[2010] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 106 & 117/2008

BEFORE: **THE HON. MR JUSTICE PANTON, P.**
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

EMILIO BECKFORD
KADETT BROWN v R

Miss Audrey Clarke for the appellant Beckford

Delano Harrison, Q.C. for the appellant Brown

Miss Kamar Henry and Mrs Andrea Martin Swaby for the Crown

6, 7 and 21 May 2010

BROOKS, J.A. (Ag.)

[1] On 10 July 2008 the appellants Emillio Beckford and Kadett Brown were convicted of murder in the Circuit Court for the parish of Saint Elizabeth. Each man was sentenced to imprisonment for life and specific periods were set before parole became available. Their respective applications for leave to appeal the convictions and sentences found favour with a single judge of this court and they now pursue the appeals before the court.

The prosecution's case

[2] The appellants do not contest the events leading to the death of Mr Kevin Watson; the victim of the offence. They, however, deny being present at the time of its commission. The eyewitnesses to the event testified that on 23 April 2006 at about 2:00 a.m., a masked man, with a firearm in hand, interrupted a game of dominoes being played at a bar at Cornwall District, Saint Elizabeth. The intruder asserted that he was not going to kill anyone. He, however, demanded money and their cellular telephones from the five men there gathered, including Mr Watson. All complied, except for one, who had neither money nor telephone.

[3] Thereafter, the gunman pointed the handgun at the forehead of Mr Watson and asked Mr Watson why he was looking at the gun. After a very brief exchange of words the gun was discharged, wounding Mr Watson to the head. The gun was then turned on another member of the gathering and he was shot twice. The weapon was, thereafter, turned on a third man, Joseph Atkinson, and he was shot twice. Mr Atkinson, however, struggled with the attacker, who then called for help. An accomplice of the gunman, also masked, entered the room and used a knife, with which he was armed, to attack and injure Mr Atkinson. Eventually Mr Atkinson was able to escape. His attackers then fled. All three victims of the attack were taken to the Black River Public Hospital

where Mr Watson died as a result of the gunshot wound to his head. The other two were treated for their injuries.

[4] The following day, Monday, 24 April 2006, Ms Claudia Thompson took her son, the appellant Kadett Brown, to the Lacovia Police Station. There he was turned over to the police. On the Crown's case, she is said to have told Detective Corporal Carty that Mr Brown had confessed to her that he had killed Watson. Corporal Carty is said to have cautioned Mr Brown, who expressed remorse for what had occurred, sought forgiveness and agreed to give a statement.

[5] Later that day, Corporal Carty, in the presence of a Justice of the Peace, again cautioned Mr Brown and thereafter recorded, in writing, a statement given by Mr Brown. In the statement, Mr Brown gave an account of the events at the bar. The relevant part, for these purposes, (at page 153 of the transcript) states:

> "…[The accomplice] have a gun, he give it to me. He said we a go rob di bar and I go wid him in the bar. I take the cash from some man, **den di gun go off and hit dem**, [the accomplice] run and leave me and mi run wid di gun in the bushes. Him ring mi phone and we meet up in the bushes. [The accomplice] take the gun and from there, I go home and I am so sorry about what happen…." (Emphasis supplied)

A question and answer session, under caution and in the presence of the same Justice of the Peace, immediately followed the taking of the

statement. It too was recorded in writing. Among the questions and answers were the following:

> "Question 21 –– in the same statement that you gave the police on Monday the 24.04.06, did you say the gun go off and hit them?
> Answer – yes.
> Question 22 –– what do you mean by the gun go off and hit them?
> Answer – **it just go off**.
> Question 23 – did you squeeze the trigger?
> Answer – **mi hand just touch it**." (Emphasis supplied) (Page 156 of the transcript)

[6] On 27 April 2006, Corporal Carty went to Reading District in Saint Elizabeth where he accosted the appellant, Mr Emilio Beckford, whom he did not know before, but who was pointed out to him. Corporal Carty says that he cautioned Mr Beckford and told him that he was a suspect in the murder of Kevin Watson. Mr Beckford's response was "Mi nuh know nutten weh yuh a talk "bout."

