JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 205/2003

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

R V. JERMAINE MCCAULSKY

Ravil Golding for the appellant

Caroline Williamson-Hay, Assistant Director of Public Prosecutions (Ag.) for the Crown

July 26, 27 and November 18, 2005

SMITH, J.A:

On the 4th November, 2003, the appellant, Jermaine McCaulsky was convicted of the murder of Randy Smith. The trial took place in the Home Circuit Court before Mrs. M. McIntosh, J and a jury. The appellant was sentenced to life imprisonment with a recommendation that he serve at least 25 years before becoming eligible for parole.

He sought and obtained leave to appeal against his conviction and sentence.

The Prosecution's case

Five witnesses testified on behalf of the prosecution. The prosecution's case rested on two planks –

(i) The oral declarations of the deceased tendered through the evidence of the deceased's siblings - Howard and Jermaine Smith.

(ii) The oral admissions of the appellant to Howard and Jermaine.

Howard Smith, a welder, lived with his common-law wife at 9 McDonald Lane, Kingston 13. The deceased Randy, also known as Christopher, was his elder brother and was a supervisor at Tank Weld Ltd. His younger brother Jermaine lived at McDonald Lane with their mother and the deceased. Their mother operated a small grocery shop at the square adjoining McDonald Lane. The appellant, McCaulsky, otherwise called "Waynie" and "Wild Dog", also lived at 11 McDonald Lane, which was described as a tenement yard.

On the 5th of February, 2002 at about 6:00 pm, Howard was sitting by the sidewalk outside his mother's shop. Jermaine was in the shop behind the counter. Someone ran to Howard and made a report. He in turn ran to his mother's gate. There he saw his brother Randy lying on the ground face down. He rolled him over and saw a hole "on the nipple" of his right breast from which blood was gushing. The deceased was clad in underpants only. Howard sat on the ground and cushioned the deceased's head in his lap. "Christopher, who shoot you?" Howard asked. "Howard, a Waynie shoot me up; Wild Dog shoot me," the deceased replied. His face was contorted in obvious pain and he

repeated the statement thrice. "Don't talk no more, just hold on". Howard advised. The deceased did not heed the advice. "Howard, Howard, whey mama deh, whey mama deh?" he asked. "Christopher, mama is not here mama is in the country", replied Howard. "Howard me a go dead yuh know, mi a go-dead", the deceased moaned. Howard, with the assistance of young Jermaine and another, placed the deceased in a van. The deceased was rushed to the Kingston Public Hospital. Howard, who was permitted to accompany his wounded brother into the emergency room, described what took place there in this way: "They start cut the side and push in hose to draw out the blood that was in his body". He said he was there for about an hour and left just after the doctor spoke to him. He next saw the body of his deceased brother at the post motem examination. He testified that he knew the appellant for over twenty three (23) years adding that "wi born and grow up."

In cross-examination he insisted that the deceased did tell him who shot him and did say that he was going to die. However he agreed that in a statement which he gave to the police on the night of the incident he did state: "I shouted out to Randy and said a who shoot you and he muttered 'Waynie'. He was groaning, but he did not say anything else." In re-examination when he was asked if he could explain the

difference between his evidence in court and the statement to the police he said:

> "Well you si tru' I did so frighten me head never deh on mi body, mi kind a frighten and kind a shock. Mi find out say certain things mi not going to remember at the time, later down I will have the whole thing in mi mind."

Jermaine Smith testified that at about 6:00 p.m. on the 5th February, 2005 he was in his mother's shop at 9 McDonald Lane, a little girl ran inside the shop and said to him "your bredda get shot". He hastily locked up the shop and rushed down the lane to his house. There he saw the deceased lying on the ground. Howard was there propping him up. He saw blood in the region of the chest. He heard the deceased say that "Wild Dog" shot him. The deceased was taken away. Jermaine went to the side of the house and there he saw the appellant "Wild Dog" whom he knew for over 20 years. The appellant had a gun in his hand. Jermaine said that he was "under a vibes" and he questioned the appellant. The following excerpt contains his evidence on this point.

