[2019] JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 48/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

WILBERT PRYCE v R

Leonard Green and Makene Brown for the applicant

Kemoy McEkron for the Crown

16 October and 6 December 2019

MORRISON P

Introduction

[1] On 25 April 2016, after a trial before Glen Brown J (the judge) and a jury in the High Court Division of the May Pen Circuit Court for the parish of Clarendon, the applicant was convicted of murdering Mrs Maxine Fearon (the deceased) on 24 February 2014. On 18 May 2016, the judge sentenced the applicant to imprisonment for life, but ordered that he should serve a minimum period of 25 years in prison before becoming eligible for parole.

[2] The applicant applied for leave to appeal against his conviction and sentence and the application was considered on paper by a single judge of this court on 24 September 2018. The application was refused and the applicant now renews it before the court itself.

[3] In his application for leave to appeal filed on 1 June 2016, the applicant complained that (i) he had been wrongfully identified as the person who shot and killed the deceased; (ii) the prosecution had failed to produce any concrete evidence linking him the crime; (iii) his trial was unfair; (iv) the judge did not give adequate directions to the jury with regard to the inconsistencies and contradictions in the evidence; and (v) there had been a miscarriage of justice.

[4] However, at the outset of the hearing of the application before us on 16 October 2019, counsel for the applicant, Mr Leonard Green, sought and was granted leave to argue two additional grounds of appeal in substitution for the grounds originally filed by the applicant. The additional grounds are as follows:

> "(a) The Learned Trial Judge failed to have left any or any adequate direction to the jury on the critical issue raised on the defence's case that the Applicant acted or could have acted in lawful self-defence at the time that the shot that killed the deceased was fired.
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> (b) The Learned Trial Judge failed to have given appropriate directions when he directed the jury to deliberate prior to the luncheon adjournment at 12:29 p.m. In failing to give any such appropriate directions, the jury would have been deprived of an opportunity to deliberate without any form of pressure being imposed on them, during the luncheon adjournment, prior to their return at 2:05 p.m."

[5] The two issues which arise on this application are therefore whether (i) the judge gave any or any adequate directions on the question of self-defence (the self-defence issue); and (ii) by requiring the jury to commence and continue their deliberations shortly before and during the period for the usual luncheon adjournment, the judge subjected the jury to undue pressure to reach a verdict (the undue pressure on the jury issue).

The background to the appeal

[6] The deceased was the applicant's mother-in-law, he having married her daughter, Tamara. At various times, Tamara, the applicant and the two children of the marriage lived together at a house in 19 miles in the parish of Clarendon. However, at the time of the incident which led to the death of the deceased, the applicant and Tamara appeared to be estranged and she and the children were living at the Fearon family home (the house) at Bryant's Hill in the parish of Clarendon. The evidence suggested that the applicant was not welcome at the house.

[7] The prosecution's case was that, armed with a gun, the applicant went to the house at about 7:00 pm on 24 February 2014. Mr Calvin Fearon, the deceased's husband (and Tamara's father), soon after returned to the house and, from the gate, saw the applicant sitting in front of the veranda with the gun in his hand. Mr Fearon called out to the deceased, who was inside the house, telling her not to open the door and to call the police. Using his cellular telephone, Mr Fearon himself also placed two calls to the police 119 number to make a report, but was directed to call another location. The deceased placed a call to her brother, who was also a policeman, and he

in turn called the applicant, with whom he had a good relationship, urging him to leave the premises. The applicant appeared to leave. But when, after approximately 10 minutes had passed, Mr Fearon was about to enter the house, the applicant emerged from the side of the house and pounced on him, knocking him on his head and causing it to bleed. Raising an alarm, Mr Fearon fled the premises. The deceased called her brother again, in a voice that was "frantic and panicking". She said, "Jason a kick off di door", two or three times, and the telephone call ended with her screaming, "murder, murder". On his way out of the premises, Mr Fearon heard explosions.

