[2016] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 106/2012

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

DELROY BARRON v R

Leonard Green for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, for the Crown

8, 9, 10 December 2015 and 9 December 2016

MCDONALD-BISHOP JA

[1] This is an appeal from a conviction following a trial in the Westmoreland Circuit Court on 29 October 2012 before G Brown J sitting with a jury. The appellant was found guilty of the murder of Norman Morales and was sentenced to 20 years imprisonment at hard labour.

[2] He made an application to this court for leave to appeal his conviction and sentence. On 31 October 2014, his application was considered by a single judge of this court who granted him leave to appeal on the basis that the learned trial judge gave no

guidance to the jury on the issue of provocation and little or no assistance in relation to the discrepancies and inconsistencies which arose on the Crown's case. The single judge also opined that the learned judge's directions on the possible verdicts for the jury's consideration were inadequate.

[3] On 8 and 9 December 2015, we heard the appeal and on 10 December 2015, having considered the submissions of counsel, we made the following order:

> "1. Appeal is allowed;
>
> 2. Conviction for murder quashed and sentence set aside;
>
> 3. Conviction for manslaughter substituted;
>
> 4. Sentence of 17 years imprisonment to run from 29 October 2012."

We promised then to reduce our reasons for the decision to writing. These are the reasons as promised.

Background

The case at trial

[4] The prosecution led evidence from six witnesses, which established the following pertinent facts that constituted the prosecution's case at trial. The deceased was the father of the appellant's common law wife, Miss Cherry Morales ("Cherry"). They all lived on the same plot of land at Paradise District in the parish of Westmoreland. On or around 5 December 2010, at about 6:00 pm, an open-air church service was being held at the front of the premises. The appellant arrived home from work and had nowhere at the front of the premises to park his vehicle as a result of the church service. He got

upset and started quarrelling with the pastor. He then started cursing the deceased for carrying his church people to the premises. During the argument, the appellant threatened to kill the deceased. The deceased left and went inside the house. The appellant went inside the kitchen and took up a knife, which he placed in his waistband.

[5] The deceased walked up to the area where Cherry, her mother and the appellant were standing and said to the appellant "you [a] big man, you must go on better, man". The appellant grabbed hold of the deceased who was unarmed and they began to wrestle. They fell to the ground. Whilst they were both on the ground, the appellant stabbed the deceased.

[6] Dave Morales ("Dave"), a son of the deceased, went into the music room in the house when he heard both his mother and Cherry screaming somewhere on the verandah. When he got to the verandah, he saw the appellant kneeling in the deceased's groin and stabbing the deceased. He attempted to assist the deceased but when he came "face to face" with the appellant, the appellant also inflicted an injury to his person. The appellant then ceased stabbing the deceased and left the premises. The deceased and Dave were rushed to the Savanna-la-Mar Hospital, where the deceased succumbed to his injuries and Dave was treated.

[7] Dr Murari Sarangi, the Consultant Forensic Pathologist, conducted the post mortem examination on the body of the deceased, which was identified by his son, Devon Morales. The doctor observed "five sharp forced injuries" on the body of the deceased. In his opinion, death was due to "haemorrhagic shock consistent upon

sharp force injury to the chest, with injury to the heart, a vital organ, accompanied by massive blood loss". The fatal injury was an incised stab wound to the chest cavity. The other injuries were superficial injuries.

[8] Detective Corporal of Police, Sidney Brevett, was the investigating officer. He was unable to locate the appellant for the rest of 2010 but on 21 January 2011, he saw the appellant, whom he knew before, at the Savanna-la-Mar Police Station. The appellant had been taken into custody in Kingston and taken to the Savanna-la-Mar Police Station. The appellant was arrested and charged by Detective Corporal Brevett and upon being cautioned, he made no statement.