"Q. What did you ask him?

A. Me ask him why him shoot me bredda Miss

Q. Did he answer?

A. Yes, miss

Q. What did he say?

A. Him said, "it dun happen already and me have fe live wid dat."

Q. Yes?

A. Then him seh" I nuh have nuh friend bout yah, but mi 13-shooter".

The witness explained that a 13 shooter is a gun. Then his evidence continued.

Q. After him sey ...'but him 13 shooter' what next happened?

A. Him seh if me waan call up him name, if me run inna ants hole him a go find me and kill me."

After the exchange the appellant left and the witness entered the deceased's house. The house was ransacked. Jermaine described it in this way. "When I went in de house, de house was wreck up like police came in and search it." He had been to the house about 20 minutes before the little girl brought him the sad news. And when he left the house to return to the shop it was not in that state. "Everything was fine and nice and all right," he said. The police was summoned and arrived shortly after.

During cross-examination counsel for the defence elicited from the witness that, contrary to his evidence at trial, he had in previous statements said that he himself had asked the deceased who shot him.

The witness also admitted to defence counsel that, contrary to his evidence, he did swear at the preliminary enquiry that, he knew the appellant for only 3 years and that they did not grow up together. He also agreed that the statement he gave to the police did not reflect his evidence that he saw the appellant with a gun. However, he insisted that he did tell the police that he saw the appellant with a gun in hand. He insisted that the appellant did say "him no have no friend but him 13 shooter and him dun shoot already him afe live with that" although it was not recorded in his statement to the police. He agreed that the statement he attributed to the appellant, namely"... if you ever call mi name you could a go in a ants hole me a go find you and kill you..." does not appear in the statement he gave to the police. He agreed that the appellant did say " a go the gun go off and shoot your brother" as is recorded in his statement.

Dr. Patricia Sinclair, a consultant pathologist performed the autopsy on the body of the deceased on the 14th February, 2002. The body of the deceased was identified by Ms. Inez Graham, an aunt of the deceased. The doctor's evidence was to the following effect. An entry wound measuring 1 cm in diameter was present on the right mid back about 4cms from the mid line. A marginal abrasion was present on the right side of the wound. No charring, tattooing or blackening was associated with the entry wound. A lacerated exit wound measuring 2 cms was

present on the right upper anterior chest just medial to the nipple. A sutured chest tube site was present on the right lower anterior chest wall.

The bullet passed through the 8th intercostal space with associated fracture of the upper margin of the 9th rib. The exit wound involved the 4th right intercostal space with fracture of upper margin of the 5th rib. The bullet passed through the right lung. In the doctor's opinion the cause of death was the gunshot wound to the right chest with injury to the right lung.

The absence of charring, tattooing or blackening indicates that the nozzle of the gun was not less than 21 inches away from the victim.

Detective Sgt. Carlos Bell testified that at about 8:00 p.m. on the 5th February, 2002, he got a report and went to the Kingston Public Hospital. There he saw and spoke with Howard Smith. From the hospital he went to the morgue where he saw and inspected the body of the deceased. From the morgue he went to Nos. 9 and 11 McDonald Lane. He said that there was a house at No. 9 and a tenement at No. 11. He entered one of the houses at No. 11. In a passage leading to a bedroom he saw what appeared to be bloodstains on the wall and on the concrete floor. He spoke with Howard and Jermaine and another person called "Welder". Jermaine was crying and appeared to be distraught.

On the 14th February, 2002, he attended the post mortem examination of the body of the deceased. The body was identified by Ms. Inez Graham to Dr. Patricia Sinclair.

Thereafter the conduct of the investigation was taken over by Det. Inspector Wentworth Buddoo. Inspector Buddoo told the Court that on the 23rd March, 2002 he went to the Duhaney Park cell block where he saw the appellant. He charged the appellant for the murder of Randy Smith. He said that upon caution the appellant said "Me no have nothing to say".