[7] He took Mr Beckford to the Lacovia Police Station where, without any further caution, he asked Mr Beckford "if he knew one Kadett Brown". Mr Beckford's reply, according to Corporal Carty was, "A Kadett shot di man dem". Corporal Carty asked further questions:

> "I asked him if he was there and he replied, 'Yes, but me never do nutten'.
>
> I asked him what he did with the gun. He replied 'Mi gi it back to Preacher'. "

The case for the defence

[8] At the trial, both appellants gave unsworn statements. Both denied having given any statements to the police. Ms Thompson testified, denying that she had said that Mr Brown had confessed to her. In addition, Mr Beckford specifically denied knowledge of the murder; he said on this point, "I did not go anywhere that night".

Analysis of Mr Beckford's case

[9] Miss Clarke, for Mr Beckford, argued that Mr Beckford's conviction should be quashed because the only evidence against him was the evidence of Detective Corporal Carty who said that Mr Beckford had made a statement in which he admitted to being present at the time of the shooting. The absence of the caution was, according to Miss Clarke, fatal to the Crown's case. In her written submissions, Miss Clarke said (in part):

> "…The prosecution in relying on the statements which the Investigator testified were made by the Appellant and links him to the commission of the offence, failed to call evidence of the circumstance (sic) of the statement being made and which would satisfy the requirement of proof that the circumstances were not oppressive."

[10] The representatives for the Crown, before us, conceded that Mr Beckford's conviction could not be properly upheld. They made some criticisms of the manner in which the learned trial judge directed the jury

in respect of Mr Beckford's oral statements. In their written submissions, learned Crown Counsel also agreed that:

> "…the Crown [failed] to adduce evidence of the circumstances under which the statements were made…so as to discharge their burden, that is, that they were freely and fairly obtained…[this] rendered the verdict unsafe and amounted to a miscarriage of justice."

[11] In ***Ibrahim v R*** [1914] AC 599, at page 609, the Privy Council, in an appeal from Hong Kong, stated:

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

This passage has been cited with approval in a number of judgments of this court. Included in that number is the case of ***R v Kevin Simmonds*** SCCA 198/2000 (delivered July 31, 2002). In ***Simmonds*** this court said, at page 17 of the judgment, "[t]his principle [cited in ***Ibrahim***] was applied in ***Ajodha v The State*** [1981] 73 Cr. App. R. 129, and consistently followed in our courts". Lord Hailsham in ***Director of Public Prosecutions v Ping*** [1976] AC 574 at page 597 has suggested that the word 'exercised', as used in the passage cited from ***Ibrahim,*** is probably a misreading for 'excited'.

[12] We agree with Miss Clarke that, in the instant case, the evidence concerning the statements, said to have been made by Mr Beckford at the police station, was inadmissible. There was no evidence led by the prosecution to demonstrate that the statements were free and voluntary and that they were made without threat, violence or the promise of favour. These statements proved to be the only connection between him and the offences committed.

[13] There was, therefore, no evidence to justify Mr Beckford being called upon to state his defence. His conviction must, therefore, be quashed, the sentence set aside and a judgment and verdict of acquittal entered.

Analysis of Mr Brown's case

[14] Learned Queen's Counsel, Mr Harrison, argued, with leave, two supplementary grounds of appeal. We shall assess them in turn.

