[2011] JMCA Crim 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 135/2004

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag.)

Donovan Barnett v R

Dr Randolph Williams for the applicant

Mrs Ann-Marie Feurtado-Richards and Mrs Susan Watson-Bonner for the Crown

7 February and 3 June 2011

HIBBERT JA (Ag)

[1] On 7 February 2011 we heard this application for leave to appeal and treated it as an appeal. We allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice ordered that a new trial be held. We promised to put our reasons in writing and do so now.

[2] The applicant Donovan Barnett was convicted in the Home Circuit Court on 19 July 2004 for the offence of murder arising from the death of David Taylor on 27 March 2003. For this he was sentenced to be imprisoned and kept at hard labour for life with

the stipulation that he should not be eligible for parole before he has served a period of 25 years.

[3] On behalf of the prosecution, Frederick Durrant, who was on 27 March 2003 a security guard at the Pavilion Mall in the parish of Saint Andrew, gave evidence that at about 10:35 am that day the deceased and the applicant arrived at the mall in a van which was driven by the deceased. While the deceased was unloading goods from the van, the applicant used a piece of board to hit him across his back. The deceased then took the piece of board from the applicant and in turn delivered a blow to the applicant. They then grappled and fell to the ground where the applicant used a knife, which he took from his pocket, to stab the deceased. The witness then held onto the applicant who was about to stab the deceased again. The applicant, however, slashed at the witness and turned towards him.

[4] The deceased used this opportunity to get up and run away. He was, however, chased by the applicant to the front of the premises where he fell. In spite of the witness' call to the applicant "don't stab him", the applicant inflicted other wounds to the deceased. It was only after the intervention of armed guards that the applicant ceased his attack. The knife was then taken from him and he was locked in an office, away from a crowd which attacked him after the stabbing of the deceased and inflicted injuries to him.

[5] Another security guard, Lloyd Davis, also gave evidence and supported the testimony of Frederick Durrant. He was alerted to the incident by someone shouting

"don't stab him, don't stab him". He also tried to prevent the applicant from inflicting further injuries to the deceased by using a shovel to ward off the applicant. This, however, did not deter the applicant.

[6] Detective Corporal Paul Robinson gave evidence that he, upon receiving a report, went to the Pavilion Mall where the injured applicant was handed over to him. He caused the applicant to be taken to the Half Way Tree Police Station then went to the Kingston Public Hospital where he saw the dead body of David Taylor. At about 4:50 pm he saw the applicant at the Kingston Public Hospital and told him that he was investigating a report of murder. On being cautioned, the applicant said, "A him attack me fuss officer and me attack him back and stab him up". The applicant was arrested and charged for murder and on being cautioned again said "A self defence officer, self defence officer".

[7] Constable Samuel Brown stated that at about 11:00 am he was instructed to take the applicant to the Kingston Public Hospital. On the way to the hospital the applicant kept asking if the man he stabbed was dead. When he was told that the man had died he said, "Him shoulda dead long time. Write pon di paper guilty without explanation".

[8] Dr Kadiyala Prasad, who performed the post mortem examination on the body of David Taylor, found two stab wounds and eight incised wounds to the body. Of these, he opined that the stab wounds to the abdomen and left posterior knee as well as the incised wound to the neck could each independently cause death.

[9] The applicant gave evidence on his own behalf. He stated that on the way to the Pavilion Mall a heated argument developed between himself and the deceased. On reaching their destination, he said, the deceased came out of the van and attacked him with a knife. He took out his knife and the deceased stabbed him in his face and head. He, in turn stabbed the deceased while he was under attack.

[10] Having abandoned the original grounds of appeal, counsel for the applicant sought and obtained leave to argue the following supplemental grounds of appeal on which he relied:

> "1. In directing the jury that there was only a suggestion but no evidence that the deceased had a knife the learned trial judge erred in law.
>
> 2. The learned trial judge failed to make it clear to the jury that if they concluded the appellant (sic) was lying and they rejected his sworn testimony that of itself was not probative of guilt."

Ground 1

[11] Counsel for the applicant submitted that, in his summing up to the jury, the learned judge indicated to them that there was no evidence that the deceased had a knife at the time of the incident. He told them instead, that there were only suggestions that he had a knife. Counsel further submitted that, in directing the jury as he did, the learned judge accorded to the sworn testimony of the applicant, a status lower than evidence and relegated it to mere suggestions. This, counsel submitted, was a misdirection resulting in the defence of self defence, not being fairly left to the jury.

[12] The learned trial judge while reviewing the evidence of the applicant said:

> "He said that David Taylor did, in fact, have a knife that morning. Mr. foreman and your members not one of the witnesses was asked anything about a knife which the accused man says that the deceased had and we have no evidence of the person having a knife, but you are not, as I told you, not to speculate. You can only arrive at a verdict on the evidence that you have heard."

[13] Later, when the learned trial judge was reminded by Crown counsel that suggestions were in fact put to the witnesses for the prosecution that the deceased David Taylor had a knife, he went on to say:

> "I may have told you that there was no suggestion that Dave Taylor had a knife. What I meant to say, there was no evidence in this case that any knife was proved as found from Dave Taylor, although there is a suggestion that Dave Taylor did, in fact, have a knife."

[14] At the trial the applicant, having given sworn testimony, relied on the defence of self defence. These directions to the jury are, therefore, serious misdirections as the effect of the passages is to discount, as evidence, the testimony of the applicant that David Taylor had a knife. This is further compounded by the learned judge's use of the words "…there was no evidence in this case that any knife was proved as found…," which clearly indicates an usurpation of the jury's functions. These misdirections could have significantly, if not totally, eroded the defence raised by the applicant.

Ground 2

[15] Counsel for the applicant submitted that the learned judge did not assist the jury by directing them how they should approach the case if they rejected the applicant's evidence. He further submitted that there was the real danger that if the jury rejected, as untruthful, the evidence of the applicant, they may have considered this to be indicative of guilt. Hence the learned judge needed to have given clear directions that they could not, by virtue of their rejection alone, conclude that the applicant is guilty.

[16] In support of these submissions, counsel relied on the decision of the Privy Council in **Broadhurst v R** [1964] A.C. 441 where Lord Devlin at page 457 said:

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so."

[17] After reviewing the evidence of the applicant and giving proper directions on self defence the learned judge said:

> "It is the prosecution who has to prove the defendant's guilt. It is for the prosecution to make you sure that the defendant was, in his act, was (sic) not acting in the necessary self defence. If you concluded that he was or that he may have been acting in necessary self defence, then you are bound to acquit him and find him not guilty."

[18] We believe that the failure of the learned judge to go on to direct the jury that they could not properly come to a conclusion of guilt, merely because they rejected the testimony of the applicant, is a non- direction which amounts to a misdirection.

[19] In light of these defects in the summation, we concluded that it would be unreasonable to allow the conviction and sentence to stand. We, however, believe the case for the prosecution was a strong one and for that reason ordered a new trial.