JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 139/89

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. CARL STERLING

Frank Phipps Q.C. & George Soutar for Applicant

Diana Harrison for Crown

3rd & 7th December, 1990

GORDON, J.A. (Ag.)

On 20th September, 1989 in the St. James Circuit Court the applicant was convicted before Patterson J, sitting with a jury, for the murder of Bertram Kelly on 11th August, 1987 at Lilliput in the parish of St. James.

The case for the prosecution was based on the evidence of two witnesses Nathan Meredith and Paul Kelly. Their evidence was that on the 10th August, 1987 Nathan Meredith, Richard Meredith, Bertram Kelly and his cousin Paul Kelly left Bamboo in St. Ann in the afternoon and went to the Sangster International Airport in Montego Bay in a blue Ford Cortina Motor Car. They later left the Airport on the return journey to Bamboo and stopped at a bar in Lilliput near Rose Hall and had drinks. Having had a great many drinks they sought and obtained food, then because of the hour, it was after midnight, they drove on an old road by the beach, parked the car and rested. The Merediths relaxed in the car while the Kellys reclined on the bonnet.

About 3.00 a.m. on 11th August, 1987 their rest was disturbed by security guards and policemen who suddenly arrived

on the scene in motor cars. They were ordered out of and off the car with hands in the air. They were searched and the contents of Bertram Kelly's and Richard Meredith's billfolds removed and these billfolds discarded. They were gun-butted, beaten with sticks and ordered to lie on the ground. They obeyed. They were asked "Whey the gun you have." The applicant was among the men, he had a short gun with which he prodded Bertram Kelly and Nathan Meredith. The four men lay on the ground on their backs.

The witnesses said that the applicant with gun in hand went to the four men that were on the ground and asked each in turn his occupation. They responded. He then returned to Bertram Kelly who wore two gold chains around his neck and an earing in his left ear and again asked him what work he did. Bertram Kelly told him he was a farmer and an entertainer. The applicant then said to Bertram Kelly "Roy, me nuh like you yu know." Then he lay hold on the two chains Kelly wore and Kelly eased his body off the ground and held on to the chains and said to the applicant "nuh buss dem Iyah." The applicant still holding the chains in his left hand bent over Bertram Kelly stuck the gun in the base of Kelly's neck and the gun was discharged. Bertram Kelly placed his hand at his neck then he called out and said to the applicant "Iyah me never do anything from the day me born and you shoot me, carry me go a doctor, Iyah". The applicant kicked Kelly who had fallen back to the ground on his head and said "Lie down dutty thiefing boy." The applicant relieved the injured man of his chains and earing. Bertram Kelly kept calling for his mother. The applicant told him to stop and the witness Paul Kelly said he heard Bertram Kelly his cousin make a gurgling sound after which he heard no sound from the injured man.

The witnesses said that there was talk among the security guards and policemen about the shooting and what should be done with the injured Bertram Kelly and after about ½ an hour had elapsed the body of Bertram Kelly was placed in the trunk of a car and was taken away. The three remaining men Paul Kelly, Richard Meredith and Nathan Meredith were taken by the police to the Coral Gardens Police Station. Before they were taken away a search was carried out in the area where they were and one person claimed he found a gun in the bushes.

Det.Sgt. St. Clair Minto was stationed at Coral Gardens Police Station and he received a report at 8.30 a.m. on 11th August, 1987 from a Det. Cons Clyde Atkinson who pointed out three men to him at the Police Station. They were Richard Meredith, Nathan Meredith and Paul Kelly. He was taken by Atkinson to an area at Lilliput and then to the Percy's Funeral Home and the body of Bertram Kelly was shown to him. He observed what appeared to be a gunshot wound at the base of Kelly's neck. On the 20th August, 1987 he was present at a post mortem examination conducted at the Cornwall Regional Hospital Morgue by Dr. Parker on the body of the said Bertram Kelly. This body was identified by Richard Meredith.

The deposition of Dr. Parker was admitted and read. She said that on 20th August, 1987 at Cornwall Regional Hospital she performed a post mortem examination on the body of a man identified by one Richard Meredith to be that of Bertram Kelly. On external examination "there was an entry bullet wound located at the base of the neck anterial (sic). The gunshot wound was surrounded by powder burns. The weapon was not evenly or firmly placed against the neck. Internal examination showed that the bullet angled downwards to the left passing through the upper lobe of the left lung and finally lodging in the lateral left fifth rib." Death was the result of "haemorrhage secondary to the passage of the bullet to the left lung."