[8] When the police finally arrived, the deceased's body was found in a pool of blood in the living room of the house. There was a machete on the floor close to the body. Injuries were observed to the left shoulder and right side of the back. The pathologist would later confirm that these were respectively gunshot entry and exit wounds and that the deceased had died as a result of the accumulation of blood and air inside the chest cavity. Three live rounds of ammunition, two expended bullets and a spent bullet casing were subsequently found in the area.

[9] There were divergent accounts of how the shots which resulted in the deceased's death came to be discharged. Miss Tamoya Fearon (Tamoya), Tamara's sister and the daughter of the deceased, gave evidence of hearing the "wrastling" between Mr Fearon and the applicant on the outside, while she and the deceased were inside the house shouting for murder. She saw the applicant standing on the veranda of the house with

a gun in his hand. He fired two shots, the second of which hit the deceased in her chest, killing her on the spot.

[10] A second account was given by a witness who, despite being present in the vicinity of the house on the evening of the incident, did not give evidence at the trial. However, his deposition at the preliminary enquiry was read to the court by the consent of the parties[1]. On his account, it was when Tamara's sister opened the grille to the house that the applicant rushed through the open grille into the house armed with a gun. Although the witness saw the deceased with a machete in her hand inside the house, he did not see her do anything with it. But, after hearing an explosion, he saw her fall to the ground.

[11] A few days after the incident which led to the death of the deceased, the applicant, accompanied by a friend, turned himself in to the police. When cautioned, he told that police that, "mi never guh up deh fi kill nobody, a dem attack mi after mi carry money guh gi mi pickney dem".

[12] Subsequently, in yet another account of how the deceased came to be shot, the applicant gave a statement under caution to the police in which he stated that he had gone to house to deliver some money and items for the baby to Tamara, but was attacked by Mr Fearon and some other men. The deceased was also nearby with a machete in her hand. One of the men was armed with a gun and it was during a

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[1] Deposition of Mr Levi Benjamin Gayle given on 9 October 2013 and admitted pursuant to section 21A of the Evidence (Amendment) Act, 2015

struggle with this man that he (the applicant) managed to disarm him and fire a couple of shots. After he fired the second shot, he saw the deceased run off and he heard someone say that she had been shot. In a subsequent question and answer session, the applicant told the police that, after firing "two or three" shots at his assailant, he ran away and the gun fell from his hand while he was running.

[13] In his defence, in a not wholly dissimilar account given in an unsworn statement from the dock, the applicant said that he went to the family home on the evening in question to deliver clothes and money for the children to Tamara. He was unarmed. When he got there, Tamara met him outside the house and he delivered the items and the money which he had brought for her. That done, they stood there talking when he was attacked by Mr Fearon and other men, one of them armed with a gun. He got into a struggle with the man with the gun and it was during that struggle that shots were fired. He received a cut on his belly and a shot to his foot, before he managed to escape and later turn himself in to the police.

[14] The judge left the case to the jury principally as a matter of credibility. He pointed out the divergences on the prosecution's case, as well as those between the applicant's statement to the police and his unsworn statement. And, in explaining the ingredients of the offence of murder to the jury, the judge told them this[2]:

> "The offence is committed where one person unlawfully, by a deliberate or voluntary act, intentionally kills another. In

[2] Transcript, pages 351-352

> order to amount to murder, the killing must be [(a)] the result of a deliberate or voluntary act, that is to say, it must not be by accident, an accidental death is no offence. Intentionally, that is to say, the act which results in the death must have been one committed with the intention either to kill or to inflict serious, really serious bodily injury. But a deliberate and intentional killing is not necessarily murder. Deliberate and intentional killing done as a result of legal provocation, is not murder but manslaughter. Such killing is [sic] done if [sic] lawful self-defence is no offence."

