JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 106/93

COR: THE HON MR JUSTICE CAREY - P (AG.)
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE PATTERSON J A (AG.)

R v ESMOND McKAIN

Lord Gifford Q C for appellant

Kent Pantry, Snr. Dep. Director of Public Prosecutions for Crown

September 20, 21 & October 31, 1994

FORTE J A

This came before us, as an application for leave to appeal the conviction of the appellant at the St. Ann Circuit Court on the 29th October 1993 for the offence of capital murder. Having heard the arguments of counsel on both sides, we reserved judgment. We now record our conclusions and reasons therefor. The application for leave to appeal is granted, and the hearing thereof treated as the hearing of the appeal.

The appellant was convicted for the capital murder of Franklyn Street, who died on the 11th August 1992, having succumbed to injuries he received, during an attack upon him in his home at Coconut Grove, Ocho Rios in the parish of St. Ann.

Before dealing with the substantive issues raised in the appeal, it is of some importance to make reference to the form of the indictment presented in the case. It reads so far as is relevant as follows:

> "Statement of Offence
>
> Capital Murder
>
> Particulars of Offence
>
> Esmond McKain on the 11th day of August 1992 in the parish of St. Ann, murdered Franklyn Street."

By virtue of 'The Offences against the Person (Amendment) Act 1992, murder committed in certain circumstances provided for in section 2 of the Act remained punishable by death (capital murder) while murder not committed in those circumstances, became punishable by life imprisonment (non-capital murder). Subsection 4 of section 2 provides:

> "Where it is alleged that a person accused of murder is guilty of capital murder, the offence shall be charged as capital murder on the indictment."

There are in all some fourteen or more instances in section 2 which result in a murder being capital, yet in the indictment in this case there is no allegation in the "particulars of offence" indicating on what basis the charge of capital murder was laid.

In our view in such cases it is just and fair for the particulars to indicate the circumstances under which the prosecution alleges that the accused committed capital murder so that he (the accused) will know exactly what the allegations are against him, and consequently be better able to prepare his answer. The requirement in subsection 4 that the offence shall be charged as capital murder, by implication requires that the accused should not only be made aware that the charge is capital murder, but also the basis of such a charge. Though we are not to be taken to be pronouncing that an indictment void of those particulars, is bad, we strongly suggest that indictments charging such an offence, be worded in such a way, as to indicate, which of the several categories of capital murder, is being alleged against the accused.

In the instant case, the learned trial judge, having no notice himself by way of the indictment, apparently formed the opinion that the prosecution was presenting its case for capital murder on the basis that the evidence fell within the provisions of section 2(1)(f) which provides -

> "2(1) Subject to subsection 2, murder committed in the following circumstances is capital murder, that is to say -
> (f) any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public."

He directed the jury thus:

> "Now, capital murder comes into play if given the facts that Mrs. Street has outlined to you in her evidence, you form the view, this is a matter for you that the murder committed by this assailant, this person, was done in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which by reason of its nature and extent is calculated to create a state of fear in the public or any section of the public. Even though that is saying a lot, what it's really saying is this, given what facts Mrs. Street in her evidence has put before you, in their home, the safety of their home, a man is seen to have entered and a stabbing which, if you accept her evidence, must be of the most vicious and extreme nature, takes place and she is also stabbed by this assailant. If you accept that evidence and when you come to look at it you form the view that this was an act or acts clearly intended to create - calculated to create - a state of fear in the public at large.
> Because, you as the good judges of this parish, and who form a part of the public at large, must ask yourselves, based on that evidence, if these acts done by this person was not calculated to create such a state of fear in the public or a section of the public; how the public at

> "large, hearing of what had happened at the Street's home view such an act, and if you form the view that it came, it was of such a degree or a nature as to amount to terrorism, then you could say that this was not just ordinary murder - non-capital murder,"

These directions gave rise to the following ground of appeal:

> "5. The learned judge erred in law in directing the jury that they could find that the murder was done in the course of furtherance of an act of terrorism. The case for the prosecution was simply that the accused had entered the dwelling house of the deceased and had stabbed him repeatedly. It is submitted that the category of Capital Murder provided for by Section 2(1)(f) of The Offences against the Person Act requires that the murder must be committed in the course or furtherance of another act of violence as defined in that subsection. If as in this case the only act of violence is the act of murder itself then it cannot be a murder committed in the course or furtherance of an act of terrorism."

