JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 5/96

COR: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J. A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

ANDREW PERKINS v REGINAM

Paul Ashley for Appellant

Miss Vivene Hall and Dwight Reece for Crown

27th May & 17th June, 1996

BINGHAM, J A (AG.)

The appellant was tried in the Clarendon Circuit Court on 7th, 8th, 11th and 12th December, 1995 on an indictment for two counts of capital murder arising out of the deaths of Marian and William Burrell which occurred on the 20th March, 1994. He was convicted on both counts and sentenced to death.

On 27th May, having heard the arguments of learned counsel for the appellant Mr. Ashley, we dismissed the appeal and affirmed the convictions and sentence of death passed on the appellant.

The facts relied on by the prosecution were as follows:

The deceased William and Marian Burrell were husband and wife, persons estimated to be in their seventies and shopkeepers carrying on the business of operating a Shop and a Bar at premises in the square at Rock River in the parish of Clarendon. The Bar and Shop as well as their living quarters were all situated downstairs these premises.

On 20th March, 1994 sometime after midnight the appellant who had earlier that night secreted himself inside the business section of the premises awaiting the opportunity to steal money from that area came from his hiding place in the belief that the Burrells had retired to bed. The shop had by then been closed for business.

The appellant was surprised by Mrs. Burrell and proceeded to slash her neck and throat with a long knife which he had, killing her on the spot but not before she managed to scream out, the noise attracting the attention of her husband and a neighbour Narval Farquharson who had just returned to his premises from a wake.

Mr. Burrell came to his wife's assistance armed with a machete and in the process of advancing on the appellant, Mr. Burrell's throat was also slashed by the appellant with the knife inflicting a wound which severed the trachea and eventually proved equally fatal to him.

The appellant then managed to open the outer door of the shop and get away but not before he was recognized by Narval Farquharson who upon hearing the screams of Mrs. Burrell coming from the direction of the deceased's premises and on going outside into the square he saw the appellant who he knew before by the name "Mickey" running from the door of the shop. He described him as holding a big knife in his hand, the blade of which appeared bloody and who called out "watch it!" He then ran away down the Tommy King Road.

Shortly after the witness saw Mr. Burrell come from the rear of the premises with a machete. He observed that his throat was cut and bleeding. Mr. Burrell ran off in the direction of the Rock River Police Station. At the station he made a report to Corporal Clarence Campbell. He rendered first aid and took Mr. Burrell to the May Pen Hospital where he was admitted but died shortly afterwards. Corporal Campbell enquired from

Mr. Burrell as to "what was wrong with him?" The deceased replied "Is Mickey, the boy who used to work at George Brown shop kill Miss Granny and cut me throat."

The learned trial judge in his summation, in our view quite correctly treated this statement made by the deceased as part of the res gestae. There is no complaint being raised by counsel as to the directions by him in this regard.

Corporal Campbell on going to the murder scene later that morning observed Mrs. Burrell lying in the passage in the grocery section of the shop in a pool of blood. She had an incised wound to her throat which extended up to her neck and appeared dead. The shop was ransacked.

Later that morning the appellant was taken into custody by Detective Acting Corporal Allen of the Chapelton C.I.B. He was seen by the officer walking on the track at Simons District in the act of leaving the Rock River Area. He had a travelling bag containing men's clothing. He was taken to the Chapelton Police Station.

Two days later the appellant gave a cautioned statement to Detective Superintendent Levi Campbell, the officer in charge of Area 3 C.I.B. The salient parts of the statement read as follows:

> "Me get into the shop, sir, and hide off meself about after seven the Saturday evening and them close up the shop. Me deh deh for a period of time till me think sey Miss Granny and Mr. Burrell gone to bed. Soh me get up from where me was. Light was still on in the shop. Me did hide behind some bottles inside the front part of the shop. Soh when me come out me goh under the trap door and goh round the counter with intention to look a little change and come out but eventually me buck up on Miss Granny sitting round the counter. Me did have a black handle knife and eventually she get stabbed in her neck. Me a try file mek me way fi come out and eventually Mr. Burrell come down and see me same time. Him fling a sitting stool at

> me and him grab a cutlass and rush me and me hang on pan it and me cut him somewhere up a him neck. A don't know directly where it catch up a him neck and him drop in a the shop. Me pull the front door a the grocery part of the shop and me run out.
> Me never even get fi tek a ten cent. When me a run out me see couple somebody stand up over the other side of the road. Me didn't stop fi look a who cause me was making me way to get away eventually."