[15] The judge touched briefly on the issue of self-defence a second time[3], repeating that "the killing must be unprovoked and … not done in self-defence". And finally, after reminding the jury of what the applicant had said in his statement to the police, the judge gave a more pointed direction on the issue of self-defence in the following passage[4]:

> "So when he gave his statement to the police, he was telling you that he was being attacked, that he wrestled - - first he took away the gun, a shot was fired by this man before, and then he run [sic] with the gun, he fired shot [sic] and he run with the gun [sic]. Now I will tell you that, if you - - if this was true, if you believe this was true, he couldn't be convicted for murder because a man who is attacked, have [sic] a right to defend himself. So if somebody have [sic] the gun and he take [sic] away the gun from them and fired a shot and it hit [the deceased] and as a result [she] died, he will not be guilty."

[16] At the completion of the summing-up, the judge invited the jury to retire at 12:29 pm. At 2:05 pm, they returned to court with a unanimous verdict of guilty of

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[3] Ibid, page 352
[4] Ibid, pages 370-371

murder. As we have noted, after a sentencing hearing on 18 May 2016, the judge sentenced the applicant to imprisonment for life, with the stipulation that he should serve a minimum period of 25 years before becoming eligible for parole.

[17] We have identified the issues on the application as the self-defence issue and the undue pressure on the jury issue, and we will deal with them in that order.

The self-defence issue

[18] Mr Green submitted that the judge's directions on self-defence were inadequate, particularly given the fact that, on the evidence at any rate, that was in fact the main thrust of the defence. He complained that the judge did not explain to the jury the requirements of self-defence in law and failed to assist them in understanding under what circumstances a person's actions or reactions might amount to lawful self-defence. It was submitted that the judge's failure to do so amounted to a grave miscarriage of justice and that this was not a proper case for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('the Act').

[19] In support of these submissions, Mr Green relied heavily on the decision of the Privy Council on appeal from this court in **Alexander Von Starck v The Queen** ('**Von Starck**')[5]. On a charge of murder in that case, the trial judge considered that a statement attributed to the defendant, which implied that the killing of the deceased may have occurred at a time when he was under the influence of cocaine, and might

[5] [2000] UKPC 5

therefore have been unintentional, was inconsistent with his primary defence, which was that he did not kill the deceased. In these circumstances, in a decision which this court later endorsed, the trial judge took the view that there was no basis on which to leave the possibility of a manslaughter verdict to the jury.

[20] The defendant's further appeal to the Privy Council succeeded on the basis that a trial judge has a duty to place before the jury all possible conclusions which they were entitled to reach on the evidence presented at the trial, whether or not they had been canvassed by either the prosecution or the defence in their submissions. Mr Green drew our attention in particular to what is now an oft-cited passage from the judgment given by Lord Clyde on behalf of the Board[6]:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the

[6] At para. 12

> evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v. The State* (unreported), 17th December 1998; Appeal No. 59 of 1997, a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In *Xavier v The State* the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, 'If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter'. In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury."

[21] For the prosecution, Mr McEkron submitted that **Von Starck** was distinguishable. Pointing out that the judge did leave the issue of self-defence to the jury, Mr McEkron referred us to the later decision of the court in **Ronald Webley & Rohan Meikle v R**[7]. Speaking for the court in that case, Brooks JA observed that "no special words are needed to convey to the jury, the meaning of self-defence", citing the

[7] [2013] JMCA 22, para. [19]

following passage from the judgment of the Privy Council on appeal from this court in the well-known case of **Palmer v The Queen** ('**Palmer**')[8]:

> "In their Lordship's [sic] view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding."

[22] However, characterising the judge's directions on self-defence in this case as "concise", Mr McEkron did allow that the judge may have given a "more helpful" direction by explaining the concept of legal self-defence to the jury.

