JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 45/91

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. MICHAEL SALMON

Noel Edwards, Q.C. & Delroy Chuck for Appellant

Miss Carol Malcolm for Crown

February 3 & 24, 1992

GORDON, J.A.

On 19th April, 1991 the appellant was convicted in the Clarendon Circuit Court held at May Pen for the murder of Jimmy Lee Foster on the 23rd February, 1990. On the 3rd February, 1992 we treated the hearing of the application for leave to appeal as the hearing of the appeal, allowed the appeal, quashed the conviction, set aside the sentence and in the interest of justice ordered that the appellant be retried at the Clarendon Circuit Court at its next sitting which commences on 30th March, 1992.

We do not consider it desirable to recite the facts or deal in depth with the arguments raised on appeal save to say that after Mr. Chuck had read the grounds he relied on and added by leave a 6th ground, the Crown was called and Miss Malcolm conceded -

(1) That the learned trial judge misdirected the jury on the effect of the unsworn statement made by the appellant from the dock.

(2) He failed to give directions on provocation which was an issue apparent on the records.

The gravamen of the grounds of appeal was misdirection in law and non-direction. As to the latter this is covered by the Crown's admission of this defect. As to the former it is necessary to extract only two of the passages impugned. They appear at pages 49 & 51 - 52 of the transcript thus:

P. 49 "But, bear in mind that the unsworn statement has no probative value. All that means, it is not capable of proving anything that is not spoken to by the rest of the evidence in the case. Its positive potential effect is persuasive in that it may cause you to view the evidence of the prosecution - the evidence of the witnesses for the prosecution in a different light but it cannot prove anything. For instance, in that unsworn statement when reference is made to Charlie, that is, the deceased, flinging stone and hitting the accused in his neck, injuring him behind his ears, there is no proof of that. If Evans, in his cross-examination, had said, 'Yes, I saw that happened.' Then there would be evidence that you could consider but the unsworn statement of the accused, unsupported by the evidence of any witness, is not capable of proving that it is Charlie who inflicted that wound in the ears or the back of the ears of the accused. When I come to review the evidence in detail I will go further into that question of how to treat the unsworn statement made by the accused."

In our law an accused has a right to make an unsworn statement in his defence and in **Director of Public Prosecutions v. Leary Walker** [1974] 12 J.L.R. 1369 Lord Salmon directed at page 1373:

> "... 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."

These directions have been followed in these courts and when they are applied no challenge to a summing-up can be successful. Indeed in **R. v. Hart** 27 W.I.R. 27 this court held that it is unnecessary and often undesirable to categorize an unsworn statement as evidence or non-evidence. At page 234, Kerr J.A. said:

> "The judge in the ordinary case should follow the 'guidance' on the 'objective evidential value of an unsworn statement' as authoritatively advocated in **D.P.P. v. Walker** [1974] 1 WLR 1090 at 1096."

The statement of the accused is his defence and it is the jury's function in considering their verdict to give it "such weight as they may think it deserves." The statement may -

(a) convince them of the innocence of the accused, or

(b) cause them to doubt, in which case the defendant is entitled to an acquittal, or

(c) it may and sometimes does strengthen the case for the prosecution. **R. v. Lobell** [1957] 1 Q.B. 547.

The summing-up of the trial judge followed directions in **R. v. Coughlan** [1976] 64 Cr. App. Rep. 11. This case was reviewed and discussed in **R. v. Hart**. In Coughlan's case there were two accused and it was necessary to explain to the jury the effect of the unsworn statement of one accused upon the other. Kerr J.A. said at page 234:

> "In the ordinary case a trial judge should avoid the Couglan prescription, which, as worded seems to go too far and to go beyond the context of that case."

R. v. Coughlan and R. v. Hart were referred to by Morgan J.A. in **R. v. Margaret Channer** (unreported) S.C.C.A. 5/91 dated 4th December, 1991. The directions challenged in **R. v. Hart** and **R. v. Channer** are almost identical to those in the instant case. It cannot be over emphasized that the directions given in **Coughlan's** case were based on the particular circumstances of that case and Kerr J.A. in **Hart's** case clearly stated that these directions should not be followed in our courts. We wish to stress that the authoritative decisions of this court must be followed and applied in the lower courts.

The directions of the learned trial judge deprived the appellant of the consideration which the jury should have given to his stated defence and as such amounted to a misdirection in law. At pages 51-52 of the transcript he said:

> "Remember that self-defence becomes a live issue in the case when there is evidence, no matter how tenuous, which makes it an issue but simply by putting it as a suggestion which is rejected, does not necessarily make it an issue and simply by putting it by way of an unsworn statement that does not necessarily make it an issue and you will recall that when I was telling you about self-defence I used the words, 'A man who is attacked in circumstances where he honestly believes his life

> "to be in danger.' The word, 'honestly', is important. You can infer honesty - 'honestly believe' that somebody thinks that or considers that his life is in danger, if he comes up here and gives evidence on which he is cross-examined, but when you do that from the dock, you cannot properly infer any honest belief in the mind of the accused. ..." (emphasis supplied)

In this passage the trial judge again deprived the appellant of a fair consideration of his defence as contained in his statement. The trial judge misinterpreted the import of the observations of Lord Griffiths in **Solomon Beckford v. R** [1987] 3 All E.R. page 475 when he said at page 433:

> "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 in the witness box and subject it to the test of cross-examination.

It is still the province of the jury, not the judge, to consider the unsworn statement and give it such weight as they think it deserves.