-examination by learned counsel who appeared for the applicant at the trial, Miss Vassell admitted that in this statement which she gave to Detective Corporal Williams on the night following the incident, she did not disclose the identity of the gunman. She gave as her reason for refraining from doing so, fear that some harm would come to her from any such disclosure on her part. This reason gained some measure of support from the fact that following the shooting she left the area and took refuge, firstly, in Ocho Rios and later on moved to St. Elizabeth.

A post-mortem examination was performed on the body of the deceased at the Kingston Public Hospital Morgue by Dr. Gangadharan, a pathologist attached to the Government Medical Laboratory. The body was identified by Leonora Vassell, the mother of the deceased.

On examination, the pathologist observed a firearm entry wound in the occipital area of the scalp. There was no scorching, blackening or tattooing which indicated that the muzzle of the gun was held more than eighteen inches from the point of entry of the bullet into the deceased body. On dissection, there was a dent to the left side of the frontal bone which, in the opinion of the pathologist, was due to the contact of the bullet. The right temporal bone indicated that the bullet was lodged in it. This bullet was removed and handed over to the police. The brain was crushed up. In the opinion of the pathologist, the cause of death was shock and brain damage resulting from injuries to the head, caused by a bullet from a firearm. Death would have been instantaneous.

On the 23rd August, 1984, the applicant was arrested and charged for the murder of Dennis Vassell, by Detective Corporal Williams while he was in custody at the Rollington Town Police Station. When arrested and on being cautioned, he said, "A must Sandra tell you lie pon me, you know sah."

That the deceased was shot and killed by a bullet from a firearm in circumstances which amounted to murder was not in issue at the trial.

Neither is there any contest that given the fact that on the account as related by the sole eyewitness, Sandra Vassell, the deceased and herself had been seated side by side, on a sidewalk under a street light at the intersection of Ocean View Avenue and Crescent Road at the time of the shooting, and that having regard to the circumstances described by her as to the manner in which the incident occurred, there would have been no room for any reasonable doubt as to the correctness of her identification of the applicant as being the assailant having regard to -

1. The state of lighting at that intersection;
2. the distance that Miss Vassell placed the applicant immediately after the shot was discharged;
3. the fact that the applicant was someone well-known to her and with whom she had been, in the past, on intimate terms.

The challenge to the Crown's case below was directed at the testimony of Sandra Vassell and the question of her credibility and her reliability as a witness of the truth. A number of factors were highlighted and explored by the defence among which were:-

1. Miss Vassell's behaviour in not identifying the gunman at the first reasonable opportunity when she ran to the deceased's home and made a report to his mother immediately following the incident.
2. Her conduct in not identifying the gunman to the police at the Elletson Road Police Station when she gave her statement to Detective Corporal Williams the same night following the shooting.
3. Her conduct in seeking out the applicant's mother Evelyn Reid after the applicant had been arrested and charged for murder and making demands on her for money.

The applicant in his defence gave sworn evidence. His defence amounted to an alibi. His testimony was supported by that of Evelyn Reid who recounted the various visits made by Sandra Vassell and the conversations which they had on those occasions.

Under cross-examination at the trial, it emerged that one of the meetings which Miss Vassell arranged with Evelyn Reid was while she had

taken refuge in the parish of St. Elizabeth. The following dialogue at the trial between the learned counsel who appeared for the applicant and the witness is worthy of note:

"Q. In fact, you have asked her for money for bus fare?

A. I never ask her for no money, no money at all.

Q. You ever wrote her any letter?

A. Yes, Ma'am.

Q. After the incident?

A. Yes, Ma'am.

Q. If you see it you will recognize it?

A. Yes, Ma'am.

Q. In fact on one of those occasions before I show this letter - on one of those occasions when you visited Mrs. Reid, you told her that you were going to tell her the reason why you call Lenford (the applicant's) name in connection with the incident?

A. I didn't tell her anything like that.

Q. You have seen the letter?

A. No. I don't see it yet.

Q. (letter shown to witness) That's the letter you write to Mrs. Reid?

A. Yes, Ma'am.

Q. In your own handwriting?

A. Yes, Ma'am.

(letter tendered in evidence as exhibit 1 along with envelope).

Q. That is the envelope you placed it in and posted it to her?

A. Yes, Ma'am.

(the witness requested by Judge to read the contents of the letter aloud and does so.)

