JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 59/99

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE COOKE, J.A. (Ag.)

REGINA v HUGH ANDERSON

Carrington Mahoney, Georgia Fraser and
Terrell Lawrence-Butler for Crown.

Leroy Equiano for Appellant.

July 20, 2000 and December 20, 2001

HARRISON, J.A.

This appellant was convicted at the Circuit Court Division of the Gun Court on March 11, 1999, of the offence of murder of one Everton Nembhard on March 28, 1997. He was sentenced to imprisonment for life and it was ordered that he be not eligible for parole before he had served thirteen (13) years.

The facts are that Donovan Williams o/c Cat, the principal witness for the prosecution was at a dance at Paradise Road in the parish of St Andrew, on March 28, 1997, when at about 11:45 p.m. the appellant also known as Carey called him. Going towards the appellant, he was 4 feet away when the appellant said to him "Cat, you and Baby Don calling mi name." The deceased, called Baby Don, was then about 15 yards away, also on the dance premises.

The appellant then pulled a gun from his pocket and said that he was going to kill him the witness, and Baby Don. The witness Williams said "What you a do," whereupon the appellant shot him in his left chest and he fell to the ground. The appellant then went to where the deceased, Baby Don was and fired 3 shots shooting him, the deceased, who fell to the ground. The witness was taken to the Kingston Public Hospital where he was admitted and remained for about one week. He made a report while there. Cross-examined, the witness said that when he was shot Baby Don was not behind him, nor was anyone else. He denied that the deceased was shot "... as the gun went off."

Dr. Ere Sesaiah, a forensic pathologist performed a postmortem examination on the body of Edward Nembhard o/c Baby Don and found a gunshot entry wound without gunpowder markings, to the right occipital area of the head i.e. the right back. The bullet travelled through the bone and into the brain, causing fracture and damage and lodged at the base of the brain. The cause of death was due to that gunshot wound.

Det. Cpl. Lenworth Mellis received a report on 28th March, 1997 and went to Paradise Road district, was told something and went thereafter to the Kingston Public Hospital. He saw the witness Williams, bleeding from a gunshot wound to his chest. He attended the post mortem examination performed on Nembhard by Dr. Sesaiah from whom he received the bullet removed from the body. He prepared warrants, and subsequently arrested the appellant for the murder of Everton Nembhard o/c Baby Don. When cautioned the appellant said,

"Boss, do anything you want do, mi already talk to mi lawyer." Cautioned further the appellant said:

> "Mi want fi si a who can give the evidence against me."

The appellant gave evidence in his defence. He said that at the dance he was called by the witness Donovan Williams and he went to him. He, the appellant then had a piece of chicken in his left hand and two bottles of Guinness drink in his right hand. Donovan Williams pulled a firearm from his pocket and holding the barrel he stretched the firearm towards the appellant. The handle was pointing toward the appellant and the muzzle towards the witness Williams. The appellant touched the said handle with some of the fingers of his right hand and the firearm was discharged. He heard an explosion, Donovan Williams fell and the appellant ran. The appellant denied that he threatened to shoot the witness Williams, and the deceased. He said that he did not shoot Williams nor the deceased. He did not have a gun that night nor did he fire a gun. He denied that he used the words, which he was alleged to have used to the police on arrest. In cross-examination the appellant denied, at first that he touched the firearm and then he admitted that he touched the handle. He said he did not grip the gun and then said he touched it with his fingers, but was unaware of how many. He said he did not know who pulled the trigger and then said that the trigger could have been pulled by him but it would have been by accident.

Two witnesses were called for the defence. The witness Junior Brown stated that he was at the dance and saw the witness Donovan Williams, Cat,

firing a gun "up in the air" while the music was playing and then he heard Cat say that he got shot. He did not see the deceased. He said that he left the dance at about 11.00 o'clock. The shooting of Donovan Williams and the deceased is alleged to have occurred at about 11.45 p.m. The other witness Joseph Edwards, the uncle of Donovan Williams said that at the dance he saw Donovan Williams firing shots in the air. He did not see the deceased at the dance. He then left and went outside.

Mr. Equiano for the appellant filed three grounds of appeal:

> "(a) The Learned Trial Judge direction on accident was insufficient.
>
> (b) The Learned Trial Judge misdirected the Jury on the significance of the Doctor, Ere Sesaiah's evidence.
>
> (c) The Learned Trial Judge gave no direction as to the good character of the Appellant."

Mr. Equiano abandoned ground (c) and therefore no arguments were advanced in support of it.

