[2012] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 31/2007

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

CARLOS BENJAMIN v R
o/c CARLOS PARKER

Delano Harrison QC for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Paula-Rosanne Archer-Hall for the Crown

19 January, 1 and 17 February 2012

HARRIS P (AG)

[1] On 14 February 2007, the appellant was convicted in the Circuit Court for the parish of Manchester for the murder of Devon McPherson. He was sentenced to life imprisonment and it was ordered that he should not become eligible for parole until he has served 15 years.

[2] The case for the prosecution was grounded on the evidence of several witnesses. The first witness, Mr Dwayne Hunter, stated that at about 9 o'clock on the night of 29 May 2005, the deceased and himself were riding their bicycles on their way back from a shop where the deceased had made a purchase.

[3] The deceased, he said, stopped to converse with two girls who were accompanied by their brothers. He, Dwayne, stopped about 50 to 60 feet away from the deceased. The appellant approached the deceased and the others who were with him. He said to one of the girls, "A dis you a dis mi 'Vah', a dis you a dis me". The deceased intervened by saying, "Low the girl nuh my youth, you nuh see say the girl dem nuh want you".

[4] Dwayne went on to say that the appellant hugged the deceased. Thereafter, he heard the deceased exclaim, "A stab you stab mi Nicholas, stab you stab me". The witness pointed out the appellant as the person to whom he referred to as Nicholas. The appellant, he said, then advanced towards him. Being fearful, he dropped his bicycle and ran home. Later, he returned to the scene where he saw blood on the deceased's shirt. He stopped a car into which the deceased was placed and taken to the Mandeville Hospital. The deceased succumbed to his injuries.

[5] The witness Latticia Thomas testified that on the day of the incident, her aunt Kellisha Gordon, her uncle Michael Gordon, and her brothers were on their way home when she saw the deceased and Dwayne on bicycles.

[6] The deceased stopped at a corner some distance away from them and from there spoke with her aunt. Thereafter, the appellant who was known to her as Nicholas, approached and grabbed her hand and that of her aunt. She freed herself from his grasp. Her aunt told him to release her. He refused to do so and asked her for the deceased who at that time appeared to be around the corner. After making the

inquiry, the appellant began to hurl abuses and proceeded to place a knife at her aunt's neck. Soon, the deceased emerged from a dark area and demanded that he release the aunt. The deceased and the appellant started to abuse each other. The appellant, having told the deceased that he had been looking for him for a long time, punched him. The deceased punched the appellant and they started wrestling and eventually went into the dark. Thereafter, she said, on hearing the deceased cry out, she saw him coming toward her and he was bleeding. Following this, the appellant chased Dwayne with a knife. She said the deceased was unarmed.

[7] It was the evidence of Kellisha Gordon that she is also known as Vahesha. On the evening of the incident her brother, niece and nephews and herself were walking home when she saw the deceased who dismounted from the bicycle which he was riding. Her group walked past him. The deceased spoke to her and she walked on.

[8] Subsequent to this, the appellant approached her, held her hand, drew her closer to him, asked her three times for the deceased and placed a knife at her neck. The deceased spoke from around a corner and told him to leave her alone because she was a little girl. The appellant announced that he was looking for him, the deceased. He then drew the deceased from out of a bush, she said, and pushed him. The deceased retaliated, after which she saw the appellant take a knife from his waist which was longer than that which he had held at her neck. The deceased then told her and her relatives that they should go home. They set off as directed but she went back toward the deceased when she heard him call her name.

[9] She said she saw the appellant chasing Dwayne. The appellant then walked away with blood on the knife and on his clothes. Sometime after, Dwayne brought the deceased to a gate and she saw him bleeding from under his right arm.

[10] Dr Paul Auden carried out a post mortem examination on the body of the deceased which disclosed that he received a single stab wound to his right armpit area which penetrated his right lung and a branch of his pulmonary artery. Death was due to hemorrhagic shock secondary to a severed blood vessel. Dr Auden opined that the injury to the deceased was inflicted by a sharp instrument.

[11] Woman Cpl Reva Thompson, the investigating officer, said that when she informed the appellant that she was investigating the murder of the deceased and that she had a warrant for his arrest, he said, "Officer mi never mean fi kill him". Upon caution, he said, "Officer, mi sorry mi never mean fi do it".