Though, Mr. Pantry for the Crown, quite correctly in our view, conceded that the learned trial judge was in the circumstances of the case, in error in leaving capital murder to the jury on the basis of terrorism, it may well be opportune to reiterate what this Court said in the case of **R. v. Walford Wallace** SCCA 99/91 delivered on the 18th January 1993 (unreported) per Carey P (Ag.) at page 8:

> "First, we do not think that the words - 'state of fear in the public or any section of the public' must be interpreted to mean that the fear can only be created in those who witness the violence. That would be too restrictive a meaning. The section brings within its ambit those persons who by the excessive use of violence create extreme fear in the minds of the citizenry whether near or far. The force used is expected to have the widest impact by reason of its brutality or apparent senselessness. It is not expected that any member of the public

> "would be called to give evidence. It would be for the jury to take a commonsense approach as right-thinking members of the public and say whether the public in its widest sense or a part of it, i.e. a community or even a family unit in that community would be affected thereby. The test is not whether viewers or witnesses to the violence are put in fear, but whether the impact of that violence is calculated to serve as a warning to the public in general or a section of it."

The 'warning' of which Carey P (Ag.) spoke is of course a 'warning' that the violence exhibited in that particular incident, could be turned upon or again be visited upon the public or any particular section of the public, given the circumstances. In the instant case, counsel for the defence was correct in his submissions that no evidence existed which could bring the killing into the category of terrorism; and consequently the learned trial judge misdirected the jury that they could on that basis convict of capital murder.

The facts of the case can be briefly summarised. The deceased, and his wife, the only eye-witness, and their two grandchildren and one great grandchild were at home at about 8.10 p.m. on the 11th August, 1992. As is common in many Jamaican homes, the children were in their room watching the television and the wife was sewing. The deceased left her and went to his bedroom, where he planned to retire for the night. His bedroom was to the back of the house, with a door leading to the yard. That door he left ajar, to enable fresh air to enter the room. Later, in the night, while the witness was still sewing, she heard the deceased calling her by name "Dor, Dor." The light in his room was then turned on and then she heard him say "Wha you a do in yah." Soon after the witness heard "a big tumbling down, everything a turn over in a de room, everything licking down inna de room" and her husband again calling to her "Dor, Dor." As a result she went to his room, and standing just inside the entrance to the room, she saw her husband lying on the floor, and a man whom

she later identified at an identification parade as the appellant, stabbing him. The appellant then turned his attention to her, raised up and stretching across the deceased, stabbed her, causing injuries to her chin, and left shoulder. At the time the appellant was stabbing her husband, he was about a yard from her. After she was injured she fell on the floor saying "Lord, Lord, mi dead mi dead." Nevertheless, she continued to observe the appellant, who then looked at her and her husband and departed through the doorway. After he left, the deceased got up and started walking but soon collapsed. Eventually, they were both taken to the hospital, where the deceased succumbed to his wounds, and the witness was admitted for a night, treated and sent home the following day.

Those facts upon which the Crown relied, left no room for a finding of capital murder based on terrorism, and consequently ground 5 must succeed. However, this conclusion can only result in the substitution of a conviction for non-capital murder (see section 4 (3B) of the Amending Act), but, having regard to our conclusions in respect of one other ground of appeal, the exercise of that power will not be necessary. Though several other grounds were filed and argued, it is ground 2 that gave us the greatest concern. It reads as follows:

> "2. The learned Judge erred in his ruling that the prosecution be allowed to call Detective Acting Corporal McDonald as a witness in rebuttal after the close of the appellant's case (page 164). In particular:
>
> i. The reason for which the said witness was called, namely to answer an allegation made by the Appellant that he had been at a night club in the presence of the said witness at the time of the murder, did not arise ex improviso, since Counsel for the Appellant had put to a prosecution witness Sergeant Sinclair in cross-examination his client's case

> "namely that he had said to the said Sergeant that he could ask Police Officer McDonald who was present in the said nightclub at the relevant time.
>
> (ii) Moreover the learned trial judge in considering whether to exercise his discretion erroneously believed that the matter relating to Detective Acting Corporal McDonald had not been put in cross-examination, whereas in fact it had been."

