

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 83/93

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

RASBERT TURNER

Howard Hamilton, Q.C. for the Appellant

Carl McDonald for the Crown

April 26, 27 and July 29, 1994

RATTRAY P.:

On the 27th of July 1993 in the Home Circuit Court, the appellant Rasbert Turner having been charged with murder was convicted of the offence of manslaughter in respect of the death of one Robert Cummings on the 10th of October 1992 and sentenced to imprisonment at hard labour for seven years.

Mr. Howard Hamilton, Q.C. on behalf of the appellant advanced two grounds of appeal which challenged:

- (a) the sufficiency of the judge's summing-up in failing:
 - (i) in the face of two different versions given by the Crown to give adequate directions as to how the jury should treat either of these two versions or both;
 - (ii) to give adequate directions as to the appellant applying proper and prudent procedure in having his firearm drawn and at the ready, in the context of a police officer approaching a motor vehicle with tinted windows in which there was a wanted suspect, as well as, other occupants;

- (b) the reasonableness of the jury's verdict in that manslaughter did not arise on the facts.

In respect of (a) above the factual evidence presented by the Crown through eye-witnesses can be divided into three segments:

- (i) the evidence of the witnesses Mickey Miller, a passenger in the car driven by the deceased, and Karlene Buckham, the girl-friend of the deceased, another passenger travelling in that car;
- (ii) the police witnesses, Constable Conrad Cummings and Constable Ancel Gordon, who gave evidence on behalf of the Crown and who were travelling in the police motor vehicle with the appellant;
- (iii) the witnesses Jabez Hall, the driver of a Volkswagon motor car, which was on the scene at the time of the incident, and Errol Cheeks, a bystander who was standing at his gate at the material time.

Of the first category of witnesses who were in the red Lada motor car being driven by the deceased, the witness Mickey Miller basically gave evidence that on the fatal occasion he was sitting in the back seat immediately behind the driver. A police car drove up from behind and coming from the police car over a sound system was a voice which said: "Red Lada motor car pull over". The driver of the Lada motor car obeyed. The police car stopped alongside the red Lada motor car and on the right of the Lada which was the driver's side. From what was said by the driver of the police car he and the driver of the red Lada motor car obviously knew each other. The appellant was in the back of the police car in plain clothes. The deceased put his head through the window of the Lada and spoke to the appellant. It was obvious that they knew each other. The Lada engine was still running. The appellant came from the police car and ordered the deceased out of the Lada motor car. The deceased said words to the effect that he had to park the car properly.

Miller testified that he turned to say something to the driver of the police car and as his head turned he heard an explosion. He spun around and saw a gun in the appellant Turner's hand. "Gun was pointing in the car to the driver of the red motor car". After the explosion the Lada car took off straight, got out of control, hit a V.W. bus and ran into a wall. The deceased was shot in the back of his head whilst he was still in the car, his body flung on the passenger's seat. The appellant tied the deceased's head with a towel.

In analysing the evidence of Miller in his summing-up to the jury the learned Trial Judge said:

"He was cross-examined - ... by Mr. Hamilton and he said that it was not true that when Turner came out of the police car he had a gun in his hands. You have to put that against the rest of the evidence. The police did not approach the Lada from the front of the police car. That is different. Again another conflict, because I think the two police officers mentioned about him coming around to the front of the car. They did not shout out, 'Switch off your engine and get out of the car.' He said he never 'reved' up the engine, that is, Cummings."

Karlene Buckham, the girlfriend of the deceased, was sitting in the front passenger seat of the Lada car. She substantially supports the evidence of Miller but was able to state that after the appellant ordered the deceased out of the car the appellant 'took one step back, pulled for his gun and fired'. After the gun was fired she felt the car moving and it burst through the wall.

Of the second category of witnesses, Constable Conrad Cummings gave evidence that he was on motor patrol duty in Montego Bay with Constable Ancel Gordon, driver of the police vehicle, when they saw Constable Turner the appellant on St. James Street in the vicinity of Woolworth in plain clothes standing up. The appellant stopped the police vehicle and told them that a man who was wanted had just passed in a red Lada motor car. He pointed out the red Lada. The appellant then came into the police car, sitting in the back. They started to follow the Lada, eventually catching up with it and hailed it on a loud speaker.