In respect of ground (a), Mr. Equiano seemed to suggest in argument that the directions by the learned trial judge to the jury on the defence of accident were insufficient without the necessary legal qualification and consequently the appellant was deprived of the opportunity to have a verdict of manslaughter returned in his favour. He relied on dicta in ***Woolmington v DPP*** [1935] AC 462. The jury, he submitted, was incorrectly directed to

consider only verdicts of guilty or not guilty of murder, and no other offence, to the prejudice of the appellant.

We observe that on the issue of accident, the learned trial judge directed the jury in this way, on page 134 of the record:

> "You will recall, Mr. Foreman and Members of the Jury, that what the defence is saying is that the gun went off by accident. Now, you will remember the details and I will come back to it at a later stage, but the defence is that Williams, the man called Cat, was handing this gun or showing this gun to the accused. Williams held the barrel of the gun and the handle was turned towards the accused. Somehow the gun went off but the accused is saying that he didn't pull the trigger, he didn't do any act to cause the gun to go off. He is saying that the gun, he doesn't know how the gun went off, and it must have been an accidental firing or that the gun went off accidentally.
>
> If you believe what the accused is saying in this respect or if you have any reasonable doubt as to whether or not that gun went off accidentally, then you are to find the accused not guilty. I repeat, if you believe him to the extent that you feel sure that it was an accidental discharge of that bullet or if there are any reasonable doubts as to whether or not it was accidental then you find him not guilty."

And at page 158:

> "How the gun went off? You heard what the accused said, that it went off accidentally. It amounts to what you believe, Mr. Foreman and Members of the Jury. He said that, and I quote, 'Cat went into his pocket and pulled out a gun, he stretched it to me, it fired off, I heard an explosion. The handle was turned to me and the mouth to him. When I stretched out for the gun, I heard the explosion.' I am quoting word for word what he said. He said, 'Someone was behind Cat, everybody was behind him his back was turned to the dance.'

> The inference there that the defence seeks you to draw, is that the deceased was somewhere in the region behind Donovan Williams, and when the gun went off and hit Donovan Williams, that that same bullet ricocheted and went to the deceased and that was what was responsible for the death. The doctor, I remind you, gave evidence that in his opinion that bullet didn't ricochet, but as I told you, you are entitled to disagree with the doctor, you are the judges of the facts of the case not the doctor and you are entitled to reject the doctor's opinion if you so wish."

By those directions the learned trial judge left the issue of accident to be considered by the jury as a defence open to the appellant on the charge of murder.

Accident in law is defined as any unintended or unexpected occurrence which has an adverse physical result or produces hurt ***(R. v. Kenneth Morris*** [1972] 56 Cr. App. R. 175). See also ***Sankar v The State*** [1990] 43 WIR 406.

A further refinement of the definition of accident is expressed in a decision of our Court of Appeal in ***R v Cedric Whittaker*** SCCA 155/89 delivered on September 28, 1990 (unreported). Carey, J.A., at p. 3, said:

> "Killing which arises by misadventure or accident occurs where a person is killed without intention in the doing of a lawful act without criminal negligence. The examples given in the books do not include circumstances of self defence. A typical illustration is where a man is at work with a hatchet, the head flies off and kills a bystander – 1 Hawk. C29 S2. Similarly, where a huntsman shooting at game kills another by accident – Fost 259."

Although the learned trial judge did not adhere to a precise definition of accident he did explain in simple terms the nature of the defence and its effect. The jury could not have failed to appreciate the issue to be considered in assessing the conduct of the appellant.

A trial judge in a criminal case has a duty to leave for the consideration of the jury any defence that fairly arises on the evidence irrespective of whether or not the accused is relying on it. In ***R. v. Muir*** [1995] 48 WIR 262, Patterson, J.A. (relying on ***R. v Bonnick*** [1977] 66 Cr. App. R 266) at page 265, said:

> "It is undoubtedly the duty of a judge to leave for the consideration of a jury all issues arising from the evidence, and to assist the jury by pointing to such evidence and dealing adequately with it. If, upon the evidence, a verdict of a lesser offence than that charged in the indictment becomes possible, it is the duty of the judge to point a jury to the evidence and leave the issue for their determination, although the defence may not have relied on it or even mentioned it. But, equally, a judge should leave an issue to a jury if, and only if, evidence has been adduced which is fit for their consideration. A jury should not be asked to speculate; their verdict must be based on the evidence in the case and the reasonable inferences that may be drawn from proved facts."

