JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 47/94

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

R. v. ARLENE HEMMINGS

Dorrell N. Wilcott for applicant

Audrey Clarke and Linda Wright
for Crown

July 22 and 31, 1996

PATTERSON, J.A.:

The applicant was convicted in the Trelawny Circuit Court on the 15th June, 1994, of the offence of non-capital murder and sentenced to imprisonment for life. She applied for leave to appeal against her conviction and sentence. Her application was carefully considered and refused by the court (Forte, Downer & Gordon, JJA) on the 14th November, 1994, and the reasons for the decision were embodied in a considered judgment given by Gordon, J.A. and delivered on the 12th December, 1994. Nevertheless, in the undoubted exercise of the powers conferred on His Excellency The Governor General by virtue of the provisions of section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act, the whole case was

referred to the court to be heard and determined as in the first case of an appeal by a person convicted.

Mr. Wilcott sought and obtained the leave of the court to argue four grounds in support of the application for leave to appeal which were not formulated and presented to the court when considering the first application. The first ground was in relation to the directions of the learned trial judge to the jury after they had retired and returned within twenty seven minutes without arriving at a verdict. This is what was said to them:

> "**HIS LORDSHIP**: I have to send you back. Let me tell you though that as far as the question of murder is concerned, the verdict as to whether or not the accused is guilty or not guilty of murder, all of you have to be agreed; you all have to be unanimous, whether guilty of murder or not guilty of murder. Do you understand? All of you have to be agreed on that, as to that. I will tell you that much at this stage, but as I tell you I can't take a verdict if you have not yet come to a decision. Very well.
> [Emphasis supplied]
>
> **FOREMAN**: Yes, sir.
>
> **HIS LORDSHIP**: Yes, send them back out."

After being out again for six minutes, the jury returned a unanimous verdict of guilty of murder.

It was contended that the learned trial judge's "insistence" on a unanimous verdict on the question of murder "amounted to coercion", and deprived the applicant of a fair chance of acquittal, or at best a conviction for manslaughter only. This contention was wholly without merit. The jury were

correctly directed as to the possible verdicts arising from the evidence. They were reminded of the evidence and instructed as to the circumstances that would give rise to the various verdicts. In the final charge to the jury, this is what was said:

> "So then, Members of the Jury, before you retire, just let me remind you again that the possible verdicts opened to you, that is to say, one of three verdicts, possible verdicts opened to you, either one, not guilty of any offence whatsoever; two, guilty of manslaughter by reason of lack of intention to kill or to inflict really serious bodily harm or by reason of provocation; and thirdly, the third alternative would be guilty of murder."

Those were full and correct directions, which could have left no doubt in the minds of the jury, as to what verdicts were open to them. It is undoubtedly the law that a unanimous verdict one way or the other on the question of murder is required of the jury, and where there is no such unanimity, the judge may direct the jury to retire for further consideration. If the judge is satisfied that there is no reasonable probability that the jury will arrive at a unanimous verdict on the question of murder, then he is empowered to discharge the jury at any time after they have retired for one hour. (See sections 44 & 45 of The Jury Act).

The other ground urged by Mr. Wilcott touched upon the credibility of the principal witness for the prosecution. It was said that because she was a rival girlfriend of the deceased, she was a person with an interest to serve and that the learned trial judge "failed to emphasize adequately to the jury in relation to her credibility". This is how the jury were directed:

> "...I will try to give you some assistance as to how you are to look at her evidence, but remember she told you that she was the girlfriend of the deceased, and that she was pregnant by him and she did tell you too that both she and the accused woman wanted the same man, Alphanso James.
>
> So they were competitors and were vying for the attentions of this man and affections of this man. So you have to take what Leonie Brown tells you with a critical eye. You have to examine her evidence very carefully, proceed with caution as you examine her evidence. Does she have an interest to serve as a former paramour of the deceased and whose child she has borne?
>
> You see, matters of credibility and reliability are entirely for you as judges of the facts; and you make assessments of the witnesses as they give evidence from the witness box."

In our view, the witness did not fall in one of the categories of suspected witnesses that places an obligation on the judge to give the jury specific directions or warning on the manner in which they should regard her evidence. The question of whether the witness was credit-worthy was left for the jury to decide and they were told to regard her evidence with proper caution. In our judgment, there was no further obligation on the judge.

A further submission was that the evidence of the prosecution witness that she heard someone say that the applicant had stabbed the deceased was hearsay, and accordingly, it should not have been admitted. The statement which the witness said was made by someone else is indeed hearsay, and the question is, was it properly admitted in evidence. It was a statement made by a bystander, implicating the applicant as the person who stabbed the deceased,

shortly after the witness had moved away from the applicant who was then confronting the deceased with a knife in hand. The evidence clearly showed that the statement could be regarded as an immediate report by a bystander of what was actually happening at the time, and was therefore admissible as part of the res gestae and an exception to the hearsay rule. (See ***Ratten v. R.*** [1972] A.C. 378 & ***R. v. Andrews (Donald)*** [1987] 1 All E.R. 513). There is no merit in this submission.

Counsel submitted that the learned trial judge erred in law in that he failed to direct the jury that where the evidence is capable of two possible interpretations, "they must adopt that interpretation which is favourable to the accused." He was quite unable to support his contention with authority, and we know of no such requirement in law or otherwise. A judge cannot usurp the functions of the jury by telling them what evidence to accept or what to reject; the jury are the sole judges of the facts. The learned judge's directions that counsel complained about were couched in the following manner:

> "Where the evidence is capable of two or more interpretations, my duty is to point out those possible interpretations to you, leaving it to you to see which one of them you are going to accept having regard to the totality of the evidence in the case. When I leave all the possible interpretations to you, what you do then is to look at the whole picture and then decide which interpretation you are going to accept and act upon it."

Those directions are impeccable and counsel's complaint is without merit.

The final attack on the summation of the learned trial judge concerned his directions on self defence. Self defence did not arise on the prosecution's case, but the applicant, in an unsworn statement, alluded to an attack on her by the deceased in circumstances where it was necessary for her to defend herself. We have examined the transcript of the summation with great care, and we are satisfied that the directions on self defence are unassailable. The contention that the jury were not told that self defence "will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not by way of self defence" is without foundation. This is how the learned judge directed the jury in that regard:

> "Let me also tell you, members of the jury, that if the prosecution have proved the death of the deceased, that the deceased died as a result of an act of the accused; that the accused's act was deliberate; that the accused intended to kill or to inflict serious bodily harm; even if you were to find those proved - well, if you find all those ingredients proved, the prosecution would have failed to prove their case against the accused for any offence whatsoever if they fail to prove that the killing was not done in necessary self defence, because if you were to conclude that the killing was done in necessary self defence, or might have been done in necessary self defence, then the accused must be acquitted; the accused would not be guilty of any offence at all."

In our judgment, the appeal was without merit, and accordingly we dismissed the appeal and confirmed the conviction and sentence of the court below.