[12] In an unsworn statement, the appellant said that on the day of the incident, he was on his way from his home when he saw Vahesha who was his friend. The deceased and Vahesha, who were standing on the opposite side of the road, were engaged in a conversation. He said he called her. The deceased came over and attacked him with a knife which resulted in his having a scar on his belly. He went on to say:

> "When I feel the jook, your Honour, I run off. The next one was standing opposite on the hill right here, him never deh too far, your Honour. Him was like this, (Indicates) he was 'bout like from here soh and mi was deh right here soh standing.

> …
>
> When I run off, he hold mi, your Honour, hindering me from making a escape and I spin 'round, your Honour, Devon McPherson was coming at me again wid him knife in his hand, your Honour.
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> …
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> I held his hand with the knife, your Honour. And just turn the blade off me, turn the knife blade off me, your Honour, and the three of us fell to the ground, your Honour. Is that time, is that time him get the stab. I don't know how him get the stab, your Honour."

[13] He further asserted that having successfully fought the other man who had held him, he ran to his home. While there, three police vehicles arrived. He went on to say that he ran away because he was scared of the police but was apprehended the following day.

[14] An original ground of appeal was abandoned. Four supplemental grounds of appeal were filed. Grounds two and four were abandoned. Leave was granted to argue grounds one and three.

Ground one states:

> "1. The directions of the learned trial judge on the Appellant's defence of self-defence were inadequate in that (a) she failed to apply the law to the particular facts, adequately, and (b) she omitted to leave for the jury's consideration the possibility that the Appellant's defence might have been the truth."

[15] The burden of Mr Harrison's submissions on this ground is that the manner, in which the learned judge dealt with the defence, deprived the appellant of a fair trial. He submitted that the learned judge's directions on self defence were unimpeachable. He, however went on to argue that she failed to deal adequately with the appellant's unsworn statement. The learned judge's directions to the jury, he submitted, was simply a bald recitation of the facts constituting the law of self defence with a bare exposition of the law and not applying the law to those facts. It was further argued that the jury was never instructed that if they believed that the appellant was acting in self defence even though he intended to inflict the fatal wound, he should be acquitted. The failure of the learned judge to give such a direction, he argued, constituted an incalculable risk that the "non-direction might have signalled a cue for the jury [many of them] to follow namely that the learned judge did not believe the Appellant's account of the material events".

[16] We find no merit in these submissions. In directing the jury on the issue of self defence at lines 19 – 25 on page 152 and lines 1 and 2 on page 153 of the transcript, the learned judge said:

> "If you feel that the accused was not acting in self-defence, then consider whether he had the intention necessary to constitute murder, bearing in mind if you believe him when he said, 'Officer, sorry, mi never mean fi kill him.' If you accept that that is what happened, then he is not guilty of murder. Then, it is open to you to find him guilty of Manslaughter.

At pages 172 to 174, she continued by saying:

Now, in this case the accused man is relying on self-defence. He is saying that he was under attack. In relation to this question of self-defence the Prosecution has to prove that there was lawful justification or excuse. In relation to this question of self-defence, I must tell you that if one is attacked in circumstances where he believes his life is in danger, in danger of suffering serious bodily harm, he may use such force as is reasonable in the circumstances, as he honestly believes them to be to prevent or resist the attack. And if in using such force he kills or causes injury to his attacker, he would be guilty of no crime.

Now, when self-defence is raised in a case, it is not the accused man who is to show that he was acting in self-defence, it is the Prosecution who is to show to you that he was not acting in self-defence. The Prosecution must present its evidence through the witnesses. So, you look carefully at the evidence of these witnesses in order to determine whether the Prosecution has disproved self-defence. The Prosecution has to satisfy you on the evidence that it has presented that what the accused man is telling is untrue. The burden remains on the Prosecution, and if after you have considered all the evidence you are left in doubt as to whether the injury may have been in self-defence, the correct verdict would be not guilty. If you are sure that he was not acting in self-defence and you accept the story, the story presented by the Prosecution, then it is open to you to find the accused man guilty of the charge of Murder. If you have a doubt about it, you must resolve that doubt in favour of the accused and find him not guilty. If you disbelieve him, that does not mean that you must convict him, you must go back to the Prosecution's case and see whether the evidence given by the Prosecution witnesses has made you satisfied, so that you feel sure of his guilt before it is open to you to convict him. If you have a reasonable doubt, it must be resolved in favour of the accused. If you believe that the accused inflicted the wound, but did not intend to kill the deceased or if you have a doubt that he had the necessary intention required by law, it would be open to you to convict the accused of Manslaughter, because lack of intention would reduce Murder to Manslaughter.