The Lada stopped parallel to the police car with its front door in line with the bumper of the police car. Constable Gordon spoke to the deceased, recognising him as someone he knew. The appellant ordered the deceased to turn off his engine and to come out of the car. Then came three simultaneous happenings; the appellant jumped backwards, the Lada moved off and the witness heard an explosion.

Constable Cummings' evidence did not assist the Court to ascertain how the gun came to be discharged and the immediate circumstances relevant to its discharge.

Constable Ancel Gordon goes into greater detail in his evidence. After the Lada stopped he states that the appellant ordered the deceased to shut off the engine and come out of the car.

Constable Gordon knew the deceased, the driver of the Lada as well as the witness Mickey Miller, the passenger in the back seat. At the time the Appellant gave the order to turn off the engine he had nothing in his hand. Gordon's evidence continued:

"I then heard the engine of the red lada rev up. Turner jumped backward. I heard an explosion. Turner was standing in front of the car as it jumped forward. Turner jumped in front of the car I was driving. Had clear view through my windshield. I then saw a firearm in his hand. Didn't see where he got it from".

It was after the explosion that Constable Gordon saw a firearm in the hand of the appellant. He did not see where the firearm came from..In cross-examination he said: "Had Turner not jumped the car would have hit him". This no doubt led the Trial Judge to leave self-defence to the jury in these words:

"I remarked about self-defence and the fact that if he was in apprehension of danger, of seeing a car coming straight at him and having reasonable apprehension of harm and hurt to himself, if under those circumstances, although he has nothing to prove, under those circumstances the gun was discharged, it would be a reasonable action. He was acting on his belief that he was in danger."

The verdict established that self-defence was rejected by the jury, so was the defence of accident left by the Trial Judge to the jury based upon the totality of the evidence including that of Detective Inspector Nigel Hart who told the Court that he took the gun from the appellant who then said: "Sarge me jump back and the gun go off."

As the Trial Judge pointed out to the jury:

"What the accused was saying as portrayed in cross-examination, and to be gathered elsewhere, is that the car was coming or the car moved off and he jumped back and the gun went off."

There was evidence before the jury which must have been taken into account, that of Detective Sergeant Lambert Scarlet as related by the Trial Judge in the summing-up:

"... the minumum amount of pressure, double action, to discharge this fire-arm would be eight pounds. ...He said jumping back, the gun couldn't go off. The trigger must be fully pressed for the gun to go off on single or double action. ...The trigger had to be pressed whether deliberate or accidental."

To Defence Counsel, Mr. Hamilton, Q.C., the witness said:

"The finger on the trigger and he jumped back, the gun could go off. ... If finger on the trigger and cocked, gun could go off."

In the third category of eye-witnesses was Jabez Hall, the driver of the V.W. motor vehicle who was coming in the opposite direction when he came upon the police vehicle and the Lada in the road both side by side coming to a stop. He heard the appellant say to the driver of the Lada: "You nun hear me sey to stop the car, sah". The Lada car was crawling forward while the appellant spoke those words. The appellant who was at the driver's window of the Lada, then went to his waist as demonstrated by the witness Jabez Hall. The Appellant pulled a gun, pointed in the direction of the driver's window of the Lada car which was about an arm's length away. Jabez Hall heard an explosion. At the time of the explosion the Lada car was still crawling, then the Lada started moving fast towards his direction. The right side of the Lada hit the right side of the V.W. motor car and ended up into a wall. The witness Jabez Hall said that it was after the Lada moved off that he heard an explosion.

There is also the evidence of Errol Cheeks, a bystander, who was at his gate. He gave evidence of seeing the radio car come up, the Lada pulled over and "Turner was talking to the driver of the Lada; see Mr. Turner pull gun and shoot driver in his head".

In considering the sufficiency of the Judge's summing-up on the state of the evidence given by the police witnesses, and the civilian witnesses, the Trial Judge directed the jury how to treat discrepancies in the evidence of a witness and between witnesses and also their right to determine what evidence to accept or reject. He said:

"You must decide what evidence you are going to accept and what evidence you reject. You may accept a part of a witness's evidence and reject the rest. You may accept the whole of a witness's evidence, or if you are satisfied that the witness is an untruthful witness, you may reject the whole of the evidence.

As Crown Counsel mentioned to you, you can take this part and say, 'I believe this part, I don't believe this part. I accept this, I reject this.' This is your right; that is your duty."

