JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 161/2004

BEFORE: THE HON. MR. JUSTICE P. HARRISON, P
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

R v KEVIN GRANT

Mrs. Althea McBean and **Miss Latoya Stephenson** for appellant
Miss Tara Reid and **Miss Natalie Brooks** for the Crown

18th, 19th, 28th July and November 10, 2006

MARSH J.A. (Ag):

The appellant Kevin Grant was convicted in the Home Circuit Court on an indictment for murder of the offence of manslaughter, on the 16th day of July, 2004. He was sentenced to a term of nine (9) years imprisonment.

His application for leave to appeal against his conviction and sentence, was considered by the single judge and he was granted leave to appeal against conviction and sentence.

After hearing the submissions of counsel, the appeal was dismissed, conviction and sentence were affirmed and we ordered that his sentence should commence as from the 28th day of October, 2004.

At the time of delivering our judgment we promised to put our reasons in writing. This we now do.

The Prosecution's Case

On the 21st day of May, 2003, the appellant had an altercation with one Keisha Watkis, mother of his two children at the upper floor of an apartment at 37 Beckford Street, Kingston. They went downstairs to an asphalted yard where the altercation continued.

Janet Lawrence, mother of Keisha Watkis, intervened. Persons around them were telling them to "done the argument" but the altercation continued. Keisha Watkis threw a cup which hit the appellant and "burst" his head. She ran through the gate, while appellant and Janet Lawrence continued arguing at the gate.

Appellant, facing the deceased Janet Lawrence, took a knife from his pocket and Janet Lawrence got "stabbed to her chin and chest". All that she had in her hand at the time she received the stab was a handbag. She received an incised wound to the upper chest wall, one to her right chin and an incised wound to an area above the sternum. Death was due to a stab wound to the right side of her chest with injury to a major blood vessel leading to the heart.

Keisha Watkis, called to testify as a witness for the prosecution, departed from what she had previously stated. A successful application was made by the Crown for her to be treated as a hostile witness.

The Appellant's Case

The appellant testified that Keisha Watkis, the mother of his two children was using "dirty words" to him. She took up two bottles, broke one and hit him on his right shoulder. He chased her in the yard where there were some thirty (30) persons.

Janet Lawrence, Keisha's mother became involved in the argument and told him to stop beating her daughter or she would " make man kill him". He had turned and was walking away when he was hit by another bottle to his back. He ran towards Keisha Watkis and her mother, grabbed Watkis and hit her on her mouth which bled. He took his things from Keisha Watkis' room and placed them in his mother's room. He was going through the gate when he saw Janet Lawrence (also called Christine) at the gate with a group of five or six guys who attacked him with knives and other weapons such as a machete. She attacked him with a knife. He grabbed her hand and stabbed at her. His defence was self-defence.

The Grounds of Appeal

Learned Counsel for the appellant, Mrs. Althea McBean abandoned the grounds of appeal filed and sought leave to argue five supplemental grounds and further amend these grounds.

The first ground was couched in the following terms, namely that the verdict arrived at was unreasonable having regard to the evidence.

It was submitted that the two eyewitnesses for the Crown were thoroughly discredited when the several material discrepancies were taken into consideration. Since Keisha Watkis, the first Crown witness had been treated as hostile, then the learned trial judge had placed more weight on her evidence than it deserved. He had understated the manner in which the evidence should be treated. He left it open to the jury to place what weight they wished on it. Because the witness had been treated as "hostile" her evidence was of "less value". The jury was confused by the judge's handling of what the witness had said in her statement and what she had said in her evidence.

Dione Lawrence, the second Crown eyewitness had indicated that her view was impeded. She had an interest to serve. Mrs. McBean relied upon the statement of Carey J.A. at page 22 of ***Regina v Solomon Beckford*** S.C.C.A. 41/85 delivered on October 10, 1985.

> "The explanation given by the witness for the previous statements might be acceptable to the jury. But there may be other cases where no explanation is given or the explanation preferred, is so tenuous that no reasonable person could accept it, then a trial judge would be acting consistent with his responsibility to ensure a fair trial to direct the jury that the effect of the witness' evidence is negligible."

She further submitted that the explanations given by the witness in the instant case were tenuous and the learned trial judge should have directed the jury that her evidence was negligible and unreliable.

There was no merit in this complaint. The trial judge's directions on how the jury should treat a hostile witness, indicated that he must have had in his mind the directions given in ***Regina v Maw*** [1994] Criminal Law Report 841. There , it was held, inter alia:

> " If the witness, as in this case , chose to adopt and confirm some of the contents of his prior statement then to that extent what he said became part of his evidence and, subject to the jury assessing his credibility and reliability, it was capable of being accepted. The evidence was when he said in the witness box, not what he had said out of court. No significant error was made in this case in relation to that distinction. The judge directed the jury in that respect in relationship to the evidence of H and he did also, near the outset of his summing up, in relation to the evidence of C. However, he later blurred the distinction and tended to sum up on the basis that what was said by C in his statement, from which the judge read extensively, was to be treated as part of the evidence.
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> If a witness had been treated as hostile, and thereafter given evidence, it was necessary for the jury to consider whether he was a witness who should be treated as creditworthy at all, and they should be clearly directed on that point. The judge did not direct their attention to that question, nor did it appear he considered it himself. It was of fundamental importance for any tribunal to consider whether a witness who had given conflicting evidence was of any creditworthiness at all. It was not proper to go straight to the stage of considering which parts of the evidence were worthy of acceptance and which were to be rejected. If the judge considered the witness was of sufficient creditworthiness, he should give the jury a clear warning about the dangers involved in a witness who contradicted himself and that they must

> consider whether they could give any credence to such a witness. Only if they considered that they could, to go on to consider what part of his evidence they could accept."