The applicant in an unsworn statement said that at the time of the incident he was a security guard employed to Rose Hall security. He was patrolling Lilliput that morning with Mr. James Wright when he saw a car parked off the road. They drove and passed this car and he saw two men on the bonnet also a gun. They left the scene, called the police and returned to the scene. The men were put to lie on the ground and the car and surrounding bushes were searched. He went on "while guarding the men, one of them sprang up and grabbed on my hand with the gun. He tried to pull it away from me and the gun went off." He denied taking chains and earing from this man and he denied kicking him. He claimed the shot was fired accidentally.

His statement was supported by the evidence of James Wright who did not see when the shot was fired. He said he heard the applicant exclaim:

> "A whey you a do boy?" Then the explosion of the gun and he looked and saw one of the four men was in a half standing position, holding on to the gun that was in Mr. Sterling's hand."

At the close of the prosecution's case Mr. Robinson of the defence team made a submission that there was no case for the applicant to answer in that the prosecution had failed to establish that the body on whom Dr. Parker performed the post mortem examination on 20th August, 1987 was that of the man Bertram Kelly shot by the applicant at Lilliput on the 11th August, 1987. He relied on the judgment of this court in the case of **R. v. Florence Bish** S.C.C.A. 112/77 (unreported) delivered 28th February, 1978. The learned trial judge ruled there was a case for the applicant to answer.

Before us Mr. Phipps urged one ground of appeal viz:

> "That the Learned Trial Judge wrongly overruled a submission of no case made at the end of the Crown's case on behalf of the Applicant.
>
> It is submitted there was no evidence to establish that the Bertram Kelly allegedly shot by the Applicant was the same Bertram Kelly who had died and on whom a post mortem examination had been performed by Dr. Parker."

He submitted that the police officer who identified the body to Sgt. Minto was not called as a witness, neither eye-witness was called at the post mortem examination and the issue of his death was not left to the jury. The case of **Florence Bish** (supra) on which he relied was decided in this court on the 28th February, 1977. The facts are these: On 31st October, 1976 at about 12.30 p.m. two men Stanford Scott and Dermonth Gayle witnessed an incident at the intersection of Princess Street and Barry Street in which the accused stabbed a man in his left breast. The wounded man was removed from the scene. Neither witness knew the injured man. At the trial of the accused for murder the Crown led no evidence linking the man stabbed at Barry and Princess Street with the body on which a post mortem examination was performed. The appeal against conviction for murder was allowed.

Miss Harrison submitted that **Bish's** case (supra) had no application to this case. The witnesses for the prosecution did not know the victim in **Bish's case**. Here the victim was known by and was related to one of the prosecution witnesses. Det. Sgt. Minto, she said, provided the link. He went to the scene then to the Funeral Home where he saw the body of the deceased and he was present at the post mortem examination when the body was identified.

On the Crown's case, which was supported by the statement of the applicant and the evidence of his witness Wright, four men

were accosted at the scene of the incident, Nathan Meredith, Richard Meredith, Paul Kelly and Bertram Kelly. Bertram Kelly was shot and taken from the scene. The three remaining men were taken to the Coral Gardens Police Station, there Sgt. Minto saw them and in his evidence he gave their names. The incident occurred about 3.00 a.m. and about 10.00 a.m. Sgt. Minto viewed the corpse of a man at the Funeral Home and on the 20th August, Sgt. Minto was present at a post mortem examination where he said he saw Richard Meredith identify the body to Dr. Parker.

The evidence of Sgt. Minto as to the identification of the body is clearly hearsay and in this respect his evidence did not provide the link between the Bertram Kelly who was shot on the beach and the corpse which the doctor performed the post mortem examination. In this respect Mr. Phipps was right in his submission, but that is not the issue. The issue was did Bertram Kelly who was shot by the applicant die as a result of the injury inflicted on him?

Nathan Meredith in the opening sentences of his evidence said he knew Bertram Kelly now deceased and that Bertram Kelly died on 11th August, 1987 (see page 3 of the transcript). He then went on to testify to the events leading up to Bertram Kelly being shot by the applicant and taken from the scene in the trunk of a motor car.

At page 85 of the transcript Paul Kelly said that the men returned "after they killed my cousin" and began searching in the bushes for a gun. At this stage he was one of the three remaining men lying on the ground. He had earlier recounted how Bertram Kelly was shot and taken away.