We can therefore find no merit in the submission that the directions to the Jury by the Trial Judge as to how the Jury should assess the evidence was in any way inadequate.

The other aspect of Mr. Hamilton's submission relates to how the Trial Judge dealt or failed to deal with the evidence of Detective Inspector Nigel Hart. The Detective Inspector was cross-examined by Mr. Hamilton and the judge summed up as follows:

"And he was questioned as to the proper or prudent procedure when suspect is in a car, tinted window, whether it would be a prudent thing to have a firearm in hand."

At this stage the Trial Judge made no comment on this.

Mr. Hamilton complains on the following ground:

"The Learned Trial Judge failed adequately to direct the Jury on the vital issue as to whether the action of the Appellant, as a Police Officer in approaching a motor vehicle, with tinted windows in which there was a wanted suspect, as well as other occupants applied proper and prudent Police procedure in having his firearm drawn and at the ready."

We have been provided with a copy of Mr. Hamilton's cross-examination of Detective Inspector Nigel Hart in his regard as follows:

"Q: Now, sir, is there a prescribed, trained method for a police officer to approach a suspect vehicle? What I mean by 'suspect vehicle' is a vehicle in which he has reason to suspect that there may be wanted persons in that vehicle.

A: A vehicle?

Q: I am dealing now with a vehicle.

A: Yes, sir.

Q: Is the procedure first of all that he should upon coming up to the vehicle within earshot, inform the driver to switch off the engine?

A: Well it depends on the type ...

HIS LORDSHIP: This is cross-examination, but - because I am wondering where ...

MR. HAMILTON: I am just establishing what the proper procedure is, the proper approach by the police.

HIS LORDSHIP: I am wondering why it was not asked of Constable Gordon or ...

MR. HAMILTON: From the Inspector I would get what the proper procedure is not how ...

HIS LORDSHIP: I am trying to see if it will assist us in light of the evidence.

Q: I want to know if what he did was the proper procedure if you were to, here, approach a suspect in a vehicle. To switch off the engine was a proper procedure?

A: That would be perfectly correct.

Q: Would it be also proper procedure to approach that vehicle with a firearm in his hand?

A: If he envisage any danger from the people in the vehicle.

Q: If he - it is a judgmental thing? He must be the one to judge the situation as he approaches?

A: If he thinks he is in danger of the people in the vehicle.

Q: And if you were here - the vehicle to be approached was dark, tinted windows, that you could not see the identity of the passengers, would that be proper procedure to approach it with a gun in your hand?

A: In that scenario, proper procedure with your firearm in your hands.

"HIS LORDSHIP: And if it wasn't done that way, would there be anything wrong?

WITNESS: If nothing happens, M'Lord, say, an attack by anybody in the car? There wouldn't be anything too wrong.

MR. HAMILTON: If nothing happened?

HIS LORDSHIP: I am thinking of two words, 'proper' and 'prudent'.

MR. HAMILTON: I accept your Lordship ...

Q: You heard what his Lordship amendment is? His Lordship has amended it to be 'prudent'. Do you think it would be prudent to approach a vehicle with dark windows ...

A: If he feels he may be attacked, then I think it is prudent to have his firearm ready.

Q: And in your experience, are you aware of police officers having been gunned down by not being so prudent?

A: If approaching vehicles?

Q: You want me to remind you ...

A: Police officers have been gunned down even with their guns in their hands".

There was in our view no evidence at all that the police officer, the appellant, in approaching the motor vehicle with tinted windows in which there was a wanted suspect approached it with his firearm drawn and at the ready. That evidence came neither from the police witnesses nor from the civilian witnesses in the red Lada motor car nor from any of the other eye-witnesses.

The evidence of Constable Cummings and Constable Gordon which the appellant avers in his unsworn statement that he accepts as true, nowhere supports an allegation that the appellant approached the Lada motor vehicle having his firearm drawn and at the ready. Constable Cummings' evidence is that after hearing the explosion he saw the gun in the appellant's hand. Constable Gordon's evidence is also to that effect. He did not see where the appellant got the firearm from.