[23] The law relating to self-defence is well settled. We take the relevant principles from **Palmer**, to which we have already referred[9]. If there has been no attack, then the issue of self-defence will not arise. But a person who is attacked, or who believes that he or she is about to be attacked, is entitled to defend him or herself. In doing so, he or she is entitled to do whatever is reasonably necessary in the circumstances, though the defensive action must not be disproportionate to the attack. However, in a moment of crisis, a person cannot be expected to weigh to a nicety the exact measure of the necessary defensive action. In a moment of anguish, a person may do what he honestly and instinctively thought to be necessary. Where self-defence is raised on a proper

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[8] (1971) 16 WIR 499, 510

[9] At page 510. See also the Supreme Court of Judicature of Jamaica Criminal Bench Book, 2017, published on behalf of the Government of Jamaica by the Caribbean Law Publishing Company, para. 18-1, where the relevant principles are all conveniently collected.

evidential basis, the burden is on the prosecution to negative it beyond a reasonable doubt. In other words, if the jury consider that the defendant acted in self-defence or if they are in doubt as to this, they must acquit him or her.

[24] As to the test of self-defence, the law is equally well settled. In the decision of the Privy Council, again on appeal from this court, in **Beckford v R**[10], it was held that the test for self-defence is a subjective one. In other words, if the jury come to the conclusion that the defendant honestly believed or may have believed that he or she was being attacked and that it was necessary to use force in order to protect him or herself, or if they are left in reasonable doubt as to this, then the prosecution will not have negatived self-defence. Even if the defendant was labouring under a mistaken view of the facts, he or she must be judged according to his or her mistaken view and that is so whether or not, on an objective view, the mistake was a reasonable mistake. A person who believes he or she is in imminent danger of an attack need not wait for the first blow before responding. In other words, he or she can take pre-emptive action if he or she believes it to be necessary in the circumstances. In assisting the jury to determine whether or not the defendant had a genuine belief, the trial judge will usually direct their attention to those features of the evidence which make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will only be in exceptional circumstances that a jury will conclude that such a belief was or

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[10] (1987) 24 JLR 242; 36 WIR 300

might have been held. But when it is clear on the defence that the defendant was being attacked, the jury will not be assisted by a direction on honest belief.

[25] We do not think that there can be any question that the issue of self-defence plainly arose on the evidence in this case. As has been seen[11], right from the moment of the applicant's first encounter with the police after handing himself in to the police station, he asserted that it was the members of the Fearon family who had first attacked him when he went to the house at Bryant's Hill to deliver some items for his children. In both the cautioned statement and the subsequent question and answer session, the applicant said that it was after he managed to disarm one of the men who were attacking him that he fired some shots from the gun. There was some evidence that, around the time when the explosions were heard, the deceased had a machete in her hand. In his unsworn statement, although he did not say that he himself fired shots from a gun that night, the applicant maintained the position that he was attacked by Mr Fearon and others and got into a struggle with the man with the gun, this time saying that the shots were fired during that struggle and that he also received injuries.

[26] Although the judge did advert in a general way to the applicant's contention that he was under attack, he gave them no specific assistance with regard to any of the features of the evidence which might have been seen to support it. In this regard, we have in mind in particular the applicant's contention that the deceased was armed with

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[11] See para. [9] above

a machete and the evidence that, when the shooting was over, a machete was in fact found close to the body of the deceased.

[27] Nor did the judge give the jury an expansive direction in terms of what the applicant might honestly have believed. Again, this was obviously a relevant consideration in relation to the applicant's statements and the evidence of the finding of the machete.

[28] But, as it seems to us, the judge's directions on self-defence, though somewhat laconic, did in fact contain the cardinal elements of the doctrine. Thus, as has been seen, the judge reminded the jury that the applicant's case was that he was being attacked and that it was in this context that he managed to disarm the man with the gun and fired a shot. In this regard, the judge could well have taken the view, in line with some previous decisions of this court, such as **R v Daisy Robinson and another**[12], that in the light of the applicant's stated position that he was in fact under attack, an honest belief direction would have been of little or no assistance to the jury. In that case, the court applied the earlier statement of Rowe P, in **R v Derrick Wolfe**[13], that:

> "The **Beckford** direction must be given where there is a question as to the nature or existence of the attack. When it

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[12] (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 27 & 28/1998, judgment delivered 11 April 2003

[13] (unreported) Court of Appeal, Jamaica Supreme Court Criminal Appeal No 94/1991, judgment delivered 31 July 1992. This dictum and others to the same effect were expressly approved by the court in **R v Mary Lynch**, (unreported) Court of Appeal, Jamaica Supreme Court Criminal Appeal No 30/1994, judgment delivered 24 June 1996.