In developing this argument Lord Gifford Q C referred us firstly to the testimony of the appellant in which he presented a defence of alibi, maintaining that at the time of the attack upon the deceased, he was at the **Roof Club** in Ocho Rios. He related an incident at the Club in which Det. Cpl. McDonald stepped on his toe i.e. his Reebok shoe, which caused him to be vexed; and subsequently they had "a little chatter" about it. As a result of that evidence counsel for the prosecution applied to the learned trial judge after the close of the defence to call Det. Cpl. McDonald in rebuttal on the basis that the evidence given by the appellant, arose ex improviso. In spite of objections by counsel for the defence, the learned trial judge allowed the evidence of Det. Cpl. McDonald who testified that on the relevant night he was at the Roof **Club but** did not see the appellant there. At that time, he had known the appellant for 4 - 5 years or more. The result of the testimony of Det. Cpl. McDonald, **if** believed by the jury, would have done very serious damage to the defence. Before us, Lord Gifford Q C contended that the evidence given by the appellant did not relate to a matter which arose ex improviso, as during the cross-examination of the investigating officer Det. Sgt. Sinclair, it was raised by defence counsel. To support this, he referred us to the following excerpt from the transcript at page 113:

> "Q. And that when you told him on the 15th, at the Ocho Rios Police Lock-up, he was being held for the murder committed on Tuesday the 13th of August, at about 8.00 p.m. he then told you that he was at the Roof Club **on** that night ...

"A. No, sir.

Q. ... and that you could ask Police Officer McDonald who was there on that night ...

A. No, sir.

Q. ... because - and Officer McDonald would tell you that ...

A. No, sir.

Q. ... and he told you the same thing on the 17th of August, when you came to the Ocho Rios Lock-up.

A. No, sir.

Q. And he told you, again, the same thing again on the 19th of August. ...

A. No, sir.

Q. ... when you charged him ...

A. No, sir."

From these questions in cross-examination, it became obvious that the appellant was maintaining or would be maintaining in his defence that he was at the Roof Club at the time of the incident, and that Det. Cpl. McDonald who was there, would confirm that fact, if the investigating officer checked with him. This evidence, however, seemed to have disappeared from the memory of the learned trial judge, as during the arguments advanced on the objection to the calling of Det. Cpl. McDonald, he made two significant comments:

> "It is a particular person who was named and that didn't arise until during the evidence of the accused."

and later at page 163:

> "I was just wondering if, in fact, the accused had indicated long before. I was just looking through Sergeant Sinclair's cross-examination and I don't see anything - any suggestion there being put to him that the accused had told him he could check with any of these persons."

These two quotations clearly indicate that the learned trial judge must have exercised his discretion, based on a misinterpretation of the evidence. Indeed, it appears from his comments, that had he a correct account of the cross-examination of Det. Sinclair, he might have exercised his discretion otherwise, for he no doubt would have concluded that the evidence did not arise ex improviso.

Before us, Lord Gifford Q C maintained that the evidence, not having arisen ex improviso, the learned trial judge exercised his discretion incorrectly. He relied on the case **Arthur Hutchinson v R** [1985] 82 Cr. App. R 51. In that case, in delivering the judgment of the English Court of Appeal Watkins L J commenced with a reference to the "expression" given to the ex improviso principle by Tindal C J in Frost [1939] 9 C & P 129, 195. We do the same:

> "There is no doubt that the general rule is that, where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins, but if any matter arises ex improviso which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown."