Mickey Miller's evidence is that he saw the gun in the appellant's hand after the explosion. Karlene Buckham as earlier pointed out stated that after ordering the deceased out of the car the appellant "took one step back, pulled for his gun and fired". Jabez Hall supports the evidence of Karlene Buckham and so does Errol Cheeks. The statement made to Detective Inspector Nigel Hart: "Sarge me jump back and the gun go off" does not refer to any prudent approach of the car by the appellant with gun in hand.

The issue is raised in the unsworn statement of the appellant, but even in that statement he did not say that he felt himself in any danger. It was in cross-examination during Detective Inspector Hart's evidence that it was sought to explore the question of a prudent approach to the car in terms of police procedure.

We therefore have to examine the unsworn statement dealt with by the Trial Judge as follows:

"He told you that his name is Rasbert Turner, Constable, member of the Jamaica Constabulary Force at Montego Bay. He has five years service, and remember he said what Sergeant Bowen, Constable Gordon and Constable Cummings said is the truth. 'When I alighted from the right of the radio car they may not have seen that I drew my service revolver. I cocked it and had my finger on the trigger guard; I only did this because I was approaching a car in which I recognized that there was a suspect in the car; rear windows of the car were dark, tinted, and were up. I was so frightened, the only thing I could do, I jumped back when the car come up at me'."

The Trial Judge continued:

"The comment was made by the crown that one would have expected, even in a statement, to tell you how it went, but from what I read here, he has told you that what those witnesses said is true. If there is a variation between them you will have to decide what you make of it. He hasn't got to prove anything, but, you see, these are the crown witnesses, but they have given you a statement. It's a narrative, if I may say so, with no discredit to the statement, that doesn't say too much. It is more significant for what it doesn't say than what it says, but I tell you how you are to regard a statement. You attach to it such weight as you think fit in deciding whether the crown has established the guilt

"of the accused so that you feel sure about it. 'I was so frightened, the only thing I could do I jumped back when the car came up at me.' Herein you can see and detect and read into, self-defence, accident. As I say it is not sworn statement, but you attach what weight you think to it. ...

He went on to say a report was made that the then driver of the car was wanted for obtaining credit by fraud. Complainant gave his name as Nelson Jones".

One further comment was made by the Judge on this aspect of the matter as follows:

"You would ask yourselves, was it unlawful to approach the car with gun in hand?"

The acceptance or rejection of what was said in the unsworn statement is a matter for the jury. They were properly directed to give it such weight as they deemed fit although not having the character of sworn evidence. They would have appreciated that the version given by the appellant as to approaching the car with gun in hand was not supported by any evidence given by the witnesses. It was for the jury to determine what was prudent and what was not, taking into account the evidence as well as the unsworn statement.

We find it necessary to say however, that it must depend upon the particular circumstances at the particular time as to whether a police officer in approaching a motor car which had tinted glasses is acting prudently by having his firearm drawn at the ready. The suspect in this motor car, an identified person, was not anyone wanted by the police for a violent act or anyone in whom there would be a suspicion in the mind of the approaching policeman that he could be dangerous. The circumstances did not disclose factors upon which a danger would be reasonably apprehended. The car was being approached because there was some question that someone in the car was required in order to investigate an allegation of obtaining credit by fraud. The appellant did not say that he approached the car with weapon drawn because he felt there was danger against which he had to protect himself.

On the state of the evidence as well as the content of the unsworn statement the Trial Judge dealt adequately with this aspect of the matter.

We now address the first ground put forward by the appellant that the verdict is unreasonable in that manslaughter was left to the jury although it did not arise on the facts. The Trial Judge summed up on manslaughter as follows:

"I will tell you how manslaughter arises if it is by reason of gross negligence. Because if a person points a loaded gun, and I should add, a policeman at that, at the head of a person, knows the gun is loaded, points it at the head, and the gun goes off, that would be gross negligence, and in my view that would reduce the charge from murder to manslaughter.

If there was gross negligence in the way the accused handled the firearm that day out there, recklessly, in a manner that is not showing due regard to safety. Load the firearm, some witnesses say points it at the head of the deceased, that would be gross negligence. That would be a reckless act, and although it would not carry the intention as I gave you in the charge of murder, it would reduce the offence of murder to manslaughter. It would be gross negligence".

We consider this a proper direction on the relevant material which was before the jury. We do not agree therefore that the verdict of manslaughter is unreasonable.

The appeal is therefore dismissed and the conviction and sentence affirmed.