At pages 8-10 of the transcript the learned trial judge dealt, in detail, with how to treat the evidence of a witness who had been treated as hostile.

He also adequately directed the jury as to what they should consider when assessing the evidence of Dione Lawrence, the other eyewitness for the Crown. This ground is without merit and therefore fails.

The second ground on which the conviction was challenged, accused the learned trial judge of misstating the evidence and by the summation and directions confusing the jury. Mrs. McBean submitted that there were several areas where the judge used the words "I think" rather than recount the evidence as given. He quoted appellant as saying he did not inflict the blow when what appellant did say was that he stabbed at her.

Counsel complained further that his directions on inferences were prolix and failed to assist the jury with what inferences should be drawn to determine if there was self-defence. The general directions, she further submitted, on inferences and self-defence were inadequate. She supported her contention by referring to the case of ***Regina v Anthony McCalla,*** S.C.C.A. 145/2002 delivered on 10th December, 2003.

The principle repeated in the latter case was earlier propounded by Scarman L.J. in ***R v. Wright*** [1974] 58 Criminal Appeal Reports 444 at page 452, and is stated as follows:

> "At the end of the day, when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the questions must be first of all, was there error, and secondly, if there was, was it significant error which might have misled the jury? If this Court has lurking doubt, it is its duty to quash the conviction as unsafe..."

That which counsel for the appellant considered a misquotation should be read along with other relevant areas of the summing-up. Advising the jury, the judge delivered himself thus:

> " If you accept it that they were prancing around in this hostile manner, you may well feel that any injury inflicted by him may have been done by him in self-defence."

Miss Brooks for the Crown argued that the judge did not misstate the evidence, nor were the jury misled. The appellant's case was adequately outlined to the jury and the jury was obviously not confused. The directions were in the circumstances adequate.

In our view the directions of the learned trial judge were adequate and we find no merit in this ground.

The third ground related to the inadequacy of the judge's directions on discrepancies but this ground was not pursued.

The fourth ground sought to impugn the trial judge's directions on how the jury should treat a hostile witness. Counsel's efforts in this regard consisted of a repetition of arguments she had mustered in support of the first ground, where inter alia, she challenged the judge's directions as to how to treat a hostile witness.

Miss Brooks for the Crown submitted in response that the judge had properly directed the jury on the particular facts at bar. She supported her contention by reference to paragraph 13 of the judgment of Cooke J.A. in ***Kayvon McPherson v Reginam*** S.C.C.A. No. 87/2004 delivered 7th April, 2006. This read as follows:

> "13. The directions to the jury pertaining to the treatment of the evidence of the hostile witness must be tailored to be in accordance with the comprehensive review of that evidence. The once common view that had been expoused in ***Golder*** (supra) that any evidence given by a hostile witness is to be disregarded has been subject to revision. In ***R v Christopher Parkes*** [1998] 28J.L.R. 47 the headnote which accurately reflects the *ratio decidendi* stated:
>
> **Held:**
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> (i) ...
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> (ii) There is no rule of law that where a witness is shown to have made a previous statement inconsistent with that made at the trial, the jury should be directed that evidence given at the trial should be regarded as unreliable. The explanation given by the witness for the previous statement might be acceptable to the jury but where no exception *(sic)* [explanation]

> is given the trial judge would be acting consistent with his responsibility to ensure a fair trial to direct a jury that the effect of the evidence is negligible.
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> (iii) Here the witness has given no evidence favourable to the defence. The trial judge was acting consistent with his duty to ensure a fair trial in telling the jury to disregard her evidence."

In the instant case, the trial judge was obliged to direct the jury as he did. The witness, though treated as hostile, had given evidence at trial which was favourable to the appellant.

The arguments advanced by the Crown in reply to this ground contains, in our view, considerable merit. This ground of appeal therefore fails.

In the fifth ground of appeal the appellant contended that the learned trial judge failed to give adequate or clear directions on the issue of self-defence. The judge's summing up and directions on self defence were impugned as being inadequate, unfair and uncertain. The salient facts of the defence were not referred to. Only once did the judge deal with the "imminence " of the attack on the appellant and no reference was made to the reasonableness of the appellant's action, whether reasonable force was used to repel attack.

In ***Regina v Lancelot Webley*** S.C.C.A. 84/89 delivered on 12th November, 1990. Rowe P stated :

> "He was entitled to have his account placed fairly before the jury. As the learned trial judge did not relate his general directions of self-defence to the defence offered, there was a material non-direction which vitiated the conviction."

Mrs. McBean bolstered her arguments with this statement.

It is our view that the learned trial judge, in the instant case, took great care to not only outline the principal defence of self-defence to the jury, but also to relate the directions on self-defence to the evidence in the case.

A perusal of pages 17-18 of the transcript will show that the judge's directions on self-defence especially with regard to the evidence adduced, were more than adequate.

We hold that this ground is without merit. Accordingly, as stated earlier, the appeal was dismissed and the conviction and sentence affirmed.