At the trial in his unsworn statement from the dock, there was a material departure from the account given in the cautioned statement. In that unsworn statement the appellant now said as related by the trial Judge in his summing-up:

> "... unfortunately he used to sell cocaine for a man and a woman who used to live in Rock River and they are now dead. He said that they made an agreement about a year and a half before he got into custody and there was a plan to meet at their business place on the 19th of March, 1994. It was on the 19th of March he left his home and he went to Rock River square to Mr and Mrs. Burrell, the deceased in this case. And he went to their business place about 9:00 p.m. When he got there they were about to close off their business, so Mrs. Burell invited him inside. She gave him a seat to sit down where no one could see him but she and her husband. She told him that she never got through with their business so he, Mr. Burell, told him to wait for a few minutes. He says unfortunately he was there for about two to two and a half hours until Mrs. Burell closed the other side of the business.
> So on his evidence, on his statement we have the shop now being closed. At that time he said it was only himself and the Burrells were inside the business place. He said all three of them came together to settle the amount of money that he was supposed to get.

> The accused man said he could not come to the level of the amount so it cause a quarrel between Mr. and Mrs. Burrell. Mr. Burrell wasn't intending to give him anything and so Mrs. Burrell never liked that. 'Mrs. Burrell always kind to people and never like to see disadvantage taken on anyone.' He said that Mr. Burrell got so irritable, he took his knife which was on the counter and stabbed at him, which ran through his lip and came through. Mrs. Burrell rushed towards to part, then Mr. Burrell made another lunge which he 'sighted' and it connected in Mrs. Burrell throat. The accused man said he got so nervous he picked up the same knife which fell on the ground. Then, Mr. Burrell rushed with a machete to chop off his head and so he 'shun' at him with the knife and eased him off. He made his way through the front door.
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> He said he went home, packed some clothes in a travelling bag and was going to the river. When he reached on a little narrow track he heard a voice shout, 'Mickey, stop there.' He turned around and he saw Constable Maitland and a guy who lived at Tanarchy District. He said Mr. Maitland held him and carried him where the other rest of police were, then they took him to Chapelton Police Station."

When the prosecution's case is examined, this was a powerful case of circumstantial evidence bolstered by the cautioned statement of the appellant which, if accepted by the jury as true was very cogent evidence going towards proving the guilt of the appellant on the charges laid in the indictment.

For the defence the unsworn statement of the appellant if believed by the jury would have exonerated the appellant from any responsibility for the killing of the deceased persons. In relation to Mrs. Burrell, her death in such circumstances would have been the result of an act done by her husband. As to Mr. Burrell his injury would

have been brought about from a blow or blows inflicted by the appellant while acting in self-defence thereby providing lawful justification for his actions.

It was against this background that learned counsel for the appellant sought and obtained leave to argue the following additional grounds of appeal which were:

> "1. That the learned trial judge erred in law by failing to direct the jury as to the manner in which they should treat the issues raised in the caution statement vis-a-vis those raised in the unsworn statement.
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> 2. That the learned trial judge erred in law by mis-directing the jury on the alternative verdict open to them.
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> 3. That the learned trial judge erred in law by failing to leave the issue of manslaughter for the consideration of the jury.
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> 4. That the learned trial judge erred in law by failing to indicate clearly the possible verdicts open to the jury on consideration of the evidence presented on each charge."

Ground I

The complaint here was that the learned trial judge did not deal fully with the issues arising from the evidence contained in the cautioned statement with the issues resulting from the unsworn statement.

An examination of both statements revealed a situation in which the cautioned statement, if accepted by the jury as being voluntarily made by the appellant and as true was cogent evidence going towards establishing the charges on the indictment against the appellant.

The contents of the unsworn statement on the other hand raised the issue of self defence in relation to the killing of Mr. Burrell and the circumstances which if

accepted by the jury would have exonerated the appellant from any responsibility for the death of Mrs. Burrell. It is our view, therefore, that in leaving self-defence to the jury the learned trial judge was extremely generous to the applicant as the unsworn statement being of little value as evidence fit to be considered by the jury the contents were not entitled to any special treatment by the judge as against the cautioned statement which was evidence that the jury was obliged to consider and act upon in coming to their verdict.

Had the jury accepted that the appellant was acting in self-defence this would have resulted in a verdict favourable to him, in which event, the directions by the learned trial judge having been dealt with in such a manner, could not be regarded as a valid ground of complaint. This ground therefore fails.

Ground 2

What is being contended here is that in leaving the case to the jury and having explained the ingredients required for proof of the offences charged in the indictment, the learned trial judge told the jury that in the event of ruling out capital murder they were to consider as the alternative verdict the offence of murder.