Ground 1:

"By directing the jury to consider, in relation to the Appellant's case, the defence of alibi, neither relied on by the Appellant nor arising in any material in the trial, in his charge the learned trial judge must have so confused the jury as to have occasioned, by their verdict, a substantial miscarriage of justice…"

[15] Although the appellant Mr Brown, in his unsworn statement, merely denied having made any confession or given any statement to the police, the learned trial judge, at the invitation of the learned prosecuting

counsel, gave directions to the jury on the defence of alibi. The prosecutor's rationale for the invitation was that, "they are both saying we were not there, we did not do it". The learned trial judge gave the following directions, (which are recorded at pages 348-9 of the transcript):

> "Now, the accused, Kadett Brown, he give (sic) an unsworn statement and it is a denial that he gave that statement at all, and implicit in that denial is the fact that he is saying that he was not there when the murder was committed up by Cornwall District. Where an accused does that, this is called an alibi, when a person says that he was not there, that is alibi and when an accused [raises] the defence of an alibi direct (sic) or indirectly, that person does not assume any burden of proving the alibi, it is the prosecution that must disprove it. If the prosecution disprove it, if you believe the evidence when they said the accused was there. So in this trial, if you believe the caution statement, then that caution statement would disprove the alibi and it is for you to decide that..."

[16] Mr Harrison, QC submitted that such a direction was unnecessary and confusing to the jury. He cited, in support, ***Roberts and Wiltshire v R*** SCCA Nos. 37 and 38/2000 (delivered November 15, 2001).

[17] In ***Roberts and Wiltshire,*** this court held "that a trial judge is only required to give a direction on the defence of alibi where there is evidence that the defendant was at some other particular place or area at the material time. **Evidence which merely states that he was not at the place where the offence was committed does not raise the defence of**

alibi". (Emphasis supplied) That quotation may be found at page 9 of the judgment.

[18] The direction in ***Roberts and Wiltshire*** arose from a criticism that a specific direction on alibi should have been given although the accused had only made a general denial of presence at the time of the offence. The ruling in that case does not preclude the direction on alibi being given, where such a general denial is made. We find that the direction may be given, in an appropriate case, to emphasise the defence. The instant case was one such.

[19] In the instant case, we agree with Mr Harrison that the direction on alibi, given by the learned trial judge, was perhaps, unnecessary. Mr Brown did not speak to his whereabouts at the relevant time and, for his part, Mr Beckford merely stated, "I did not go anywhere that night". The defence of alibi did not, therefore, strictly speaking, arise. We, however, cannot agree that the direction could have been confusing to the jury. Indeed, the direction was consistent with, though perhaps over-generous to, the defence.

Ground 2:

"In the teeth of evidence from the Appellant's caution statement (Exhibit 1) that he did not himself intentionally discharge the material firearm (it "just go off"), the learned trial judge nonetheless directed the jury – twice – that, if they accepted the Appellant's caution statement, it would be open to them to find that it amounted to an "admission"/"confession" of

the murder of deceased, Kevin Watson. It is submitted that this was a misdirection which effectively deprived the Appellant of a verdict of guilty of the lesser offence of manslaughter…"

[20] In a very attractive argument, Mr Harrison, submitted that the evidence led by the prosecution's witnesses was not unequivocal as to the intention of the gunman. The witnesses stated that the intruder used the words "I not going to kill any of you tonight, yuh nuh". Mr Atkinson also testified that the gunman, "sey him not hurting nobody, him sey him nah do nobody nothing". In the context of those statements, submitted learned Queen's Counsel, the intention of the gunman was moot. The testimony of the witnesses, he says, did not refute Mr Brown's pleading of inadvertence, in his statements to the police.

[21] According to Mr Harrison, in light of all the material on the prosecution's case suggesting a lack of specific intention to kill, the learned trial judge ought to have left the offence of manslaughter for the consideration of the jury. He relied on the cases of ***R v George Jarrett*** (1963) 8 JLR 146 and ***R v Larkin*** [1943] 1 All ER 217, in support of his submissions.

[22] Miss Henry, for the Crown, with some degree of diffidence, submitted that the actions of the gunman, as described by the witnesses as to fact, belie any claim of inadvertence. Learned counsel submitted that pointing the firearm at Mr Watson's forehead and the subsequent

shooting of two other persons, demonstrated an intention to unlawfully cause serious injury. Therefore, Miss Henry submitted, manslaughter should not have been in the contemplation of the jury. She cited, in support, the case of ***Xavier v The State*** (1998) 57 WIR 343.

