JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 19/97

COR: THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE PATTERSON, J.A
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA v. ROY ALEXANDER

L. Jack Hines for the Appellant

Lloyd Hibbert O.C. Senior Deputy Director of Public Prosecution for the Crown

27th and 28th April and May 26, 1998

FORTE, J.A.:

On the 21st July, 1995, Desmond Douglas was murdered while sleeping in his bed. The door to his home was kicked down by an intruder, who shot him killing him. His live-in partner witnessed the incident and became the sole witness on identification for the Crown. The appellant having been convicted for non-capital murder of Douglas in the Home Circuit Court on the 13th February, 1997, applied successfully to a single judge for leave to appeal his conviction and sentence of life imprisonment with a twenty year bar to parole. The appeal thereafter came before us and was heard on the 27th and 28th April, 1998, the Court then taking time out to arrive at its decision. We now set out below our conclusions.

The issue raised on appeal concerned the omission of the learned trial judge to give the special directions required when a witness could be found as having an interest

to serve in giving evidence implicating an accused person. It was conceded in argument that the learned trial judge did not invite the jury to treat the witness as having an interest to serve and consequently omitted to direct them to approach her evidence with caution, there being no other evidence in support of it. The evidential basis for this complaint arose through the evidence of Det. Sgt. Harvey, who came into the investigation of the case on the 6th September , 1995 some seven weeks after the murder of Mr. Douglas. He testified that the witness Beverley Franklyn and the appellant were taken into custody and brought to him at the Spanish Town Criminal Investigation Branch office. A member of the police party which brought them in made a report to him.

Consequently, the Detective cautioned Franklyn and told her, he had information that she was involved in the murder of Douglas. The witness then told the Seargent that she would tell him " the whole thing". She then gave a statement. It is that statement that formed the basis of the witness' testimony against the appellant.

Miss Franklyn in her testimony stated that her common-law husband, Desmond Douglas and herself had retired to bed at about 9:00 p.m. She was awakened at about 2:00 a.m. by the sound of barking dogs. As a result she got up, went to the back door, peeped through a "crease" about 1 1/2" wide in the door and saw the appellant on the outside with a flashlight in his hand. It was a moonlight night. Immediately thereafter the appellant kicked open the door. She then saw that he had a gun in his hand. In the room was a lighted kerosene lamp. The appellant fired a shot hitting the deceased as he laid asleep in his bed. Having done so the appellant departed. Miss Franklyn asserted in her testimony, that she went to the police station and made a report and the police came and removed the body of the deceased. A few days after she again saw the

appellant, who confessed to her that he had killed Douglas. She again asserted that she again went to the police station and informed the police of this encounter with the appellant. On the question of identification the witness stated that she knew the appellant longer than she knew the deceased. Although she first testified that she knew the deceased from 1967 when asked how long it was between 1967 and 1997 she said about eleven years. She used to see him every day. She knew him because he made several overtures to her concerning an intimate relationship, all of which she turned down until he threatened to kill Douglas and herself, unless she so consented. For that reason, she had subjected herself to sexual intercourse with him for fear that he may make good his threat. The threat made by the appellant, she stated, was also the subject of a report to the police.

As is usual in these cases, the appellant gave an unsworn statement in which he denied the allegations against him and denied knowing either the deceased or Miss Franklyn, or having had sexual relations with the latter.

WAS THERE EVIDENCE THAT MISS FRANKLYN HAD AN INTEREST TO SERVE?

Counsel for the appellant contended that there was such evidence, given the fact that the witness was taken into custody by the Police, and was cautioned, on the basis of the Detective's statement that he had information that she was involved. It was not until then, that she gave a statement to the police, that is, when she might have thought that she was under threat of prosecution. In our view this contention has no foundation upon which it may stand. The very root of it lies in the hearsay information which the Detective says he had. On the other hand the witness maintained that she had made reports firstly of the pre-death threats and then of the

murder itself, at which time she spoke the name, and the subsequent confession made to her by the appellant. No challenge was made to these assertions by the witness and consequently the evidence remained uncontradicted. On this evidence, the learned trial judge directed the jury as follows:

> "Now counsel for the accused pointed out that there was no evidence from the police confirming or denying whether she did in fact make these reports. Now, a police officer does not necessarily have to attend to establish or disprove whether or not she had in fact made these reports. It is for you to determine in the light of all the evidence whether or not you believe her and believe that she had in fact made the report to the police".

Counsel for the appellant complains that the learned trial judge should thereafter have instructed the jury that because it was possible that the witness may have had an interest to serve, they had to treat that evidence with caution there being a lack of confirmation or corroboration by the Police and most importantly that this evidence of reports was contrary to the sworn evidence of the police officer that he had information that she was involved in the matter.

We have great difficulty in accepting this submission of counsel as firstly there would have been no requirement for the corroboration and or confirmation of the witness' testimony concerning the reports she allegedly made, a determination of the truth of it resting entirely on whether she was a witness whose credibility the jury accepted. In addition it would be incorrect to state that her evidence of reports are in contradiction to the evidence of the police officer who (i) came into the investigation on the very day that the witness was taken into custody, and consequently would not necessarily have known of her reports, though he was never challenged as to his knowledge in respect of the same, and (ii) the statement he made to the witness,

related to hearsay evidence, the details of which were necessarily concealed from the Court.

Though we find no merit in the appeal, we must state some surprise that the case was conducted without the benefit of any investigation, as to whether the witness had in fact made the reports that she allegedly made at a named police station. This omission, however, which led to the lack of evidence in that regard is not sufficient to enable us to intefere with the verdict of the jury, which was arrived at, on directions which in our view were adequate, and instructive as to the need for acceptance of the credibility and accuracy of the witness.

In the circumstances , the appeal is dismissed, and the conviction and sentence are affirmed. We order that the period of sentence to be served before the appellant becomes eligible for parole should commence on the 13th May, 1997.