In this regard learned counsel for the appellant submitted that with the coming into force of the Offences against the Person (Amendment) Act, 1992, the offence of murder had ceased to exist. For the learned trial judge to leave murder as the alternative verdict therefore was wrong.

This submission by counsel prompted a member of the Court to remark that this ground of complaint ought properly to be categorised as what is commonly referred to as "lawyers argument" having nothing by way of substance to support it.

What in our view is important in this regard is the meaning to be extracted from the summation of the learned trial judge when looked at as a whole. The particular direction is to be found at page 171 of the transcript. There the learned judge said:

> "Now in my summation I have told you what capital murder is. It is murder committed in the course or furtherance of burglary and robbery. And I told you what murder is. I have also explained to you the law on self defence."

Having explained the possible verdicts open to the jury and the conclusions that followed from an acceptance in each instance, the learned trial judge then continued in this vein:

> "Now I am going to leave also an alternative verdict of murder. You may not, therefore, find the accused man guilty of both capital murder and murder. So first of all you must consider capital murder which the indictment charges and that is the more serious one. If you find this accused man guilty of capital murder then you do not have to consider the alternative count of murder. But if you are not satisfied that the accused man is guilty of capital murder, then you must consider murder.
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> If you find that the accused man had gone to the premises on invitation, and committed the offence, as he says, and didn't commit the murder in furtherance of burglary and robbery, then it would only be murder, not capital murder."

In the context in which the words capital murder and murder were used throughout the summation these words could only be regarded as referring to the two

categories mentioned in the Offences against the Person (Amendment) Act, 1992, that is capital murder and non-capital murder having regard to the degree of criminal responsibility relating to each offence. This ground therefore also fails.

Ground 3

This ground has its basis in the contents of the unsworn statement. Learned counsel submitted that the appellant's unsworn statement revealed that prior to the killing of the deceased persons he had been stabbed through his lip by Mr. Burrell with his own knife which the deceased had taken from off the kitchen counter. This act he contended amounted to a provocative act calling for a particular direction on the law relating to provocation. The learned trial judge was obliged therefore to leave provocation to the jury and his failure to do so deprived the applicant of that defence capable of reducing the offence of capital murder to manslaughter.

In this regard, in so far as the contents of the unsworn statement raised the issue of self-defence any attempt by the learned trial judge to go on to embark on further directions as to provocation could, in the particular circumstances of this case equally be met with a complaint that this had the effect of eroding or whittling down what in self-defence was now the cardinal line of the defence in the case for the appellant . The substantive case for the appellant given the unsworn statement was that at all material times, during the incident, he was under attack and that it was while under attack from Mr. Burrell who, having killed his wife, was now armed with a machete advancing on him that he struck out with his knife in defence of himself.

In the manner in which the case for the appellant was presented therefore it does not lie in counsel's mouth to complain as to how the defence was left to the jury by the learned trial judge.

Ground 4

Given the defences raised at various stages during the trial, the learned trial judge was left with a difficult task in leaving the defence for the jury's consideration. The manner of his approach was in all the circumstances fair and reasonable. The cross-examination of the chief Crown witness Narval Farquharson, at the earlier stages of the trial tended to suggest that the issue which arose for determination was one of visual identification. When the appellant came to make his unsworn statement from the dock, he now sought to place himself at the scene of the crime at a time material to the testimony of the witness Narval Farquharson thereby supporting his account of hearing the screams of Mrs. Burrell and seeing the appellant hurriedly leaving the scene armed with the bloody knife. Added to this state of affairs was the cogent evidence contained in the cautioned statement taken from the appellant by Superintendent Levi Campbell at the Chapelton Police Station two days following the incident and at a time when the appellant's motive to misrepresent the facts surrounding the killings would have been lessened and free from external influences.

Conclusion

What emerged during the hearing therefore was on the Crown's case a strong case of circumstantial evidence against the appellant bolstered by the confession statement implicating him in the killings. When contrasted with the unsworn statement of the appellant, the defence of mistaken identification was put forward then abandoned at the end of the Crown's case and the mantle of self defence put on. Given that state of affairs when pitted against the evidence presented by the Crown the verdict of the jury was inevitable.

Despite the valiant efforts of learned counsel for the appellant we found no fault with the learned judge's conduct of the trial or with his directions on the law. There being no valid basis for any complaint in this matter therefore and involving as it did questions of law, we treated the application for leave to appeal as the hearing of the appeal and came to the decision we did as set out at the commencement of this judgment.