[23] In ***George Jarrett***, this court approved of a definition of circumstances where manslaughter may be the appropriate offence for which a person should be convicted. It cited, with approval, a quotation from ***R v Larkin***, mentioned above, which we shall deal with more fully hereafter.

In ***Xavier's*** case the headnote accurately encapsulates the ruling of the Privy Council:

> "Although in a criminal trial the trial judge must leave to the jury any possible defence, even if it is consistent with that put forward at the trial, the defence must cross the threshold of credibility."

Their Lordships accepted that the threshold is low but that it had not been reached in ***Xavier's*** case. They held that there was nothing to support the appellant's assertion in his cautioned statement that the gun had gone off accidentally. Their Lordships found that the trial judge had, correctly, specifically withdrawn the verdict of manslaughter from the jury's consideration.

[24] The principles in both ***R v Larkin*** and ***Xavier's*** case, were considered in a decision of this court in ***R v Jermaine McCaulsky*** SCCA No. 205/2003 (delivered November 18, 2005). In ***McCaulsky's*** case the appellant was convicted of murder. The victim had been shot in the back. Mr McCaulsky is alleged to have made a statement to one of the Crown's witnesses that, "a go the gun go off and shoot your brother". In his unsworn statement at the trial, he denied knowing anything about the killing and proffered an alibi. The complaint, on appeal, was that the learned trial judge, in directing the jury, did not adequately deal with the evidence concerning the statement that "a go the gun go off". The court was urged, on the basis of that failure, to quash the murder conviction and substitute a conviction for the offence of manslaughter.

[25] In addressing the issue, Smith, J.A. in delivering the judgment of the court, approved of the following quotation, taken from page 219 C of the judgment in ***R v Larkin*** (mentioned above):

> "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…**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…." (Emphasis supplied)

The importance of the principles cited in ***R v Larkin*** is that the nature of the act being done will determine whether a direction of manslaughter need be given to the jury.

[26] In ***McCaulsky***, the court opined that for the appeal to have succeeded it had to "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". There was no specific treatment of the defence of accident by the learned trial judge in that case. The court was of the view that, because of the nature of the injury and other factors in that case 'accident' was not a credible defence in that case.

[27] The learned judge in ***McCaulsky,*** in directing the jury, dealt with the question of 'intention' in the context of the statement, allegedly made by Mr McCaulsky. The learned judge is quoted, at page 15 of the judgment, as saying:

> "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 [the witness], 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 lack of intention would reduce murder to manslaughter."

[28] This court approved the judge's treatment of the matter of 'intention'. Smith, J.A. said, at page 16 of the judgment:

> "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 trial judge confined the relevance of the words to the specific intent required. In our view the learned trial judge was right."

According to the court, the learned trial judge was attempting to secure the overall interests of justice in the resolution of the issues with the direction to the jury that "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". That stated objective, we find, is consistent with the principle, cited in ***Xavier*** and re-stated in ***McCaulsky*** that "where there is evidence from which a jury could reasonably infer that a defence might be available, which has not been relied on by the defence, such defence must be left to the jury".

[29] In the instant case, the learned trial judge, in reference to Mr Beckford's case, spoke to the question of accident and spoke to the question of whether the act done was a voluntary and deliberate one. The learned trial judge said at pages 277-278 of the transcript:

> "Thirdly, the prosecution must prove that the killing was a voluntary and deliberate act, that it was not by accident. Now, I pause to say that you will have to consider that issue in this trial whether the killing of the deceased was a voluntary or a deliberate act. The reason is, if you accept the caution statement in relationship to Kadett Brown, there is a section in that caution statement where he said the gun went off and that would raise the issue of whether the killing of the deceased was done by him as a voluntary and deliberate act...you would have to consider…whether the prosecution has satisfied you on that point."