> Remember I told you intention is an essential ingredient to the charge of Murder.
>
> The verdicts open to you are guilty of Murder or not guilty of Murder or guilty of Manslaughter or not guilty of any offence at all."

[17] It is not uncommon for trial judges to give directions on self defence in a format of their choice, as no particular format is required. The learned judge, as she was required to do, gave full directions on the law of self defence in accordance with the dictates of ***Beckford v R*** [1987] 3 WLR 611; [1987] 85 Cr App Rep 370; [1987] 3 All ER 425 which Mr Harrison acknowledged . There is nothing to show that she had misdirected the jury on the issue. We cannot accept that she should have directed the jury on the unsworn statement in such terms as Mr Harrison proposed. The appellant, on his account as to what transpired, related that he was attacked by the deceased. The question whether this account was true or untrue was a matter for the jury, the learned judge having brought to their attention the facts within the purview of the law of self defence .

[18] In our judgment, there is no requirement that the learned judge should give any additional directions concerning the appellant's defence relating to self defence. She correctly tailored her directions to the facts within the ambit of the law and appropriately guided the jury on the issue of self defence. She dealt properly with the unsworn statement of the appellant and was not under a duty to do more than she had done. The jury could not have possibly entertained any conceivable doubt that they were required to consider the unsworn statement against the background of the

evidence advanced by the prosecution in order to decide whether the appellant was speaking the truth.

[19] It was Mr Harrison's further complaint that the directions of the learned judge appearing at lines 19 to 25 on page 152 and lines 1 and 2 on page 153 of the transcript did not clarify the matter for the jury as to the treatment of the defence.

[20] In response to this submission, Mrs Archer-Hall argued that the learned judge's directions do not constitute a miscarriage of justice. The learned judge, she submitted, was endeavouring to convey to the jury that the words "Officer, sorry, mi never mean fi kill him" were used by the appellant although the use of these words did not directly emanate from him. She contended, that the words were in the evidence given by the police officer and the jury being aware of them, it would have been important for them to have looked at these words to determine whether or not he would have been guilty of manslaughter.

[21] The defence put forward by the appellant was that he was attacked by the deceased. He attempted to escape but was prevented from doing so by the deceased's associate and in an ensuing struggle, he said he did not know how the deceased was injured. It follows that the learned judge was obliged to have left the question of manslaughter to the jury by telling them that if they found that there was a lack of intention on the part of the appellant to kill, then the charge would be manslaughter. It is true that the appellant did not himself state that he did not intend to kill the deceased but it was for the jury, on examination of all the evidence, taking into account

the evidence of the investigating officer and the unsworn statement to decide whether any lack of intention on the part of the appellant existed. This ground also fails.

Ground three states:

> "The learned trial judge erred in law in her failure to give the jury any directions at all on the issue of provocation which, it is submitted, plainly arose in the case."

[22] In his written submissions, Mr Harrison's complaint on this ground is that the issue of provocation arose in this case by reason of the appellant's assertion that having received the injury to his belly, after being attacked by the deceased, he was prevented from escaping.

[23] In every case in which an accused is charged for murder the law requires a trial judge to consider whether the defence of provocation arises as prescribed by section 6 of the Offences Against the Person Act . The section reads:

> "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."

On a charge of murder, for tactical reasons an accused may not think it prudent to raise a defence of provocation when there might be some other defence which may possibly result in an acquittal. If the defence avails him, then the trial judge must

bring it to the jury's attention even if he has not raised it. Where the defence arises on the evidence, the authorities show that a trial judge must leave it for the jury's consideration.

[24] Bearing in mind, the statement of the appellant that the deceased had attacked him with a knife causing him injury and that he was prevented from making good his escape, he having been restrained by the other man, it is without doubt that this case gave rise not only to the defence of self-defence but also the defence of provocation for the jury's consideration. Consequently, the safety of the appellant's conviction for murder must be considered with reference to the law of provocation. The question therefore is whether the acts to which the appellant referred were capable of rendering the verdict unsafe.