The general rule is that the prosecution must present all its evidence before closing its case, an exception however being that evidence arising ex improviso may be allowed to be called in rebuttal, at the discretion of the trial judge. Lord Gifford Q C conceded that, but nevertheless contended that the evidence in this case did not arise ex improviso and relied on the following passage in the judgment of Watkins L J at page 59 of the **Hutchinson** case (supra):

> "The ex improviso principle has to be applied by the court with a recognition that the prosecution are expected to react reasonably to what may be suggested as pre-trial warnings of evidence likely to be given which calls for denial before hand, and for that matter to suggestions put in cross-examination of their witnesses. They are not expected to take notice of fanciful and unreal statements no matter from what source they emanate. [Emphasis added]

It is the underlined words that Lord Gifford Q C emphasised, in order to convince us that in the instant case, the suggestions made to Det. Sinclair in cross-examination gave a clear indication to the prosecution that the defence was alleging that Det. McFarlane saw the appellant at the Roof Club and consequently could confirm his alibi. In our view, this contention is correct, and consequently we conclude that the evidence did not arise ex improviso, and cannot come within that exception to the general rule.

Nevertheless, since hearing the arguments of counsel we considered whether, in spite of the learned trial judge's incorrect reasons for admitting the evidence, there would be any other circumstance which would allow the exercise of the discretion to permit evidence to be called by the prosecution, after it has closed its case. In doing so, we examined the case of **Peter Robert Francis** v R [1990] 91 Cr. App. R 271 in which Lloyd L J gave a thorough treatment of the subject, and came to certain conclusions with which we are in agreement. He posed the following propositions which he gleaned from the authorities:

> "(1) The general rule is that the prosecution must call the whole of their evidence before closing their case. The rule has been described as being most salutary.
>
> (2) There are, however, exceptions. The best known exception is that the prosecution may call evidence in rebuttal to deal with matters which have arisen ex improviso: see Pilcher [1974] 60 Cr. App. R 1.

"(3) The prosecution do not have to foresee every eventuality. They are entitled to make reasonable assumptions, see Scott [1984] 79 Cr. App. R 49.

(4) Another exception to the general rule is where what has been omitted is a mere formality as distinct from a central issue in the case - contrast Royal v. Prescott-Clarke [1966] 2 All E R 366 with ex parte Garnier.

(5) In cases within the two above exceptions the judge has a discretion to admit the evidence."

Then relying on the judgment of Edmund-Davies L J in the case of **Doran** [1972] 56 Cr. App. R 429, in which the Court of Appeal approved the exercise of the discretion of the trial judge to allow the evidence to be called in rather special circumstances on the simple ground that it was not available at the close of the prosecution case, Lloyd L J proposed a new category of exception to the general rule as follows:

"The discretion of the judge to admit evidence after the close of the prosecution case is not confined to the two well established exceptions. There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding and lest it be thought we are opening the door too wide, we would echo what was said by Edmund-Davies L J in the Doran case at p. 437 that the discretion is one which should only be exercised outside the two established exceptions on the rarest of occasions."

In summary, we conclude that the prosecution may be allowed to call evidence at the discretion of the learned trial judge after it has closed its case, in the following instances -

(i) where the evidence arises ex improviso

(ii) to adduce evidence which is a mere formality and

(iii) in very special circumstances, which must be decided in the context of the particular case, such circumstances naturally occuring on the rarest of occasions.

In the instant case, none of these exceptions existed and the learned trial judge fell into error in allowing the evidence of Det. Cpl. McDonald after the defence had closed its case. Mr. Pantry contended, that assuming we came to this conclusion, the proper course would be to apply the proviso, because having regard to the evidence, the jury nevertheless would have been bound to convict the appellant. With this submission we find it difficult to agree. The defence of the appellant was an alibi, and the evidence given by Det. Cpl. McDonald attacked the essence of that defence. While the appellant said he was at the Roof Club where he actually had an incident with the detective and spoke with him, the detective said he was there but never saw the appellant. In those circumstances, we cannot say that the jury did not reject the alibi of the appellant because of the evidence of Det. Cpl. McDonald, and consequently cannot conclude that they would nevertheless have convicted the appellant. In the interest of justice therefore, there can be no other course than to order a new trial.

