

C.A. CRIMINAL LAW - MURDER EVIDENCE - declaration - identification

whether trial judge erred in admitting declaration of dying victim -
whether evidence of identification fell short of required standard

Annihilation for leave to JAMAICA appeal refused

Cases referred to
R v Bedingfield (1879) 14 Cox CC 341

Ratten v The Queen (1972) AC 378
IN THE COURT OF APPEAL
SUPREME COURT CRIMINAL APPEAL NO. 203/87

R v Andrews (1987) 1 All ER 513.

BEFORE: THE HON. MR. JUSTICE CAREY, P.(Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

v

RICHARD MURRAY

Lowell Marcus for the Applicant

Canute Brown for the Crown

October 21 and November 14, 1988

WRIGHT, J.A.:

On October 21, 1988 we refused this application for leave to appeal and promised to put our reasons for so doing in writing. This we now do.

Mr. Marcus sought and obtained leave to argue Grounds 3 and 4 of the Supplemental Grounds which he had proposed to argue. The two Grounds are as follows:

Ground 3: The Learned Trial Judge erred in Law when he ruled that the Declaration was admissible in the light of objections by Learned Counsel for the Defence - pgs. 78-79.

Ground 4: The evidence in relation to the identity of the Defendant falls short of the required standard to allow for certainty of identification - pgs. 85, 91.

The evidence which was thus being assailed was as follows.

Sophia Gibbon, a 15 year old school girl who at the time of her death on January 20, 1985 was 4½ months pregnant lived in the town of Falmouth not far from the applicant's home - just two streets separate

✓ comp

EVIDENCE
(Declaration)

dated 21/10/88

Unlabeled

done

officer?

their homes. Sophia would frequent the applicant's home to purchase charcoal which was sold there and quite often the applicant was the person who dealt with her. She was reputed to be an attractive girl. Even the applicant admitted this, albeit reluctantly. The evidence of Joan Beadle, Sophia's cousin, suggests that the applicant seemed to have been quite fascinated with Sophia's charms and made overtures at intimacy which she rebuffed. Joan claimed to have witnessed two such occasions in public. The first such occasion was about 7.30-8.00 p.m. on March 22, 1985 by the Oasis Club in Falmouth. Sophia's response to his demand for sex was to walk off to the other side of the street. Obviously irked, the applicant is alleged to have threatened, "I going stab you in you b....c....neck... wring me knife in you b....c....neck". And it is worthy of note that at the time he had a buck knife in his hand. The other occasion which Miss Beadle said she witnessed was on Christmas Eve, 24th December, 1985. He was sitting on a tree stump by the roadside as Joan and Sophia walked towards a shop. Apparently, endeavouring to suit his approach to the mood of the season he queried, "Sophia, you not giving me you chup-chup". In a clear rejection of his overtures, she replied, "my p.....is not for you, is for my man". His angry retort was "Stay there with you p....., a gwine wring me knife in a you b....c....if you don't give me you p....". Then observing that she showed signs of being pregnant he added:

"You see how long me a beg you p.....
and you nuh give me and you go mek next
man breed you".

Again on this occasion he had his vade mecum, his buck knife. He tried to engage Sophia in further talk but Joan counselling that "trouble don't set like rain" called Sophia away and they continued to the shop leaving him sitting there. But on their return journey they passed him still sitting there and he then said to her, "You still nah give me you stinking p.....". Cross-examination of this witness was predictably aimed at destroying this damaging evidence. In the process, the confession was secured from her that she and the applicant "are not as good friends as she and Sophia". Indeed, "she didn't chat with him at all". Counsel could not resist asking why? and got the answer -

"Because once ago he have threatened my bigger sister".

In an apparent effort to mitigate the effects of this blow, Counsel extracted the information that the applicant had never threatened her, the witness but he always troubled her i.e. molest her whenever he saw her on the road. Not satisfied, Counsel persevered and had the jury told that both the witness and Sophia became afraid when the applicant uttered his threats and Sophia would cry. A point of interest was that throughout this witness' testimony she referred to the applicant, whom she said she saw regularly over a period of three years, as "Richie" but when the applicant testified, he denied that anyone referred to him as "Richie".

The other witness on whom the prosecution rested heavily is Detective Constable Cecil Clarke. He and the applicant have known each other for over 20 years. They went to school together and have maintained such good relationship that the applicant admitted that during the time that he has been in custody the witness gave him money more than once without his soliciting the same.

It was Constable Clarke's evidence that at about 10.00 p.m. on January 20, 1986 he was driving along Upper Parade Street enroute from Kingston to Montego Bay via Falmouth when he passed the deceased and the applicant at an intersection. The applicant who was dressed in a red, green and gold T-Shirt, a black and red sweat suit top and pants was talking to the deceased who was standing about 18 inches in front of him. By way of greeting Constable Clarke tooted his horn and waved to the applicant who waved back at him. Constable Clarke then stopped at Club International about two chains from where he passed them, entered the club, purchased a bottle of beer and just as he returned to the car within two minutes of leaving the car he heard a loud male voice shouting from the direction where he had passed the deceased and the applicant. He immediately ran off in the direction of the shout and when he had gone about ten yards he saw the applicant about one chain away running off from the direction of the body of Sophia which then lay prostrate on the ground just about 3 feet from the applicant. According to the witness, the

applicant ran off into an open lot which adjoined the intersection and because of the vegetation on the lot he lost sight of him. But he had no doubt about the identity of the person who fled. There was a street light at the intersection where he had seen them standing. By way of this open lot the applicant's grandmother's home where he was wont to stay was only about $1\frac{1}{4}$ chains away.