The evidence placed before the jury was that Bertram Kelly was shot near the base of his neck by the applicant in the early morning of the 11th August, 1987 at Lilliput in St. James. His body was removed from the scene in the trunk of a car. About 10.00 a.m. Sgt. Minto in investigating the report of the shooting visited the Funeral

Home and saw a corpse with what appeared to be a bullet entry wound at the base of the neck. Dr. Parker performed a post mortem examination on the said body with a bullet entry wound at the base of the neck - anterial, this body was identified by one Richard Meredith. The Crown did not adduce evidence from Richard Meredith to say that the Bertram Kelly on whom the doctor performed the post mortem examination was the Bertram Kelly who the applicant shot on 11th August, 1987. How then is the evidence adduced by the prosecution to be viewed?

Where, as in this case, there is evidence that a man is shot and injured and he dies thereafter in the same day, then in the absence of evidence to the contrary a jury may infer that he died as a result of the gunshot injury he sustained. The fact that Bertram Kelly died as a result of the gunshot injury inflicted on him by the applicant could be and was proved by inference from the circumstances.

In **R. v. Onufrejczyk** (1955) 1 All E.R. 247 no body was recovered, there was no evidence of causation, the Court of Criminal Appeal held:

> "In a criminal case the fact that the murdered man was killed like any other fact, can be proved by circumstantial evidence being evidence which leads only to that one conclusion of fact, ..."

There has been in this case one Nathan Meredith one Richard Meredith and one Bertram Kelly and also one Paul Kelly. The evidence of Nathan Meredith by itself is sufficient to found the charge even if unsupported my medical evidence. There was placed before the jury at the end of the prosecution case evidence of a prima facie case of murder and the learned trial judge was correct in ruling that there was a case for the applicant to answer.

Mr. Phipps further submitted that even if there was evidence the trial judge withdrew the issue of proof of death from the jury in this passage:

> "Let me examine with you now the evidence that the prosecution has led in proof of the ingredients of this crime. The first thing that you must be satisfied about so that you feel sure is that Mr. Bertram Kelly is dead. Madam Foreman and members of the jury, I don't think you will have any difficulty in saying that you are satisfied that Bertram Kelly is dead. You will recall that Nathan Meredith, the first witness called by the prosecution, told you that he was present, heard this explosion, having seen the accused man with a gun which was pointed into the neck of the deceased. He said he saw the deceased fall back on the ground there; he said certain words, then he did not hear him say anything more. After some time Mr. Kelly was taken away in the trunk of a car. The other witness Paul Kelly told you a similar story. He told you that after the deceased had been shot, he heard him bawl for his mother, after saying some words, then he heard a gurgling sound, so he described it, then nothing more, and he told you that the deceased was taken away in the trunk of this car. Sgt. Minto, told you that about 8.30 a.m. that morning, the 11th of August, 1987, he got a report and at about 10.30 a.m. that same morning he attended Percy's Funeral Home in Montego Bay; there he saw the body of a man with a gunshot wound to the base of the neck, that man was identified to him as Bertram Kelly. He told you that on the 20th of August 1987 he went to the Cornwall Regional Hospital morgue where he saw Dr. Parker perform a post mortem examination on the body of the same man that he had seen at Percy's Funeral Home, the body that had been identified to him then as the body of Bertram Kelly and that body was identified to Dr. Parker as that of Bertram Kelly by Richard Meredith. The doctor's evidence, Madam Foreman and members of the jury, may assist you as to the cause of death. The doctor said that having performed this post mortem examination, having seen this entry wound, having traced it, having seen that it ended on one of the ribs, I think she said, where a bullet was found having passed through the lung, she formed the view that death was caused by haemorrhage secondary to the

> "passage of the bullet through the left lung. The bullet punctured the lung, caused bleeding killing the man.
> So Madam Foreman and members of the jury, I think you will have no difficulty in saying that Bertram Kelly is dead."

The learned trial judge obviously had the principles of **Pinfrejczyks case** in mind when he delivered this charge. He did not withdraw the issue from the jury he merely expressed a view as he was entitled to do, and the jury could have accepted and adopted it or rejected it as they saw fit.

We do not agree with the submissions of learned counsel for the applicant, we find that the summing up of the learned trial judge was fair, balanced and unimpeachable. The case of **Bish** was of no assistance to the applicant and is distinguishable from this case.

We are unable to find support for the submissions of the applicant on the facts or in law and accordingly leave to appeal is refused.