JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 74/2004

BEFORE: **THE HON. MR. JUSTICE P. HARRISON, J.A.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

R.v. Lenford Clarke

Patrick Atkinson for the Appellant

Paula Llewellyn, Senior Deputy Director of Public Prosecutions and Simone Wolfe, Crown Counsel for the Crown

April 4, 5 and July 29, 2005

SMITH, J.A.

Lenford Clarke, the appellant, was convicted of the murder of Richard Coombs in the Westmoreland Circuit Court on the 19th February, 2004, before Campbell J and a jury. The judge sentenced the appellant to imprisonment for life and specified that he should serve a period of imprisonment of 20 years before becoming eligible for parole. His application for leave to appeal was refused by a judge in chambers. However on 13th December, 2004, the Court granted him leave to appeal.

The appellant was a security guard at Club Cancer in Smithfield, Westmoreland. On the 24th June, 2002, about 11:30 p.m. Richard Coombs, the deceased, was about to enter the club when he was stopped by the appellant. The appellant stood in front of the deceased

and attempted to "chuck out" the deceased by pushing him in the chest. According to a prosecution witness, Miss Nyesta Lewis, the deceased "chuck him back." The appellant then shoved the deceased again and drew his gun. The appellant pointed the gun to the ground and fired it. He then raised his arm with gun, pointed it at the face of the deceased and shot him. The deceased fell. The appellant ran.

The evidence of Miss Lewis was supported by the evidence of Mr. Patrick Green and Mr. Ricardo Coombs, a brother of the deceased. Ricardo added that he heard people screaming and that he also screamed because "it is a fight that happen."

Dr. Murari Sarangi, a pathologist performed the post mortem examination of the body of the deceased. He observed a penetrating gunshot lesion with entrance wound on the left side of the chin close to the outer angle of the mouth. The bullet fractured the mandible (jaw) bone, severed the major blood vessels of the neck and lodged within the neck muscles of the back of the neck. The bullet was removed and handed to the police. In the opinion of the doctor, death was due to the gunshot wound described above.

In an unsworn statement the appellant said that he was one of three security guards on duty at Club Cancer on the night in question. He was standing at the gate of the Club when five (5) men approached him. "One of the men push his way through into the club." He continued,

"One of the men make a push and push me, and I push him back. He push me back again and I stagger very hard, and I walk to him. The time when I walk to him he is dip (sic) in his waist coming out with something. I start to go back he is coming up with something and I go back, step back, and I take out my service revolver and I fire one at the earth and tell him ease off don't come any further, and he still advancing on me coming more stronger on me, and I fire and I see him fell (sic). I go over to see what he have, his brother was over him before me, then I have to run because the crowd coming down..."

Grounds of Appeal

The following six grounds were argued by Mr. Atkinson:

"1. The learned trial judge misdirected the jury by withdrawing manslaughter from their consideration when there was evidence of provocation for the jury to consider in reducing murder to manslaughter.

2. The learned trial judge misdirected the jury as to the law relating to reasonable force.

3. The learned trial judge failed to adequately direct the jury on the law of self defence, and this inadequacy amounted to a misdirection. In the alternative the learned trial judge erred in law when he led the jury to believe that if the deceased was unarmed then the appellant was not acting in lawful self defence contrary

to the law of self-defence as adumbrated in **Solomon Beckford v.R.** (1987) 3 ALL ER 425; (1988) A.C. 130 P.C.

4. The learned trial judge misdirected the jury as to how they should treat inconsistencies in the evidence to the prejudice of the appellant's case.
5. The learned trial judge erred in law when he directed the jury that the appellant's unsworn statement was not evidence and thus prejudiced the appellant's defence and/or effectively withdrew the appellant's case from the jury's consideration.
6. The learned trial judge misdirected the jury by inviting them to speculate as to why the appellant chose not to give evidence, thus rendering his trial unfair and the verdict unsafe."

Ground 1 – Withdrawing manslaughter

The learned judge told the jury that provocation did not arise. Mr. Atkinson submitted that the issue of provocation arose both on the evidence of the prosecution and on the unsworn statement of the appellant. He contended that the evidence of the prosecution witness as to a physical encounter between the deceased and the appellant was evidence on which a jury could find that the appellant was provoked to lose his self control. Further, he submitted that provocation clearly arose on the statement of the appellant from the dock that one of the five men

pushed his way into the club. One pushed him, he retaliated and was again pushed "very hard."