The appellant's case

[9] The appellant made an unsworn statement from the dock and called no witnesses. He stated, in summary, that at the relevant time, he returned from work and he heard the deceased and his son say, "mek the boy move his pick-up from there". He went around the back where the deceased "threatened [him] firstly". He went in the kitchen and took a knife and placed it in his waistband. He then went back to the front of the premises and called Cherry and her mother's attention to the situation. Cherry and her mother were on the verandah. He and the deceased were on the outside and he was talking to Cherry and her mother. When they finished talking, Cherry and her mother stepped off and as he was about to step off, the deceased took up a fish gun and pointed it at his stomach. He shifted position in order to avoid being stabbed and held on to the fish gun. He and the deceased were "rassling" with the gun. There was a "big rassling". He was afraid for his life and he had to defend himself. He said:

> "I was afraid of my life that I would lose my life so I have to defend myself. I had to defend myself because the son, Dave, the son, Dave, come from behind and, and [sic] cut me across my back. Dave cut me across my back I have to defend myself because I afraid I was gonna lose my life. I do not know where this thing coming from because me never have any fuss before, so I don't know where it coming from. I don't know if it is because they always telling me that... I, I [sic] have my house on the land. They always tell me fi tek the house from off the land and I tell them how can I take a concrete house off the land... "

The grounds of appeal

[10] With leave of the court, the appellant abandoned the original grounds of appeal that were filed and, instead, argued two supplemental grounds of appeal as follows:

> "**Ground 1**
>
> The Learned Trial Judge erred in that he failed to leave the issue of manslaughter to the jury as there was ample evidence adduced at the trial from which it would be open to a jury to infer that the Appellant had been provoked.
>
> **Ground 2**
>
> The Learned Trial Judge erred in that he failed to provide any or any proper direction to the jury regarding the discrepancies and inconsistencies that arose in the case and was unhelpful as to how those discrepancies and inconsistencies were to be dealt with so as to arrive at a proper verdict."

Issues

[11] The issues for determination on the appeal may be simply stated in these terms:

(a) Whether the learned trial judge erred by failing to leave the issue of provocation for the consideration of the jury (ground 1).

(b) Whether the learned trial judge failed to properly direct and assist the jury with regards to their treatment of inconsistencies and discrepancies in arriving at their verdict (ground 2).

Ground 1

Whether provocation should have been left for the jury's consideration

[12] In his submissions, Mr Green pointed out that the learned trial judge was well aware of the fact that the accused had raised not only self defence but provocation, as was evident in his unsworn statement. He noted that counsel for the defence had indicated to the trial judge that the circumstances of the case warranted that he should leave manslaughter to the jury, however, the learned judge after hearing from Crown Counsel, accepted the prosecution's position that provocation did not arise on the facts.

[13] In support of his argument, counsel relied mainly on section 6 of the Offences Against the Person Act and the decision of this court in **Dwight Wright v R** [2010] JMCA Crim 17.

[14] The learned Director, having herself reviewed the authorities, agreed with the submissions of Mr Green and conceded that the learned trial judge ought properly to have left the issue of provocation and the alternate offence of manslaughter for the jury's consideration as there was evidence arising on the case for the appellant that gave rise to the question of whether he was or may have been provoked.

[15] We found that there was merit in the submissions of Mr Green and that the resultant concession of the learned Director, on behalf of the Crown, was rightly made. The contention of the appellant on ground one, did find strong support in the provisions of section 6 of the Offences Against the Person Act and in the authorities on which he relied.

[16] Section 6 of the Offences Against the Person Act provides:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[17] In **Dwight Wright v R**, the issue for consideration was whether the trial judge erred by withdrawing the issue of provocation from the jury and thereby deprived the appellant of the right to have the issue of manslaughter left for consideration. Upon reviewing the relevant authorities, the court applied section 6 of the Offences Against

the Person Act and ruled that the section requires that two conditions be left to the jury:

> "[14] 1. The subjective condition of whether anything said or done caused the appellant to lose his self control; and
>
> 2. The objective condition of whether those things said or done might have caused a reasonable man to have reacted as the appellant did."

[18] The court proceeded to specifically point out at paragraph [15] that:

> "The section therefore takes away the power previously exercisable by a trial judge to withdraw the issue of provocation from the jury where there was evidence potentially capable of satisfying the subjective condition if the judge considered that there was no evidence which could lead a reasonable jury to conclude that the provocation was enough to make a reasonable man do as the accused did. It is now for the jury to decide whether the objective condition was satisfied."