[25] Although the learned judge directed on self-defence, she failed to bring the law relating to the defence of provocation to the jury's attention. Where these defences arise, if the jury rejects self-defence, they would be obliged to consider provocation. The learned judge was duty bound to have adverted them to the fact that the defence is available to the appellant, informing them, not only that an onus is placed on the Crown to negative provocation but also that provocation reduces the charge of murder to manslaughter. In so doing, she was required to have brought to their attention such acts as were capable of amounting to the provocative conduct of which the appellant complained and would have been obliged to have pointed out to them each act which was likely to support a finding that the appellant was provoked, causing him to have lost his self control - see **R v Humphreys** [1995] 4

All ER 1008. Failure of the learned judge to remind the jury of the issues within the context of provocation is a serious misdirection.

[26] Section 14(1) of the Offences Against the Person Act states:

> "14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Mr Harrison urged the court not to apply the proviso. He submitted that the applicable test in applying the proviso is whether a jury properly directed would have inevitably convicted and drew to our attention the case of ***R v Adams and Lawrence*** SCCA Nos 35 and 36/1993 delivered on 7 April 1995. In ***Adams and Lawerence*** the appellants were convicted for non-capital murder and sentenced to life imprisonment. The trial judge left for the jury's consideration, irrelevant and inadmissible evidence. Despite this, the court applied the proviso in keeping with section 14 of the Judicature (Appellate Jurisdiction) Act, having found that the case for the prosecution was overwhelming and the jury would have inevitably convicted for murder.

[27] In light of our decision and in the circumstances of this case, we do not think the proviso would be applicable. There remains for our consideration the appropriate order which the court ought to make. Two options are available to the court in light of the non direction on provocation. It may:

(a) quash the conviction and sentence and order a new trial, or

(b) it may set aside the conviction of murder and substitute a verdict of manslaughter.

[28] Mr Harrison further submitted that the evidence of the witnesses Hunter, Thomas and Gordon in relation to the knife which may have inflicted the mortal wound was discrepant in terms of the material time of the infliction of the injury. Hunter, he argued, was 50 - 60 feet away and did not plainly state that the appellant was armed with a knife at the material time while Thomas said that the appellant had a knife which he held at her aunt's neck but did not see what happened to the knife at the material time. On Gordon's evidence, the presence of a long or short knife in the appellant's possession did not assist the prosecution as to the use of any knife to injure the deceased, he argued. The learned judge having not charged the jury to consider provocation which arises on the defence's account, deprived the appellant of a fair chance of acquittal of murder and a conviction of manslaughter, he submitted.

[29] Miss Archer-Hall conceded that there was an omission on the part of the trial judge in failing to have given the jury the benefit of considering the defence of manslaughter by reason of provocation. By the jury's verdict, she contended, there was

no substantial miscarriage of justice as the verdict shows that the appellant had the requisite intention to be convicted of murder. However, she accepted that the issue concerning whether the appellant had lost his self control so as to reduce the verdict to manslaughter had been taken from them.

[30] The evidence discloses that the witness Dwayne said that when the appellant advanced towards him, he ran because of fear. Latticia's evidence is that she saw him [the appellant] chasing him with a knife. Kellisha saw the appellant with a long knife and a short one. There can be no doubt that the appellant was armed, obviously with one or two knives. However, at the time that the fatal wound was sustained by the deceased, none of these witnesses testified that they observed the stabbing. Lattica and Kellisha had left the scene, they having been requested by the deceased to do so. Dwayne was 50 - 60 feet away from the men. The appellant and the deceased, after wrestling, disappeared into the dark where the stabbing had taken place. There was no evidence to indicate what had transpired immediately preceding the stabbing, the men being alone at the time. Clearly, the men were not in the witnesses' view when the fatal injury was inflicted on the deceased.

[31] In this case, although the prosecution's case is very strong, the appellant spoke to provocative acts which he encountered. He did not only relate that the deceased had attacked him with a knife which resulted in him receiving a cut in his abdomen but also that he was prevented from escaping by the restraint of the other man who was with the deceased.

[32] We cannot say with confidence that if the jury had been given the requisite directions they would have necessarily convicted for murder, although admittedly, they could have done so. It may well be that, if the learned judge had left the defence of provocation for the jury's consideration they may have returned a verdict of manslaughter. In the circumstances, it would be appropriate to set aside the verdict of guilty of murder and substitute a verdict of manslaughter.

[33] We would allow the appeal, quash the conviction and sentence for murder and in substitution therefor enter a verdict of manslaughter. The appellant should serve a term of 15 years imprisonment hard labour. The sentence should commence on 14 May 2007.