Miss Llewellyn for the Crown conceded that there was evidence capable of amounting to provocation and that manslaughter should have been left for the jury's consideration. We think the concession is right.

Grounds 2 and 3 – Self-Defence

The complaint of the appellant in these grounds is that the learned trial judge whittled away the appellant's defence in dealing with the issue of reasonable force in self defence. Mr. Atkinson submitted that the trial judge misdirected and misled the jury into believing that the force used was unreasonable because no weapon was seen by the appellant nor was any produced. Counsel referred the Court to ten passages in the summing-up where the trial judge referred to the absence of or lack of description or sighting of a weapon in a manner which, he said, would inevitably mislead the jury into believing that the actual absence of a weapon was the defining factor for them to decide that the force used was not reasonable.

This overemphasis, counsel contended, would effectively negate the principle that it is the belief of the appellant that should be the dispositive factor. Reliance was placed on the decision of their Lordships in **Solomon Beckford v.R.** (supra).

We will state, in part, the relevant directions of the learned trial judge before proceeding to consider whether the defence was whittled down by the impugned passages.

After correctly defining self-defence the trial judge went on to say (p. 182):

> "A person only acts in lawful self-defence if in all the circumstances he believes that it is necessary for him to defend himself and if the amount of force which he uses in doing so is reasonable. So, Madam Foreman and your members, there are two main questions for you to ask ... yourselves: Did the defendant honestly believe or may he honestly have believed that it was necessary to defend himself? – Question 1
>
> A person who knows that he does not need to resort to violence, does not act in lawful self-defence. If you are sure that the defendant did not honestly believe that it was necessary to defend himself, then self-defence does not arise and he is guilty. But if you decide that he must or may have been acting in that belief you must then consider the second question, taking the circumstances and the dangers as the defendant honestly believes them to be: Was the amount of force which he used, was that reasonable? ...
>
> Force used in self-defence is unreasonable and unlawful if it is out of all proportion to the nature of or is in excess of what is really required of the defendant to defend himself."

No complaint was made of these general directions. Indeed the judge faithfully followed the directions recommended by the Judicial Studies Board.

We will now refer to the impugned directions. In addressing the questions posed in the passage above the learned judge, after reminding the jury of the unsworn statement of the appellant, said (p. 184):

> "On that evidence, on that statement, he has not said --- there is nothing identified. What he said, he saw him coming up with something and that is where it was left."

Thereafter the judge referred to the three prosecution eye-witnesses, warned the jury against conjecture and speculation and then continued:

> "...they (witnesses) were asked: Did you see any weapon? None of them admitted or said they saw any weapons. There was no suggestion from the defence that any particular weapon was there, whether a stone ... or knife, an icepick – nothing ... what the accused man says in his unsworn statement –'I saw him coming up with something' It is a matter for you."

Another of the impugned passages is at p. 185 of the record. The trial judge reminded the jury of the second question that he told them they should ask themselves and then said:

> "... you will have to ask yourselves such questions as: was a weapon used by the attacker? If so, what sort was it and how was it used?"

These questions, we think, are not appropriate where the issue is whether or not a defendant honestly believed that he was under attack.

Later on in his summing-up the learned judge emphasised (p. 194):

> "Nobody has said what that something is, because you remember, Madam Foreman and your members, in his unsworn statement, he said there were three other security guards there.

> ...
> The three guards were there. He said that. You have not heard one bit of evidence in this court that that deceased, about the weapon that he had there. In the unsworn statement he has said he came up with something, and that is as high as it goes.
> ...
> What is it that Richie would have been reaching for ? Nothing was found.
> ...
> There is no evidence before this court of any weapon on that deceased."

The learned trial judge in analyzing the appellant's unsworn statement reminded the jury of a comment made by crown counsel in this way (page 216):

> "Now he has not said what it is he is coming out with. You will recall the comment made by Crown Counsel in that regard. 'Where would the something be?' The question is asked, if a youngster by dipping into his waist, going to his waist, even in the circumstances where he is entering a club, would he be expected to be met by this lethal firearm? What do you make of it?"

We should observe here that we cannot see the relevance of the "expectation" of the deceased to the issue of whether or not the appellant was acting in lawful self-defence.