[30] The learned trial judge also addressed the issue of intention. He said at pages 278-279:

> "The prosecution must also prove that the accused intended to kill the deceased or to inflict really serious grievous bodily harm, not only that the act was done, but there was an intention to kill or to cause serious bodily harm…If there is an unlawful killing of a person without the intention to kill or to cause serious bodily harm, then the offence is not murder but manslaughter…."

[31] Having given those, as well as other, instructions on the issue of intention, the learned trial judge placed them in context. He made reference to the words said to have been used by the gunman on entering the bar where the domino game was in progress. He said, at page 280-281 of the transcript:

> "One aspect of the evidence given by the prosecution witnesses, both Mr. Hall and Mr. Joseph Atkinson, is that the person who came in with the gun at first said words to the effect that he is not going to harm anybody, even though those words were said, it would suggest that there was no intention to kill or to cause serious

> bodily harm. But, remember, when you are assessing the intention, you have to look at what was said, what was done and the surrounding circumstances."

[32] The learned judge then put those directions in the context of common design. It is in that context that he directed the jury that if they were in doubt or did not believe, that the scope of the common design extended beyond robbing the men in the bar, to killing or causing grievous bodily harm, then it was open to them to find Mr Beckford not guilty of murder but guilty of manslaughter. He however did not give to Mr Brown the benefit of his directions on the issues of accident and intention; it was either a conviction for murder or an acquittal in the case of Mr Brown.

[33] In our view, the learned trial judge, having given Mr Beckford the benefit of directions in respect of manslaughter, ought to have afforded Mr Brown a similar benefit. The question of the intention of the gunman was a matter for the jury.

[34] As in the case of **McCaulsky**, where the option of a conviction for manslaughter was left for the consideration of the jury, we find that, the combination of the words attributed to the appellant Brown, firstly, by the eyewitnesses and secondly, in his cautioned statements, made the issue of intention a live issue for the jury's consideration. It was for the jury to

juxtapose those statements against what they accepted occurred at the bar on that fateful night and thereby determine the issue of intention.

[35] We agree with learned Queen's Counsel that, Mr Brown having been deprived of the benefit of a direction concerning manslaughter, his conviction for murder must be quashed. The jury having, by their verdict, clearly accepted that he fired the shot which killed Mr Watson, there is no question of a verdict of acquittal being substituted. A verdict of manslaughter must be substituted. As a consequence of this finding, we are obliged to consider what would be an appropriate sentence.

Sentence

[36] Mr Brown had been convicted, by the jury, of an offence which attracted the ultimate penalty. The learned trial judge did not impose that penalty but instead, had imposed a sentence of life imprisonment. He had ordered that Mr Brown serve twenty-three years before becoming eligible for parole. The learned trial judge rightly considered the circumstances of the offence very serious. He pointed out that the nature of the weapon used, made it serious. He pointed out that pointing such a weapon could have serious consequences. The indication of remorse in Mr Brown's cautioned statement was also considered by the judge. There was no indication of any previous conviction and Mr Brown was 21 years old at the time of the commission of the offence.

[37] The appropriate sentence in this case must be considered against the background of the maximum penalty for manslaughter, being imprisonment for life (See section 9 of the Offences Against the Person Act) There is no gainsaying that the circumstances of this killing, in the context of a robbery and accompanied by a degree of arrogance, were particularly heinous. A sentence for the lesser offence of manslaughter should, however, be less onerous than that imposed for murder. Bearing all those issues in mind, but especially the manner in which this offence was committed, it is our view that a fairly long sentence of imprisonment must be imposed. Eighteen years imprisonment at hard labour would be appropriate in the circumstances.

[38] Based on the reasons set out above, it is ordered that the appeal of each appellant is granted, both convictions quashed and the sentences set aside. A judgment and verdict of acquittal is substituted for Mr Emilio Beckford and a conviction of manslaughter is substituted in the case of the appellant Kadett Brown and a sentence of eighteen years imprisonment at hard labour imposed on him. His sentence is to commence on 29 December 2008.