[19] The court reiterated and accepted the relevant principles of law enunciated in some relevant authorities such as **Benjamin James Stewart** [1996] 1 Cr App R 229 and **Joseph Bullard v The Queen** [1957] AC 635 that:

i. If the defence do not raise the issue of provocation, and even if they prefer not to because it is inconsistent with, and will detract from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked.

ii. The issue should be left even if the evidence of provocation is slight or tenuous in the sense that the measure of the provocative acts or words is slight.

iii. If on the evidence, be it the prosecution's or the defence's, there is evidence of provocation to be left to the jury, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond a reasonable doubt that the killing was unprovoked.

iv. Evidence that had been adduced to support an unsuccessful defence of self-defence may be relied on, wholly or partially, as giving rise to provocation which would reduce the crime from murder to manslaughter.

v. Every accused on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict could be given. To deprive him of that right must, of necessity, constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.

[20] It is against the background of the applicable law that the case for the appellant, as contained in his unsworn statement, was considered. There is no question that the explanation of the appellant specifically raised the defence of self-defence. However, although he did not expressly say that he was provoked, and he did not give the

particulars of the threat he said was made by the deceased to him, he, at least spoke to things done to him by the deceased and the deceased's son, which he said led him to act the way he did. The question whether the two conditions existed, as a matter of fact for provocation to avail him as a matter of law, within the provisions of section 6 of the Offences Against the Person Act, was one for the jury to consider. Therefore, the issue of provocation should have been left for the jury's consideration, especially when an essential ingredient of murder, which the learned trial judge had correctly pointed out to the jury, is that the killing must have been unprovoked.

[21] We concluded therefore that there was sufficient material on the case for the defence to have raised the issue of provocation for the determination of the jury. Therefore, the learned trial judge being of the view that the appellant was relying only on self defence would have fallen into error when he refused to leave provocation for the jury's consideration.

[22] Once provocation was not left to the jury for consideration, it meant that the appellant was deprived of the benefit of an alternate verdict of guilty of the lesser offence of manslaughter being returned in his favour.

[23] For these reasons, we could not say that there was no miscarriage of justice resulting from the learned trial judge's failure to leave provocation to the jury and so we were constrained to allow the appeal on ground one, which was weighty enough to be dispositive of the appeal. We, nevertheless, considered ground two for completeness.

Ground 2

Whether the learned trial judge failed to properly direct and assist the jury with regards to inconsistencies and discrepancies

[24] Although the ground of appeal specifically refers to inconsistencies and discrepancies, counsel in his submissions did not identify any inconsistency (that is internal conflict within the evidence of a particular witness) with which the ground of appeal was concerned. The core argument advanced by him was that discrepancies in the prosecution's case were of the kind that a proper direction on that issue could have caused the jury to arrive at a different verdict. Mr Green submitted that the learned trial judge dealt with the question of discrepancies and inconsistencies by simply outlining the legal position without referencing any instance where there were discrepancies and assisting the jury as to how they should deal with them.

[25] Counsel pointed, in particular, to two specific items of evidence. The first item of evidence relates to the fish gun. This evidence concerning the fish gun was elicited from the two witnesses, Cherry and Dave, during cross-examination. Cherry stated that the deceased was a fisherman and that he had a fish gun, which he would normally keep in an old shop that he had at the house, same place in the yard. She also stated that Dave had a fish gun that he kept at the same place in the yard in the old shop. She stated that she did not know of them leaving the fish guns down by the seaside. Dave, on the other hand, gave evidence that his fish gun was down by the boat at the seaside and that his father had no fish gun.

[26] There was, indeed, a clear discrepancy on the case for the prosecution in this regard. While the learned trial judge gave the general directions to the jury on how to treat inconsistencies, contradictions and differences (as he called them) in the testimony of witnesses, he did not, at that point, highlight any example for the jury's consideration as to what he meant by an inconsistency or discrepancy.