The Defence

The appellant made an unsworn statement. He told the Court: "At the time when my friend Randy Smith dead I was at my grandmother's stall selling. Like bout 7:30 when I come down I hear that Randy Smith get shot. I don't know anything bout Randy Smith's death, I am an innocent man."

Grounds of Appeal

Mr. Golding sought and obtained permission to argue two supplemental grounds of appeal namely:

1. The Learned Trial Judge did not adequately deal with the bit of evidence of the Crown Witness JERMAINE SMITH when he said that the appellant had said " a go the gun off".

2. The Learned Trial Judge did not adequately explain to the jury the effect of the aforementioned bit of evidence in relation to a verdict of manslaughter and failed to pose the following questions to the jury:

> "(a) Was the act of pointing the firearm by the appellant at the deceased intentional?
>
> (b) Was that act unlawful?
>
> (c) Was it an act which any reasonable person would realize was bound to subject the accused to the risk of physical harm albeit not necessarily serious harm?
>
> (c) Was that act the cause of death?"

What is stated above as two grounds really constitutes one ground and was so dealt with by counsel. The complaint of counsel for the appellant is that the learned trial judge did not explain to the jury how manslaughter could arise in the circumstances of the case. He further complained that the learned trial judge in reference to the words " a go the gun go off and shoot your brother" merely told the jury that she did not know how they were going to deal with them. He contended that the learned trial judge should have directed the jury that if they found as a fact that these words were used by the appellant or were in doubt about them they would show that the deceased's assailant did not intend or might not have intended to kill the deceased and could only be convicted of manslaughter. He urged that merely to tell the jury that if they found a lack of intention they could convict of manslaughter was not enough. He

relied on ***R.v Oral Lawrence*** SCCA No. 193 of 2002 delivered on December 19, 2003. He asked the court to substitute a verdict of manslaughter.

Mrs. Williamson-Hay, Assistant Director of Public Prosecutions, submitted that the directions of the learned trial judge when looked at as a whole were accurate and adequate. She contended that in the context of the medical evidence and the evidence of the appellant's conduct, the words "a go the gun go off" did not require the trial judge to leave manslaughter to the jury. She argued that the words appear tenuous and unconnected to any bit of evidence by which it could be supported to raise a defence. Counsel for the Crown referred to ***Evans Xavier v the State***, Privy Council Appeal No. 59 of 1997 delivered December 17,1998, ***Alexander Von Stork v the Queen,*** Privy Council Appeal No. 22 of 1991 delivered 28th February, 2000, ***Fazal Mohammed v The State*** [1990] 2 A.C. 320 and to ***R v Andre Jarrett*** SCCA No 130 of 2001 delivered March 4, 2003.

It is now the settled law that where there is evidence from which a jury could reasonably infer that a defence might be available, which has not been relied upon by the defence, such defence must be left to the jury. This is so even where such defence may be inconsistent with or weaken the force of the defence specifically relied on. However, there is no duty to leave to the jury defences which have not been relied on and which are fanciful and speculative. This principle was clearly enunciated

by their Lordships' Board in ***Evans Xavier v the State*** (supra) and ***Alexander Von Starck v The Queen*** (supra) and applied by this Court in many cases such as ***R. v. Andre Jarrett***(supra).

The question for the determination of this Court is whether the words " a go the gun go off..." were sufficient to raise an issue fit to be left to a jury. Mr. Golding is saying it is sufficient to raise the issue of accident. Mrs. Williamson-Hay is saying that they are tenuous and establish no evidential basis for any defence.

The term accident is often used in two senses namely :

(i) consequences due to some external agency over which the accused person had no control; and

(ii) unintended consequences of a voluntary act.

In (i) the accused person is not guilty of any criminal offence because there is no voluntary act or omission on his part.

