JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 118/98

COR. THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA vs JAPHETH JOHNSON

Lord Gifford Q.C. and Kerry Brown for the Applicant

Brian Sykes, Deputy Director of Public Prosecutions, Mrs McDonald-Bishop and Miss Marjorie Moyston for the Crown

November 30, and December 3, 1999

LANGRIN, J.A.

This applicant was convicted at the St. Elizabeth Circuit Court before Ellis J sitting with a jury on November 26, 1998 for the murder of Othneil Burke. We treated his application as an appeal against conviction and a sentence of life imprisonment.

On the 24th January, 1997, there was an incident at the entrance of the Superplus supermarket, Black River when the deceased was fatally shot by a security guard who was on duty on the premises.

The prosecution's case depended upon the evidence of three eye witnesses who were in the supermarket at the time of the shooting. According to their evidence the deceased did not have anything in his hands when he was shot by the security guard. A

The appellant's statement from the dock was to the effect that a man came into the supermarket attacking the cashier whose back was turned to the road. The man boisterously demanded money and cigarettes. He spoke to this man who threatened to thump him. In a flash the man pulled a knife and stabbed at his chest several times. He had to step back and he pulled his firearm and shot the man.

The appellant called Vivienne Morris who was on that day working at the supermarket. She testified that while she was cashing goods for a customer she heard someone talking behind her saying that he wanted money and cigarettes. The security guard asked him to leave and the man replied saying, "You want I thump you in your mouth". She said the man pulled a knife and stabbed three times at the guard. The security guard stepped back and she heard an explosion from the gun which was in the hands of the guard.

In order to appreciate the points raised in the appeal it is necessary to know that Miss Morris gave evidence for the prosecution at the Preliminary Enquiry but at the trial her name was never placed at the back of the indictment.

Rule 5 of the Schedule to the Indictment Act provides:

> "(5) There shall be endorsed on the back of an indictment the name of every witness examined or intended to be examined".

The grounds of appeal are stated under:

(1) The Learned judge erred in law in failing to direct that one Vivienne Morris, who had testified at the preliminary inquiry and who was a witness capable of belief, should be called by the prosecution.

(2) The verdict of the jury was unreasonable and/or cannot be supported having regard to the evidence.

In relation to the first ground Lord Gifford, Q.C. argued before us that in essence the impact of a witness called by the Crown on the minds of a jury is greater than that called by the defence. He further submitted with force that as a matter of authority it is the duty of the prosecution to call a witness who is capable of belief. For this latter proposition he cited the following cases:

Ziems v The Prothonotary of the Supreme Court of New South Wales [1957] 97 C.L.R. 279; *R v Joseph Frances Olivia* [1965] 49 Cr. App. R. 298; *R v Kenneth Russell Jones* [1995] 1 C.R. App.R. 538. (C.A.)

The Court finds that the principles which apply to prosecution witnesses at the trial of a defendant are correctly stated in the judgment of Kennedy L.J. in *R v Kenneth Russell-Jones*. The following principles are extracted from the judgment:

> "(1) Witnesses who are on the back of the indictment ought to be at Court, if the defence want those witnesess to attend.
>
> (2) The prosecutor has a discretion whether or not to call them to testify depending on the particular circumstances of the case.
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> (3) The discretion is not unfettered, and must be exercised in the interests of justice.
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> (4) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case, although normally all such witnesses should be called or offered to be called.
>
> (5) The prosecutor is the primary judge of whether or not a witness to the material events is credible, or unworthy of belief. Thus, a prosecutor properly exercising his discretion will not be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies."

Applying these principles to the present case the Court is of the clear opinion that the learned trial judge was right in saying that:

> "The witness' name is not on the indictment; the prosecution has not referred to that witness and I am not aware of any oblique motive on the part of the prosecution not to call the witness. The Court will not interfere in the

> execution of the prosecution's discretion unless there is a an oblique motive which is shown. In the circumstances also the defence is not inhibited by it calling the witness. The witness has been made available for the defence and is present".

It is the unanimous view of the Court that the crown counsel in the circumstances of this case was entitled to conclude that if she had called the witness Vivienne Morris to give evidence for the prosecution instead of tendering her to the defence it would not further the interests of justice.

In relation to ground 2 we are unable to find any merit in that ground. The learned trial judge gave adequate directions on the issue of self defence and more particularly that the burden of disproving self defence rests on the prosecution.

Accordingly, the appeal is dismissed. The conviction and sentence are affirmed. The sentence will commence on 27th February, 1999.