The following excerpt from the judge's summing-up bore the brunt of Mr. Atkinson's criticism (p. 217):

> "Where is the weapon? In these circumstances, is he at liberty to fire when all that he can say is that he saw something? Is this 'something' a Bible, a hymn book, a pencil, a nail file, an ice

> pick, a gun, a ratchet? What is it that he has seen? Has he told you? Is it enough? And then there is a sequence. He said that, "I walked to him and he is dipping in his waist. I go back and step back. I take out" –this is after he is dipping into his waist that he takes out his firearm. And you have to remember the order. The youngster is dipping into his waist, he takes out his firearm and up until that point he still has not told us what it is he is dipping into his waist for. He takes out his firearm ... and fires one shot on the earth. There is still no mention of what it is."

At the end of the summation the learned judge told the jury (pp 221-2):

> "He says having fired, remember he said he saw him coming up with something. He goes over to see what he had. And he said the brother was there, he did not say he saw anything, no suggestion has been put to any of those witnesses that anything was found. It is a matter for you to say if you find that he honestly believed that it was necessary for him to defend himself in all the circumstances that I have outlined to you, that he was there , it was his duty to collect, he was performing his job, five men come in, he was pushed, he fired a warning shot, man coming, man dip in his waist, he saw something coming up, was it reasonable if he honestly believed as he told you, he had to defend himself, and that the amount of force used was reasonable in the circumstances. It is a matter for you."

Having carefully examined the above extracts from the judge's summation we are inclined to agree with Mr. Atkinson that the jury might have been misled to believe that the actual absence of a weapon in the hand of the deceased was conclusive evidence that the appellant was not acting in lawful self-defence. It is now the settled law that where a

defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts and that is so whether the mistake was, on an objective view, a reasonable mistake or not – see **Solomon Beckford v.R.** (supra) The reasonableness or unreasonableness of the defendant's alleged belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned is neither here nor there – see **R.v. Williams** (1987) 3 All ER 411.

Where a defendant was not in fact under attack or threatened attack, but honestly believed that he was, the jury should be directed to consider whether the degree of force used by the defendant was commensurate with the degree of risk which he believed to be created by the attack under which be believed himself to be – see **R.v. Oatridge** 94 Cr. App. R. 367.

If, of course, a defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held – **R.v. Solomon Beckford v.R.** (supra).

Difficulty in assisting the jury to apply the subjective test arises where the defendant gives an unsworn statement. Indeed the passage above in which the learned judge rhetorically asked – whether this 'something' was a bible, hymn book or gun is, we think, a criticism by the judge of the

appellant's decision not to give evidence so that the reasonableness or otherwise of his belief could be tested. In **Beckford's** case (supra at 433) their Lordships' Board expressed surprise that this is the practice rather than the exception in this jurisdiction. The Board per Lord Griffiths warned of the danger of this practice and we quote:

> "Now that it has been established that self defence depends on a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

We have given anxious thoughts to the complaint in these grounds. We have taken into consideration the total effect of the learned judge's summing up. We have come to the conclusion that in emphasising, time and again, the fact that no weapon was produced or seen, the learned judge might have left the jury with the impression that if the appellant did not see a weapon, or if there was no weapon, self defence could not avail him. The unsworn statement of the appellant clearly raises the issue of mistaken belief – that the defendant might have been labouring under a mistaken view of the facts.

In the circumstances we cannot be sure that the jury would necessarily have returned the same verdict if they had been directed in terms of "mistaken belief".

Accordingly the conviction cannot stand.

Ground 4 – Inconsistencies

Counsel for the appellant complained that the learned trial judge having told the jury that whether inconsistencies were slight or serious, should be determined by reference to the central issue, wrongly defined the central issue as whether the appellant shot the deceased while acting in self defence.

In our view restricting the consideration of inconsistencies to the so-called central issue is not helpful and may indeed be confusing to the jury.

Invariably the so-called 'central issue' in a case involves many material issues. A witness might speak to one or more of these issues. Whether or not an inconsistency is material would, we venture to think, depend on the nature, degree and relevance of the inconsistency. Where, for example, credibility is in issue, discrepancies in respect of peripheral matters may be relevant and thus, we think, material. On the other hand a discrepancy or conflict may be in respect of a material issue but its degree de minimis and so insignificant that the discrepancy may properly be regarded as slight or immaterial.