In (ii) there is no criminal responsibility for the unintended consequences of conduct which is neither unlawful nor negligent. The corollary of (ii) is that an accused is criminally responsible for unintended consequences of conduct which is unlawful or negligent.

An example of unintended consequences of unlawful conduct is ***R.v. Bloomfield*** SCCA No. 49 of 1996 delivered February 19, 1997. In that case there was a struggle between B and the deceased. B used a gun to hit the deceased; the gun went off and killed the deceased. B was held

to have been properly convicted of manslaughter. Cases of motor car manslaughter are but instances of unintended consequences of conduct which amounts to criminal negligence.

The law was accurately stated by Humphries J, in ***R v Larkin*** [1943] 1All ER 217 at 219 in this way:

> "Perhaps it is as well that once more the proposition of law should be stated which has been stated for generations by judges and, so far as we are aware, never disputed or doubted. If a person is engaged in doing a lawful act, and in the course of doing that lawful act behaves so negligently as to cause the death of some other person, then it is for the jury to say, upon a consideration of whole of facts of the case, whether the negligence proved against the accused person amounts to manslaughter, and it is the duty of the presiding judge to tell them that it will not amount to manslaughter unless the negligence is of a very high degree; the expression most commonly used is unless it shows the accused to have been reckless as to the consequences of the act. That is where the act is lawful. Where the act which a person is engaged in performing is unlawful then, if at the same time it is a dangerous act, that is, an act which is likely to injure another person and quite inadvertently he causes the death of that other person by that act then he is guilty of manslaughter. If in doing that dangerous and unlawful act, he is doing an act which amounts to a felony he is guilty of murder, and he is equally guilty of murder if he does the act with the intention of causing grievous bodily harm to the person whom, in fact, he kills."

Mr. Golding did not and indeed could not properly argue that accident (in the sense of circumstances due to external agency over which the

appellant had no control) should have been left to the jury. The burden of his submissions, as we understand them, is that in relation to a verdict of manslaughter the learned judge should have posed the following questions to the jury:

(a) Was the act of pointing the firearm by the appellant at the deceased intentional?

(b) Was that act unlawful?

(c) Was it an act which any reasonable person would realize was bound to subject the deceased to the risk of physical harm albeit not necessarily serious harm?

(d) Was that act the cause of death – see ***R v Oral Lawrence*** (supra) at page 9.

In our judgment for this appeal to succeed this Court must be satisfied that 'accident', in the sense of the unintended consequences of an unlawful and dangerous act, arose on the evidence and that the directions of the trial judge were defective in that regard.

Before examining the main thrust of Mr. Golding's submissions we will refer to what was argued as ground one. Mr. Golding's first complaint was that the learned trial judge told the jury that she did not know how they were going to deal with the words " a go the gun go off and shoot your brother", instead of telling them that on the Crown's case the issue of lack of intention arose.

However, when the impugned directions are read in the context of what was said before there can be no doubt that the learned judge was not abdicating her duty. The context of the impugned statement is as follows (page 289):

> "It was put to him he did not see the accused man and he had no conversation with the accused man but it was put to him that in the statement the accused said
>
> 'A go me gun go off and shoot your brother.'
>
> I don't know how you going to resolve that, Madam Foreman and members of the jury because if he did not have a conversation, I don't know how the conversation took place. You must see what you make of it."

Clearly what the learned trial judge was alluding to is the obvious inconsistency of the defence's apparent acceptance of the witness' evidence that the appellant used those words and the suggestion that the appellant had no conversation with the witness.

We now return to the main issue. Did the learned trial judge treat adequately with the implication of the words "a go the gun go off...?"

In the general directions to the jury the learned judge defined the offence of murder. She told the jury that the prosecution must make them feel sure that the appellant fired the shot which caused the injury to the deceased and that the deceased died as a result of that injury. Further that the appellant must have acted voluntarily and deliberately.

She told the jury that one of the elements which the prosecution must prove is :

> "that the killing was without lawful excuse, that is to say, the killing was neither the result of accident nor as a result of the accused acting in self defence."