As Constable Clarke approached the scene the only other person in sight was Fitz Clarke who was then about 4 yards from the body. It was he who had shouted and was himself approaching the body. Unfortunately, despite much effort the prosecution had to proceed without the evidence of Fitz Clarke who could not be found. Constable Clarke rushed up to Sophia and knelt down beside her just in time to hear her utter silently "Richie, Richie" and then she died. She had a stab wound in the left breast. The Constable knew where the applicant and his girlfriend lived on Market Street and both he and Fitz Clarke hastened there where they saw and spoke with his girlfriend. They did not see the applicant.

Constable Clarke reported the matter to Acting Corporal Bevan Earle of the Falmouth Criminal Investigation Branch. The intersection in question was of Georges' Street and Crooked Street. By the time Acting Corporal Earle reached the spot the body had been removed to the hospital and all he saw was a large pool of blood and a large crowd. He began an immediate search for the applicant whom he did not know. He went to the applicant's home at 2 George's Street and made enquiries but did not find him. However, when he returned later about 11.30 he saw the applicant sitting by the gate dressed as Constable Clarke had seen him. He was cautioned and told of the report made by Constable Clarke as to what he had seen to which the applicant replied, "No sah, me nuh know about it".

The medical evidence assigned the cause of death to shock and haemorrhage resulting from an incised stab wound to the left front of the chest - $1\frac{1}{4}$ inches x $\frac{1}{2}$ inch cutting through the third intercostal muscles, pericardium, the right ventricle of the heart to a depth of 4 inches. The doctor also said that the injured person would survive the injury for a few minutes during which it would be possible for her to speak.

Detective Sergeant Dudley Grant spoke with the applicant on the day following the killing after cautioning him and upon his telling the applicant that he was seen running away from the scene of Sophia's murder the latter responded, "And from last week me no see her".

The defence was an alibi - the applicant had been at a video centre from about 7.00 p.m. and after he had left and was walking down the street, he saw Sophia's body lying in the road and, what is significant, Constable Clarke was nowhere in sight. It was after he had viewed the body and was standing there that he saw Clarke drive up in a blue Lada car, feel the body and then drive away. He denied being earlier at that intersection with Sophia as well as the allegation that he was seen running away from the body.

The defence of alibi was bolstered by evidence calculated to discredit Constable Clarke's evidence. This evidence was given by Fredrick Brown, the applicant's uncle, who testified that he knew Constable Clarke quite well - they had both grown up together in Falmouth. He said that on the night in question he had gone to this bar where Constable Clarke said he had bought the bottle of beer and there he saw Constable Clarke and others drinking from glasses. He and Constable Clarke even started a little joke. He went so far as to say that he bought drinks for Constable Clarke which the Constable took to his car and that Constable Clarke told him he was on his way from Montego Bay to Kingston (just the opposite of the direction the Constable was travelling). He continued that after he left the bar and was proceeding home he saw the large crowd near his gate and on entering the crowd he saw the girl lying there still alive. He ran back to the bar and alerted Constable Clarke who then set off in his car - a blue Lada - to the scene while the witness and another Constable walked by another way. Certain aspects of this witness' testimony had been ventilated during the cross-examination of Constable Clarke but were all denied. Interestingly enough, contrary to the evidence of the applicant that he is not referred to as "Richie" this witness admitted in cross-examination that everybody calls the applicant "Richie".

After a careful summing-up in which the defence was fairly put, the jury obviously had no difficulty in rejecting the alibi. They arrived at their verdict after retiring for 9 minutes. Once they accepted the evidence of Miss Beadle and Constable Clarke, the only verdict to which they could properly come is a verdict of guilty of murder.

Mr. Marcus essayed to argue first - Ground 4 which challenged the identification evidence but soon found that neither the evidence nor the trial judge's treatment thereof lent any support to his complaint. Without much ado, he abandoned that Ground. Also he summarily abandoned Ground 3 which raised objection to the admitting into evidence of the last words of the dying girl - "Richie, Richie" because he was satisfied that they were admissible under the res gestae rule.

Mr. Marcus did not refer to any authority which counselled his change of heart on Ground 3 but as it is probable that his objection might have contemplated the hearsay rule as exemplified in R. v Bedingfield (1879) 14 Cox CC 341, it is well to call attention to the fact that there has been a change introduced in Ratten v The Queen (1972) AC 378, 387 and followed in other cases including R. v Andrews (1987) 1 All ER 513. It was decided in Andrews that -

"Hearsay evidence of a statement by a stabbed man made soon after he was attacked that his attackers were two named men, was properly admitted as evidence of the truth of the facts he had asserted when one of the men he had named was tried for murder and convicted of manslaughter - the attacked man having died two months after making the statement and not knowing that he had been mortally wounded."

Accordingly, the statement of the deceased had properly been admitted in evidence. Beyond that point, Mr. Marcus did not seek to go.

We were in no doubt that there was nothing that could be argued in favour of the applicant and accordingly refused to grant leave to appeal.