We have examined the directions which the learned judge gave on inconsistencies and cannot agree with counsel for the appellant that the judge had failed to adequately direct the jury as to the way in which

inconsistencies in a witness' evidence should be approached by them. This ground fails.

Grounds 5 and 6 – The unsworn statement

Counsel for the appellant complained that the learned trial judge effectively withdrew the appellant's unsworn statement from the consideration of the jury.

The learned trial judge in directing the jury as to their role as judges of the facts told them (p. 170):

> "You must not allow yourselves to be taken off into the path of speculation. Look to the evidence ... and to the evidence alone. Do not be distracted into making conjectures. The evidence must be the basis by which you judge this case. And the evidence comes from the witnesses... those persons called by the prosecution who went up there and swore, those are the witnesses in the case."

Later when dealing with the unsworn statement the trial judge told the jury (p. 212):

> "And it is for you Madam Foreman and your members, to decide whether the evidence for the prosecution has satisfied you until you feel sure of the accused's guilt, and in considering your verdict you should give the accused's unsworn statement only such weight as you think it deserves because, what he says from there is not evidence, I told you that the case is tried based on evidence."

The effect of these passages, counsel argued, was to nullify the appellant's defence that he was acting in lawful self defence.

This court had to consider a similar complaint in **R.v. Alfred Hart** (1978) 16 JLR 165. In that case Carey J, as he then was, gave the jury the following directions (16 JLR 168 D-F):

> "Now an unsworn statement from the dock has no evidential value and cannot prove facts not otherwise proven by evidence. Its potential effect is persuasive in that it might make you Mr. Foreman and members of the jury see the proven facts and inferences to be drawn from them in a different light; so that when you come to consider the statement made by the accused man, he cannot prove anything in his statement. If there is evidence given on any particular point, then his statement may be used to explain it, to understand it, you see it in a particular light, but the statement is not evidence, it cannot prove fact. So anything that is introduced in his statement that is not in evidence anywhere, has no evidential value whatsoever."

In that case the complaint was that Carey J directed the jury in such terms and in such a manner which had a "debilitating effect on the defence" and the issue of self defence which depended to a great extent on the statement of the appellant, was thereby denuded.

Kerr, J.A. was clearly of the view that such a direction, which was obviously influenced by **R.v. Coughlan** (1976) 64 Crim. App. R 11 p. 17, was not only unnecessary but was undesirable and confusing. In reference to the judge's attempt to categorise the statement the learned judge of appeal said:

> "To persons learned in the law, his earnest efforts may seem commendable; to those desirous of learning the law, helpful, but it seems to be

> asking too much of a jury of laymen to appreciate the nice distinction of a statement being of some weight but yet of no evidential value. It is often confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has "no evidential value whatsoever" – and all this after telling them at the outset that their verdict must be according to the evidence. Indeed, the judge in Coughlan's case was not unaware of this difficulty; thus at page 18 he said:
>
> 'It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence' ".

The learned judge of appeal went on to say (p 170 I):

> "In cases such as Coughlan's where there are two or more accused and it is necessary to make it clear to the jury what is the effect of the unsworn statement of one accused upon the position of the other, the directions there may be in order, but in the ordinary case a trial judge should avoid the Coughlan prescription which, as worded, seems to go too far and to go beyond the context of that case. The judge in the ordinary case should follow the "guidance" on the "objective evidential value of an unsworn statement" as authoritatively advocated in **DPP v Leary Walker** [1974] WLR 1090 at 1096:
>
> 'The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should

> give the accused's unsworn statement only such weight as they may think it deserves.' "

We share the view of Kerr, J.A. that in the ordinary case a trial judge should avoid telling the jury that a statement made from the dock is not evidence or that it has no evidential value. Such a categorization of the unsworn statement might have the effect of withdrawing from the jury a full and fair consideration of all the issues raised in defence thus denying an accused person a fair trial.

Because of the conclusion we have reached in respect of grounds 2 and 3 it is not necessary for us to embark on an examination of all the directions on this aspect of the case with a view to determining the effect of the impugned directions.

Conclusion

We have found that the judge erred in withdrawing provocation from the jury and that his directions on self defence were materially flawed. Accordingly the appeal is allowed; conviction is quashed and the sentence set aside. In the interests of justice a new trial is ordered.