[27] We observed, however, that, subsequently, in reviewing the evidence with the jury, the learned trial judge did highlight that there was a discrepancy between the evidence of the witnesses concerning the fish gun. This is how he noted it:

> "…When you look at his evidence, he was asked if he had a fish gun. He said he had a fish gun, but if you listen carefully to him he said his father do net fishing. So there is a difference between net fishing and spearfishing but he had a gun. A fish gun. He said he don't keep his fish gun up there at the yard. He keeps it by the beach in a storeroom. I say that because the sister comes and says that the father have a fish gun, and they both keep it up there. **So that is a discrepancy between the two witnesses**." (Emphasis added)

[28] In returning to the witnesses' evidence, the learned trial judge carefully pointed out the evidence of Cherry and impressed upon the jury that she was the one who was present and who had witnessed the incident and not Dave. The learned trial judge said this:

> "And what the Crown is saying, if you listen to Cherry, because what you have to decide, you know, is whether Cherry is telling lies on her baby father, because Cherry is saying she never see her father with any fish gun...
>
> So Cherry is the witness who saw certain things, because her brother say he never see anything, is when him hear the

> mother and sister shout out that him run 'round there and when him run 'round there he was already on the ground, so it is Cherry...
>
> So Madam Foreman and members of the jury, you have the right to reject the account given by any witness. Cherry was cross-examined."

[29] Looking at the summing-up, as a whole, in relation to the evidence concerning the fish gun, the learned trial judge had directed the jury's attention to the difference in the evidence of the witnesses in question. He specifically stated that there was this discrepancy. This would have come after he had already directed them on how to treat with differences in the evidence of witnesses. He gave them the standard direction on discrepancies, which included, in so far as is relevant, directions that differences in the testimony of witnesses are always possible and that conflict in the evidence of witnesses "provide material for the suggestion that the truth had not been spoken". He then said, in continuing the direction, that "…whether there [had] been honest mistake or wicked invention", that was essentially a question for the determination of the jury.

[30] The focus of the learned trial judge on the evidence of the witnesses concerning the fish gun would have come after he already told the jury how to treat generally with the evidence of witnesses and that they should reject the evidence of any witness they did not believe.

[31] In reviewing the evidence concerning the fish gun, he then proceeded to fit the evidence of Cherry within its proper perspective, bearing in mind the defence being relied on by the appellant. He directed in this regard:

> "As far as Cherry is concerned, when she see her father get stab she run. So, is Cherry telling lies on the accused man? Because Madam Foreman and members of the jury, you know the issue of self-defence is raised so the prosecution must satisfy you so that you feel sure that the accused man-- that the deceased did not have that fish gun. You have to look—nobody told us the size of the fish gun. You have to now use your common sense to say if, you know a fish gun is an instrument; that at that time of the night, although they say light was there, would Cherry see her father with a fish gun? And if sherry [sic] says she didn't see any fish gun there, but them have fish gun in the yard, does that mean that the deceased had a fish gun? So you have to look at it and say I don't believe Cherry, because if you believe that Cherry is telling a lie on the accused man; the man who is the father of her child... then you must acquit him. If you believe that Cherry is telling you a lie to protect her father, you must acquit him."

[32] When the summing-up relating to the fish gun was considered in its totality, we found that it could not fairly be said that the learned trial judge did not identify the discrepancy pertaining to the fish gun and aided the jury in how to approach their consideration of the evidence of the witnesses involved, within the context of the appellant's defence. He made sure to advise them that if they believed that Cherry was lying about the fish gun to protect her father, then they should acquit the appellant. The special focus on Cherry was critical and appropriate, because she was the witness who was present from the very start of the incident and not her brother.

[33] We agreed with the submissions of Miss Llewellyn QC that the directions were adequate and that the discrepancy was not such as to go to the root of the prosecution's case. We concluded that there is no way that any different or further directions on discrepancies, relating to the issue of the fish gun, would have caused the

jury to have arrived at a different verdict. The learned trial judge gave them all the necessary directions in considering the issue. Accordingly, we found that there was no merit in this aspect of the submissions in relation to ground two.

[34] The next issue that gave rise to the complaint that discrepancies on the prosecution's case were not properly dealt with is the evidence relating to the positioning of the appellant and the deceased when the deceased was stabbed. Both Cherry and Dave said that they saw the appellant and the deceased on the ground with the appellant on top of the deceased when the stabbing occurred.