" 'Elgin District, St. Elizabeth. Hello Miss Reid, meet me at Elletson Road and Windward Road when you are coming from G.P. and carry Thirty or Twenty-five dollars with you. When I see you I will tell you what reason on Saturday. You alone. I am coming up Friday. Sandra. Don't tell nobody that I write you. '

Q. Miss Vassell, did you not just tell this Honourable Court and members of the jury that you never asked Mrs. Reid for money?

A. Yes, Ma'am.

Q. Why did you lie to the Court and to the members of the jury?

A. You see, I couldn't recall that I did ask her for money because more time she push all money give me because all the first time that I go see her she push money give me and I never take it.

Q. Did anyone push you to write that letter, Miss Vassell?

A. No ma'am."

This letter in so far as it disclosed a request on Sandra Vassell's part for money from the applicant's mother, Evelyn Reid, contradicted her earlier testimony in which she had denied ever making any such demands on her. Her explanation seemed at best a flimsy excuse for the request made in the letter and was a factor which went towards the issue of just how credible was the account of Sandra Vassell as to the shooting. She further denied under cross-examination, having told Evelyn Reid during a conversation at her father's house on St. James' Street that she had said "let me tell you the truth, is Fatman and Jerome who kill Dennis (the deceased) and I feel that is Lenford (the applicant) who caused it."

At the highest, on the basis of the accounts given by both the applicant and his mother, which two versions were supported to some degree by certain damaging admissions in Sandra Vassell's testimony, if either of these two versions were accepted by the jury, then a verdict of not guilty would have resulted.

At the lowest, the testimony of Evelyn Reid if accepted, would have had the effect of leading to the rejection of the evidence of Sandra Vassell

as being that of an unreliable witness, or her credibility would have been shaken to such an extent as to leave the minds of the jury in a state of reasonable doubt.

Mr. Phipps who argued the appeal on behalf of the applicant, did not appear at the trial. Although there were some four additional grounds of appeal filed for which he sought and obtained leave to argue, these tended to overlap, having to do in the main with the deficiencies in the summing-up of the learned trial judge in so far as it related to the credit of the sole eyewitness, Sandra Vassell.

In addition to these additional grounds, Mr. Phipps sought to urge the Court to exercise its powers under section 28(a) of the Judicature (Appellate Jurisdiction) Act to order the production of the statement given by Sandra Vassell on 4th August, 1984 to Detective Corporal Williams.

He relied in support of his application on R. v. Oliver Thompson, S.C.C.A. No. 29/84 in which judgment was delivered on 3rd June, 1986. The Court took the opportunity on facts not too dissimilar to the instant case, to re-state the principles by which this Court is to be guided in giving consideration to the exercise of its powers under the particular section of the Act referred to. Rowe P., said, inter alia -

"..... the issue of identification was so crucial in the circumstances of this case, that if it could be shown that the evidence elicited at trial was inconsistent with the information contained in the statements or in the depositions, the Court was entitled to look at those earlier documents,"

The Court in the exercise of its powers, under section 28(a) of the Judicature (Appellate Jurisdiction) Act, ordered the production of the first statement which Miss Vassell gave to the police.

The relevant portion of that statement in which she described the shooting, states:-

"..... Suddenly a lone man armed with a short gun and fired one shot. I was so frightened that I got up and ran to Dennis' house shouting 'Miss Babsie, Miss Babsie dem kill Dennis.'

A few minutes later a large crowd gathered and I returned to where we were sitting to see Dennis lying on his back in a pool of blood. He was bleeding from what appeared to be a gun shot wound to the back of his head. He appeared to be dead. The man that fired the shot is of black complexion about 5' 4" tall. I did not take notice of his clothes. If I should see him again I will be able to identify him."

This statement was taken on 4th August, 1984 at 12:20 a.m., a few hours after the shooting occurred.

Three very important factors emerged from the statement:

1. The witness did not give any name to the police;
2. she described the gunman as being -
 - (a) someone unknown to her before;
 - (b) he was alone at the time of the incident.

Having examined that statement, we are firmly of the opinion that it so gravely affected the credibility of the witness Sandra Vassell that had it been made available to the defence at the trial, the credibility of this witness would have been so shaken as to render her entire evidence unreliable and totally discredited.