It does not appear that any other mention was made of "accident". In dealing with "intention" as an ingredient of the offence the learned judge said:

> "...The only practical way of proving a person's intention is to infer it from his words, or conduct or both. So, if you find, Madam Foreman and members of the jury that an individual pointed a loaded firearm at another individual and pulled the trigger and caused that injury to that individual, if you accept those facts what inference you draw from them? What intention do you think that person could have had?"

Towards the end of the summing up the learned judge, having been prompted by counsel for the Crown, revisited 'intention' in light of the words "a go the gun go off". The learned judge told the jury:

> "Madam Foreman and members of the jury if you accept that this was said that 'de gun go off and shoot mi bredda' that the accused said that to Jermaine Smith, then remember what I told you. That one ingredient to prove the charge of murder is intention. If the prosecution has failed to establish that intention existed or if you have a doubt that the intention existed then, it would be open to you to convict the accused of manslaughter because the lack of intention would reduce murder to manslaughter."

It is clear that the learned trial judge was of the view that the words " a go the gun go off..." were not sufficient to avail the appellant of the defence of accident in the sense that he was doing something unlawful and dangerous and the gun accidentally went off. The learned judge confined the relevance of the words to the specific intent required. In our view the learned trial judge was right.

As Mrs. Williamson-Hay submitted, the threshold of credibility although a low one in this context was not met. She referred to the following aspects of the evidence in support of her contention:

(i) The fatal injury was to the back of the deceased and was not inflicted at close range. The inference is that there was no struggle. She distinguished the instant case from the case of ***Lawrence*** (supra) where the injury was inflicted at close range.

(ii) The appellant admitted shooting the deceased while in possession of the gun which he called his "friend".

(iii) The admissions were made in the course of continued aggression and threats to kill the witness, Jermaine Smith, if he told the police.

The above factors, she argued, rendered "accident" incredible. In our judgment there is merit in the contention of counsel for the Crown. There is certainly not sufficient evidence to raise the defence of accident in the sense of "unintended consequences of conduct which was unlawful or negligent." There was certainly no sufficient evidential basis to justify the

judge leaving the issue of accident to the jury. A judge is only required to leave to the jury a defence, which was not relied on, when there was evidence on which a jury could reasonably infer that particular defence. The decision of the English Court of Appeal in ***R.v. Critchley*** [1982] Crim. L.R. 524 is instructive. In that case C, a drug taker was taken to hospital one night having been badly injured on the pavement below the window of his flat. Shortly, afterwards the police found in his flat a man who had been battered to death. C was charged with murder. He claimed to have no recollection of what had happened, but denied the killing. At the trial C's counsel in his final speech suggested that if the jury rejected C's denial, the evidence as a whole raised other defences such as self-defence. The judge directed the jury that self defence was not in issue. C was convicted and appealed on the ground that the judge's direction was wrong.

It was held, dismissing the appeal, that although there were circumstances in which a judge should leave to a jury a defence which was not the one put forward by the defendant, he should do so only, when there was evidence from which a jury could reasonably infer that the defendant acted in a way which provided a defence in law, for example, that he acted in self-defence or under provocation. The judge was under no duty to leave to a jury defences which were fanciful or

speculative. On the facts of the case there was not a sufficient evidential basis to justify the judge leaving the issues of self defence to the jury.

In the instant case the learned trial judge, in an attempt to secure the overall interests of justice in the resolution of the issues, told the jury that if they found that the words might have been said by the appellant they should consider whether in light of those words the prosecution had established beyond reasonable doubt that the appellant had the requisite intention. Further, if they entertained reasonable doubt, it was open to them to convict the accused of manslaughter because lack of intention would reduce murder to manslaughter.

We are of the view that the learned judge, in the circumstances, dealt adequately with the possible implication of the words in question. Accordingly, the appeal is dismissed. The conviction and sentence are affirmed. The sentence is to commence as of the 4th February, 2004.