[35] Dr Sarangi who performed the post mortem examination however, opined in examination-in-chief that it was unlikely that the stab wounds could have been caused by the person with a knife, stabbing downwards into the deceased. According to the doctor, based on his observations, "the person inflicting the wound" (which would have been the appellant) and "the person receiving the wound" (the deceased) would have been standing. He said further that the appellant would have been standing to the "left front of the deceased".

[36] Clearly, the observation of Dr Sarangi was not consistent with the eyewitnesses' account and so this evidence would have served to cast doubt on the credibility of the evidence of the eyewitnesses. It was ultimately a question for the jury, as to whose evidence they accepted, bearing in mind the directions to them that they were sole judges of the facts.

[37] Again, the learned trial judge, at the time that he gave general directions on inconsistencies and discrepancies did not draw this aspect of the case to the attention of the jury. However, following the general directions, he focused the jury's attention for a considerable time on the evidence of the doctor and Cherry concerning the manner in which the injuries may have been inflicted.

[38] In highlighting the material aspects of the evidence, the learned trial judge did highlight the difference between Dr Sarangi's view of the positioning of the appellant relative to the deceased and the main eyewitness' evidence of how she said the stabbing had occurred. This was a noted discrepancy highlighted by the learned trial judge for the jury's benefit.

[39] The learned trial judge also juxtaposed the evidence of Cherry, in this regard, alongside his directions on the treatment of expert evidence. The jury would have heard the evidence of the doctor and that of Cherry and having been told how to treat Dr Sarangi, which was like any other witness, it was open to them to reject his view on this matter. The jury, in the face of the conflicting evidence, were properly directed that it was a matter entirely for them what view they accepted. Bearing in mind that Dr Sarangi was not an eyewitness, it cannot be said that there is anything perverse in the jury accepting the evidence of the eyewitnesses and rejecting his view.

[40] We found that the jury was adequately directed on how to treat with the evidence of the witnesses concerning the positioning of the appellant and the deceased at the material time, when the stabbing occurred. There was no material deficiency in

this aspect of the learned judge's direction that could have adversely affected the case for the appellant to the extent and with the effect that a different verdict would have been possible. We found that there was no merit in ground two.

[41] Based on our findings in relation to ground one, we allowed the appeal and quashed the conviction for murder. We set aside the sentence and substituted in its stead a conviction for the lesser offence of manslaughter. We then gave consideration to the question of sentencing for manslaughter.

The sentence

[42] After hearing submissions from counsel for the appellant, we considered a social enquiry and antecedent report that were made available to the court at trial, in our effort to arrive at an appropriate sentence. There is no question that this was a serious offence. It was a senseless killing, even if provoked. Albeit that the doctor had identified one stab wound to have been the fatal injury, he opined that bleeding from the less serious wounds contributed to the massive blood loss which resulted in the death of the deceased. So the number of wounds inflicted could not be ignored in considering the nature and seriousness of the offence and the penalty to be imposed.

[43] We also take into account that the social enquiry report and antecedent report were not substantially favourable to the appellant. The only mitigating factor was that he had no previous conviction although he was described by his own family members, members of the deceased family and the wider community, as a violent, aggressive and ill-tempered person. Mr Green submitted that seven years imprisonment would have

been appropriate. We could not accept that submission. We considered the objectives of sentencing against the background of the nature and seriousness of the offence, the circumstances surrounding its commission and the personal circumstances of the offender. The sentence in this case, however, must be such as to emphasise, in particular, retribution, deterrence and rehabilitation given the circumstances of the commission of the offence and the offender.

[44] At the same time, we gave due consideration to similar cases from this court to ensure, as far as was reasonably practicable, parity in sentencing. See, for instance, **Dennis Beagle v R** [2013] JMCA Crim 50 and **Franklin Chong v R** [2013] JMCA Crim 67, which show the range of sentences in similar cases as being between 15 and 18 years. Having considered all the relevant matters, we concluded that a sentence of 17 years imprisonment was appropriate in all the circumstances to achieve the ends of justice. For these reasons, the orders at paragraph [3] were made.