In the instant case, the case for the prosecution was a deliberate act of discharging a firearm by the appellant firstly into the chest of the witness Williams followed by the discharge of three shots, one of which caught the deceased in the back of the head, all preceded by a threat to kill both men. No defence of accident arose on the prosecution's case.

The evidence of the appellant before the jury ranged progressively from a denial that he gripped the firearm, to touching the handle with his fingers, to a denial that the trigger was pulled by him, and then "Yes sir, it could be pulled by me but by accident," after which he ran.

The jury would have been aware that this contact with the firearm, according to the appellant, was with his right hand which was then already engaged in gripping two bottles of Guinness drink.

Even assuming that the firearm was discharged in any of the various circumstances related by the appellant, it resulted in a single shot into the left chest of the witness Williams. There was absolutely no evidence, on the defence's case, that that single discharge of the firearm had any relevance to the bullet wound to the head of the deceased. It is significant that counsel for the defence in his cross-examination of Dr. Sesaiah, asked as his first question:

> "**Q.** Doctor, is it possible that the gunshot wound that you saw on the deceased, is it possible that if the bullet that caused that fatal blow, if that bullet had, from you use the term, 'glazed someone' before, is it possible that the bullet that caused the fatal blow to the deceased, could it be from a ricochet?"

Presumably, counsel meant "grazed" instead of "glazed". However, the evidence, on the contrary, was not that the bullet grazed the witness Williams and ricocheted, but that it entered his left chest. There was no suggestion to the witness Williams that the bullet merely "grazed him". Certainly, the real evidence of the scar to his chest which was shown to the jury would have

refuted that. The speculative theory advanced in the cross-examination of the said doctor in respect of the bullet, namely:

> "... it touches this gentleman, ricochet; could that same bullet, having ricochet cause the death of the deceased, is it possible?"

was answered by Dr. Sesaiah –

> "A. Based on my findings, that possibility is not there ... based on the amount of damage to the skull and brain, that's my opinion." (Emphasis mine)

On that evidence before the jury, the "gunshot wound" sustained by the deceased from the several shots fired, on the prosecution's case, had no relevance to the single discharge of the firearm, on the defence's case, which resulted in the gunshot wound to the witness Williams' chest resulting in his hospitalization for one week. There was no evidential link between the injury to the chest of the witness Williams and the bullet wound to the head of the deceased.

We agree with Mr. Mahoney that the defence did not advance any evidence of conduct on the appellant's part to amount to accident as opposed to misadventure, and therefore the jury would have been asked to speculate. There was an absence of any evidence of any act attributable to the conduct of the appellant which, could give rise to a consideration of criminal negligence. Therefore, there is no merit in the contention that the issue of lack of intent ought to have been placed before the jury, thereby leaving for their

determination whether the appellant was guilty of murder or manslaughter. No direction on manslaughter was appropriate, in the circumstances of this case.

Consequently it is our view that no defence of accident arose on these facts. In the circumstances the learned trial judge was over-generous to the appellant to leave the said defence to the jury for their consideration. There is no merit in this ground.

Counsel argued as his second ground:

> "The Learned Trial Judge misdirect (sic) the Jury on the significance of the Doctor, Eve Sesaiah's evidence."

Counsel urged that the learned trial judge initially cautioned that the question was properly for a ballistic expert, which Dr. Sesaiah was not, and ultimately directed the jury to give due consideration to his evidence instead of directing the jury to disregard it.

The learned trial judge directed the jury with these words:

> "There is one bit of evidence given by the doctor when the doctor was being cross-examined by Mr. Williams, he was asked about the bullet ricocheting from one place to another, and the doctor said that in his opinion it is not possible that the bullet could have ricocheted before hitting the deceased. In other words, he is saying that in his opinion, it was a direct hit from the gun; direct, didn't hit anything else first. But you as the judges of the facts of the case, even though the doctor is an expert you are free to accept or reject what the doctor said. But, of course, the doctor's opinion is something that we cannot take lightly."

Because the doctor based his opinion on " the amount of damage to the skull and brain..." to conclude that the injury was not caused by a bullet which had previously glanced off the body of another individual, we are of the view, that from his experience as a consultant forensic pathologist, he was competent to give that opinion. Despite that, our observations in respect of the first ground argued, apply similarly to this ground, in that the question was purely academic and unrelated to the actual evidence led before the jury. By leaving to the jury for consideration the evidence of the doctor in this respect the trial judge was more than fair to the appellant. This ground also fails.

For the above reasons the appeal is dismissed and the conviction and sentence are affirmed. Sentence for purposes of parole shall commence as from 11th June 1999.