

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 231/88

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

REGINA v. FABIAN MORGAN

Robin Smith for Appellant

Brian Sykes for Crown

6th and 10th May, 1991

GORDON, J.A

The appellant was convicted before McKain J. and a jury in the St. Mary Circuit Court held at Annotto Bay on 2nd December, 1988 for the murder of Joycelyn Sinclair on the 11th day of November 1985 at Bailey's Vale in the parish of St. Mary.

On the 6th May, 1991 we treated the hearing of this application for leave to appeal as the hearing of the appeal which we allowed, quashed the conviction, set aside the sentence and entered a verdict and judgment of acquittal. As promised then, we now give our reasons.

Miss Sinclair, her father, her daughter, Andrea Foster; and her paramour, Raymond Williams, were asleep in their home at Bailey's Vale on the night of the 10th November, 1985 when they were awakened by strange sounds. Stones were thrown smashing windows and doors of the house. Gunshots were heard. Miss Sinclair ran with her daughter to her father's room and was confronted by a masked robber armed with a gun. The robber demanded money and asked for the man of the house.

Andrea Foster recognised the voice of the robber as that of one "Trevor." Miss Sinclair threw money outside to the robber. In the meantime Mr. Williams who had remained in his room saw a man enter his room through the broken door with arms raised as if to strike. Being armed with a machete, Mr. Williams chopped at the intruder and felt the machete strike an object. This intruder fled. The robbers left the premises and Miss Sinclair left to seek help; she bled from what appeared to be a gunshot wound in her chest. She was heard talking to someone at the gate. A voice was heard threatening to shoot her. This was followed by the sound of gunshot explosions. Later her lifeless body was found at the gate with another injury, a bullet hole in the forehead. The doctor found that either of the gunshot injuries the deceased sustained could have caused death. The injury to the head caused brain damage and haemorrhage, that to the chest fractured the left clavicle and ruptured the superior vena cava, producing massive intra-thoracic haemorrhage.

About 6.00 a.m on 11th November, 1985 the appellant and his nephew went to the home of Dorothy Watt, a midwife, and sought help. The appellant had suffered from wounds to his left cheek and his right hand; two fingers were almost severed. She told him they required suturing at a hospital and she dressed them to staunch the bleeding. The appellant's story to Miss Watt was that he had had a fuss with a man and in resorting to weapons, each had injured the other.

The appellant was taken into custody on the 12th November, 1985 by Sergeant Whyte. On that day he was seen in custody by Deputy Supt. Canute Griffiths in whose presence, after being cautioned by Sergeant Whyte, he said, "Is Trevor and a young man named DJango ask me to follow dem to ... Street and when me get there Trevor draw a gun and ordered me to kick

down the door of a house. I did so with a stone and as I entered a man chop me and Trevor shoot the woman and me run." On the said day he was hospitalised and he received attention for his injuries.

In his defence the appellant denied making the above statement. He repeated the story he had told Miss Watt. He said he was not involved in the criminal activity of the 11th. He was elsewhere. In a nutshell, his defence was an alibi.

Roderick Morgan, the nephew of the appellant, was tried jointly with the appellant. A cautioned statement which he gave to Deputy Supt. Griffiths was admitted in evidence after a voire dire. He was acquitted when a no case submission made at the close of the prosecution case was upheld.

The cautioned statement of Roderick Morgan made frequent references to the appellant and the role he played in the events of the 11th November, 1985 and at the same time the author sought to extricate himself from involvement therein.

In her summing up the learned trial judge addressed the jury thus:

"Linking the case with this accused man and the other persons, one dead and others off in connection with the death of Miss Sinclair, you have to take into consideration the statement that he gave and remember also that I said that when you come to look at what the other co-accused said to you, that it is not evidence, it is not evidence against this man; when you come to weigh it you only weight it against himself, that is the chief part of it, to say you look on the statement that he gave, if you remember it, and ask yourself, was Roderick speaking the truth when he made that statement, was he a reliable witness, because if you look on the statement and say he was a reliable witness, then whatever persuasive powers it has on you, you examine it. So the only thing it can do as far as this case is concerned, is to make you ask yourself, was Roderick a truthful witness when he was saying all these things that he said."

(emphasis supplied)

The learned trial judge in the first section of this passage quite properly directed the jury that the statement was not evidence against the appellant, but she destroyed these correct directions by going on to give it the status of the statement of a witness and she further invited the jury to use it in determining the verdict to be returned by them in the case against the appellant. This is manifestly wrong and led to a substantial miscarriage of justice. The extra judicial statement of an accused implicating a co-accused cannot be evidence against the co-accused. Roderick Morgan having been acquitted his statement ceased to have any validity or value.

There were other areas of the summing up which were unsatisfactory. At p.111 there is this direction:

"The question of intent to kill or cause grievous bodily harm can easily be inferred from the nature of the killing. She had a gunshot wound in her head and in her chest. Now, there is no defence to an act like that. We live in a society now where you all know about shooting. There can be no question of defence to the acts of persons who do this deed"

(emphasis supplied)

This direction in law was wrong. It negated the appellant's defence usurped the functions of the jury and denied him of a fair chance of an acquittal.

Directions were also given on duress which were gleaned from the oral statement which the appellant is alleged to have made in the presence of Deputy Supt. Griffiths wherein the appellant said, "Trevor draw a gun and ordered me to kick down the door of a house." The law on duress in Jamaica is clearly stated in the judgment of Rowe P. in R.v. Wayne Spence S.C.C.A 202/88 dated 18th June, 1990 at p.10:

"We take the view that the law of duress in Jamaica as it applies to cases of murder is the same as it is in England and consequently the defence of duress is not available to a person whether he be the actual killer or an aide or abettor."

The defence of duress did not therefore apply to this case and the directions on duress were inappropriate and amounted to a misdirection.

Mr. Sykes for the Crown conceded that he could not support the conviction and asked that the court consider ordering a new trial. We found the evidential base of the case is altogether unsatisfactory and this factor dictated the course adopted by us.