Mr. Phipps submitted that despite the various inconsistencies in the evidence of Sandra Vassell, coupled with her behaviour and her conduct in relation to the applicant's mother, Evelyn Reid, her testimony was left to the jury by the learned trial judge not as that of a witness whom they had to treat with some degree of caution and whose credit-worthiness had to be scrupulously examined and tested, but as someone who was to be regarded as presenting a picture of innocence and purity.

He forcefully contended that if the jury had the evidence contained in the statement given by the witness to the police on the night of the incident in which she did not identify the applicant and in which she used

language indicating that the assailant was not previously known to her, they would in all probability have determined that she was not a person whose testimony was capable of belief. There could, he further stressed, be no reasonable explanation for the witness to be saying to the police, on the night of the incident, that the person doing the shooting was a "lone gunman" and someone unknown to her, when compared with her testimony at the trial.

Mr. Daye for the Crown, on the other hand, has submitted that although he conceded that the witness Sandra Vassell did not call the applicant's name when she gave her statement to the police following the shooting; she gave a reason for omitting to do so as being one due to fear. He further contended that this aspect of her evidence was left to the jury by the learned trial judge in his summing-up. It was clear from the verdict at which the jury arrived that they accepted the witness' explanation for the omission. He relied in support on R. v. Baker & Ors. [1972] 12 J.L.R. 902 at 912.

We note that the summing-up of the learned trial judge, although calling for a careful approach by the jury to the account given by Sandra Vassell, directed them in a manner in which their attention was focussed on the circumstances of the evidence in so far as it related to the issue of the correctness of the identification by the witness of the applicant. In our view, this was not the area which was of crucial importance on the facts of this case for the obvious reason that on the account as related by Sandra Vassell at the trial, if her story was a credible one, there could be little, if any, doubt in the minds of the jury as to the correctness of her identification.

The issue which, in our view, was of critical importance and which called for every assistance to the jury by the learned trial judge, was that relating to the credibility of the sole eyewitness Sandra Vassell. Although the learned trial judge dealt at some length with the identification

evidence, the law as it related to visual identification and how the jury were to approach this question, they were given little, if any, assistance when it came to how they were to approach the credibility of Sandra Vassell's testimony.

In so far as the learned trial judge sought to direct the jury to pay attention to the evidence given by the witnesses at the trial, in making up their minds as to the guilt or innocence of the applicant there can certainly be no complaint made in this regard, however, it has been an established principle of law that the previous written or oral statements of a witness can always be used to contradict the sworn testimony given by the witness at a trial as a means of attacking the credit of that witness in order to establish that the testimony of the witness is not worthy of belief. At page 107 of the record, the learned judge directed the jury as how to treat previous inconsistent statements, by saying:

"Now, some of these statements she admitted making, some of them she didn't, and the defence called the mother of the accused who gave evidence and she told you that the witness made these statements. You will have to decide in your minds whether or not these statements were made, whether the witness had previously made statements that were inconsistent with the evidence that she has given in court here today, and I have to tell you two things about that matter.

The first thing I have to tell you is that the statement that was put to her, those statements put by the defence to her, that she had made them, oral statements, both those that she admitted and those that you accept, if you accept that she made the others which she didn't admit, those statements they are not in any way part of the evidence at this trial, and you must put its contents out of your minds when you consider the evidence."

In so far as the learned trial judge told the jury to put the contents of the earlier statements out of their minds when considering the evidence tendered at trial, he was in error. However, in the direction which followed, some attempt was made to put the matter right when the learned trial judge said:

"The second thing that I must tell you about is that the fact that Sandra had previously made a statement which is inconsistent with the evidence that she has given here today, if you are satisfied that that is so, that she has made these inconsistent statements, it is a matter which you can take into account in considering the credibility of Sandra. It goes to credit."

This last direction, although proceeding along the correct path, did not go far enough. Although the learned trial judge reviewed the evidence of the witness at some length, the jury were never told what the effect of the admissions made by the witness and the inconsistent statements in her testimony, if unexplained to their satisfaction, would have had on her credibility as a whole in the light of her subsequent conduct in her dealings with Evelyn Reid, neither were the jury told that if they accepted the testimony of Evelyn Reid, that this would have had the effect of rendering the testimony of Sandra Vassell as unreliable.

We concluded, therefore, that the verdict of the jury could not be supported by the evidence.