Other grounds of appeal were argued, but our decision on this ground, makes it unnecessary to deal with those at any length.

There was a contention that certain prejudicial evidence was allowed, and that although the learned trial judge directed the jury to dismiss that evidence from their minds - that was inadequate to deal with it.

As it turned out, however, the evidence was disclosed as a result of the cross-examination of counsel for the defence who was deliberately seeking to adduce the evidence as part of the defence. The evidence related to the fact that the appellant had been to jail frequently. The appellant, however, through his counsel was trying to establish that because of the malice that existed between the investigating officers and himself, they would take him into custody frequently on false charges, and that his arrest for the instant offence was a continuation of the said exercise of malice on the part of the officers. In any event, in our view the learned trial judge dealt with it appropriately and correctly in the circumstances, by directing the jury at the time the evidence was revealed to disabuse their minds of the evidence that the appellant was in jail often and thereafter not returning to the issue. We found no merit in this ground.

In ground 3, the direction of the learned trial judge on the important issue of visual identification was also criticized Though the arguments were interesting and very helpful we found no merit in them. One of the complaints related to an allegation that the learned trial judge did not direct the jury as to the special need for caution in acting upon the evidence of visual identification. The transcript reveals that at least on two occasions the learned trial judge alerted the jury to approach the evidence with caution, and the reasons for so doing. Indeed, in addition, he gave the following directions which elevated this type of evidence to that of a complainant in a case of rape:

> "It is also my duty to warn you that you must look for supporting evidence - corroboration - of Mrs. Street's testimony and that it is dangerous to convict an accused man on uncorroborated, unsupported evidence of a sole eyewitness such as Mrs. Street; and in this case,

> "indeed, there is no evidence really capable of corroborating her testimony but despite that warning, if when you come to weigh and examine her evidence, if you accept her as a truthful and correct witness, a witness whose testimony is believable, you can still go - and you find that her evidence is evidence on which you can rely, you can still go on to find the accused guilty, despite the warning I have just given you."

It was also contended that the learned trial judge should have pointed out to the jury as a weakness in the identification evidence, that "the possibility of error must have been enhanced by the terrifying and distressing circumstance of the observation by the sole eyewitness." While we agree that there will be cases, in which such a factor could affect a consideration as to the accuracy of the identification evidence, nevertheless the evidence of the eyewitness in this case if accepted, specifically ruled out any such effect upon her. The evidence reveals that the eyewitness, though admitting she was so frightened that she had no time to count how many stab wounds the appellant inflicted on her husband, it did not affect her ability to see the assailant. She said at page 43:

> "No sir, I say the way I so frighten I didn't have time to count how much him a give him. I was penetrating him face."

then,

> "Q. You were penetrating his face?
>
> A. Yes, I wasn't looking how much stabs him was giving him. ...
>
> Q. So why you were penetrating his face as you say?
>
> A. Because me want to know the person who kill him and me want to identify the person if me see him again."

Undoubtedly the witness was here testifying that her fright did not hinder her ability to see the assailant so as to be able to identify him subsequently.

In our view, the learned trial judge dealt adequately with the issue of visual identification, explaining to the jury the necessity for caution, the reason therefor in acting upon such evidence, and in addition pointed out the areas of the evidence which called for careful examination in determining whether the evidence of the eyewitness was not only honest, but reliable as to its accuracy. We found no merit in this ground. One other ground concerning the direction of the learned trial judge on the issue of alibi, was argued, but with the greatest of respect to Queen's Counsel who argued for the appellant, we are unable to find anything wrong in the manner in which the learned trial judge dealt with it.

In the event, in pursuance of our conclusions in relation to ground 2, the appeal is allowed, the conviction quashed, the sentence set aside, and in the interest of justice a new trial is ordered.