

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)**

SUPREME COURT CRIMINAL APPEAL NOS COA2019CR00042, 43 & 44

**DURVIN HAYLES v R
ANDREWAIN SMITH
ANNA-KAY BAILEY**

Kemar Robinson for the appellant Durvin Hayles

Peter Champagnie KC and Richard Lynch for the appellant Andrewain Smith

**Oswest Senior Smith instructed by Oswest Senior Smith & Co for the appellant
Anna-Kay Bailey**

Miss Paula Llewellyn KC, Dwayne Green and Miss Dainty Davis for the Crown

19, 20, 21 and 24 April 2023

ORAL JUDGMENT

BROOKS P

**Criminal Law- Good character directions- Manslaughter- Convictions quashed-
No Retrial**

[1] In this case, on 20 March 2012, the appellants were police officers on mobile patrol in the Payne Lands area of the parish of Saint Andrew. They approached a motor vehicle which had driven into the area and stopped on Norman Lane where a party was in

progress. On the prosecution's case, they fired into that motor vehicle from behind. One of the occupants was struck by a fragment of a bullet and was killed. The main witness as to facts for the prosecution said that the police fired without any reason. He also denied that anyone from that car fired any shots or that any firearm was present at or near that motor vehicle. The appellants were charged with the offence of murder.

[2] At the trial, the defence was that the appellants were responding to gunfire coming from the motor car and that when the motor vehicle stopped, two men alighted from it and ran. They said they had initially approached the motor vehicle because they had a report that it was involved in a robbery earlier that evening. They also said they found a firearm beside the motor vehicle. In addition to their evidence, there was evidence from the person who was said to have been robbed that evening. He testified that he went to the scene on Norman Lane and identified his stolen belongings in the motor vehicle.

[3] At the end of the trial, the appellants were convicted of the offence of manslaughter.

[4] The appellants appealed their convictions. They raised numerous grounds of appeal, and those grounds of appeal raised several issues. It is, however, only necessary to address two of those issues, on which the Crown, represented by the learned Director of Public Prosecutions and two Crown Counsel, have conceded, and we find properly so. Those two issues are the complaints about the learned trial judge's directions in respect of the appellants' good character and the leaving of a verdict on the offence of manslaughter.

[5] In relation to the directions on good character, the learned trial judge was obliged to give a direction on both limbs of the good character directions namely, the propensity direction and the credibility direction. Although the appellants gave unsworn statements at the trial, they had given pre-trial statements in respect of the incident to the Independent Commission for Investigation. Those statements formed a part of the prosecution's case.

[6] The learned trial judge gave a proper propensity direction but, unfortunately, her direction on the credibility issue fell short of the required standard. That error, in this case, was fatal to the conviction as the credibility of the appellants was a critical element of their defence. This principle was demonstrated in the case of **Chris Brooks v R** [2012] JMCA Crim 5 at paras. [49] to [57].

[7] The second error that the learned trial judge made, which was fatal to the conviction, was to direct the jury that they could consider the offence of manslaughter. In this regard, on pages 234 to 236 of the transcript, she said:

“In that situation I remind you, Mr. Foreman and your members, there must be an apparent necessity for the killing, for if there were no reasonable necessity for the violence used by the officer; if there is no apparent necessity for the killing, then the killing would be manslaughter, at least. You need to consider the circumstances existing at the time — the tinted car, the other persons in the area. Was it reasonably necessary for the killing in the particular circumstances that existed?

I remind you that the police officer has no duty to retreat and where he or she meet [sic] with resistance, he or she meets force with force.

Now, if your view is that the shooting was reasonably justified, in the course of duties, as a police officer, then because of the defense [sic] provided for police by the law, your verdict must be not guilty of any offence.

If you find that in the circumstances the police were seeking to do their duty, but were shooting carelessly, without regard for human life and the safety of others, to such an extent as to be a crime, and it was in those circumstances that Miss Kirkland was killed, then your verdict must be not guilty of murder, but guilty of manslaughter.

Before you can convict of manslaughter, you must be satisfied that the risk of death being caused by the action of the accused was very high. Ask yourself, was there an obvious and serious risk of causing injury to someone? Did the accused act without having given any thought to the

possibility of there being any such risk, or having [recognised] that there was some risk involved, nonetheless going on to take it? These are questions you pose to yourself as you try to determine whether this is an issue of manslaughter, which is a lesser offence than murder.”

[8] These directions were given in contrast to the authorities of **R v Clegg** [1995] 1 AC 482 and **Palmer v The Queen** [1971] AC 814. Those cases indicate that in circumstances, such as these, where the defence is self-defence, the defence would be a complete defence, or it would fail. There was no evidence in this case that would support the learned trial judge's direction about carelessness or reasonable necessity.

[9] Based on the above reasoning, the convictions cannot stand.

[10] Although the reason the convictions cannot be sustained is that there were errors by the learned trial judge in the directions given to the jury, there is no option of a retrial, as the appellants have already been acquitted of murder and, as has already been indicated, there is no evidence to base a direction concerning the offence of manslaughter.

[11] Accordingly, the orders are as follows:

1. The applications for leave to appeal convictions are granted.
2. The hearing of the applications is treated as the hearing of the appeals.
3. The appeals are allowed, the convictions for manslaughter are quashed and the respective sentences are set aside.
4. A judgment and verdict of acquittal is to be recorded in respect of the offence of manslaughter for each appellant.