> is clear, however, on the defence that the appellant was being attacked the jury would not be assisted with a direction on honest belief."

[29] But, in any event, the judge clearly told the jury that, if they believed that the applicant's statement that he was under attack was true, they could not convict him, "because a man who is attacked, have [sic] a right to defend himself".

[30] In our view, the judge's directions were sufficient in the circumstances of this case. It further seems to us that, given the significant body of evidence which supported the prosecution's case against the applicant, the jury would have been fully entitled to conclude beyond reasonable doubt that the applicant did not act in self-defence. The only other possibility in the applicant's favour on the evidence, which was that the shooting of the deceased was accidental, was explicitly covered by the judge in his directions, in terms of which no complaint has been made.

[31] For these reasons, even if we are wrong on the question of the judge's directions, we consider that this would have been an appropriate case in which to apply the proviso to section 14(1) of the Act, on the basis that no substantial miscarriage of justice has occurred.

The undue pressure on the jury issue

[32] We can take this issue more shortly. Before us, Mr Green submitted that, in inviting the jury to retire at 12:29 pm, the judge failed to address the question of the luncheon adjournment. The submission was that the timing gave rise to "the niggling

concern that the jury might have been pressured not to give adequate consideration to the issues".

[33] For this submission, Mr Green principally relied on the decision of this court in **R v Tommy Walker** ('**Walker**')[14]. In that case, which was a murder case, after a trial which lasted less than three hours, the jury were invited to retire at 4:55 pm. Just prior to them retiring, the trial judge exhorted them as follows:

> "Mr. Foreman and members of the jury, it is getting late in the evening but it does not to exclude you from giving due consideration to the charge which this man faces, which is murder. I hope that you all can agree. So when we say knock heads together, I don't mean literally, right. You exchange ideas and where there are different views you talk about them and look at the evidence and see whether one can win over the others, to that side and in due course arrive at a verdict. You try to come back well before midnight, you see."

[34] The jury returned at 5:40 pm without agreement. They were divided eight to four in favour of a conviction. The judge told them that:

> "On a charge of murder, you all have to agree one way or the other. If after a certain time you cannot agree then we have to discharge you, but we haven't reached that time."

[35] After retiring again at 5:42 pm, the jury returned to the court room at 6:15 pm, still divided in the same proportions. Further exchanges between the trial judge and the

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[14] (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/2000, judgment delivered 20 December 2001

foreman of the jury led the latter to explain to the judge that the jurors had "a big problem", in that, "[s]ome agree and some disagree". The judge then said:

> "That is how it start out. You take a vote and you say to those who say yes on that bench, and those who say no on the other bench, and you find out from each of them why they say what they are saying. You have to find out one by one what is causing the problem, why they hold to the view.
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> I did tell you before you retire that you have to try and all of you agree because it's not a charge where you can take a majority verdict. That is not part of the system.
>
> So if you start out with that in mind that you all have to agree, the weaker side might win or vice versa, I don't know."

[36] Having retired for the third time at 6:29 pm, the jury returned 12 minutes later with a unanimous verdict.

[37] The appellant complained on appeal that the trial judge's statements to the jury during the course of their deliberations had the effect of pressurising them into arriving at a verdict adverse to him. The court agreed. It took the view that, not only was the timing of the commencement of the jury's retirement unfortunate, but that, given the trial judge's statements to the jury after they had retired, "the circumstances amounted to nothing short of the administering of pressure on the jury to arrive at a verdict". On the timing issue, the court clearly considered that the invitation to the jury to retire at that late hour, at the end of a long day, was undesirable.

[38] We have rehearsed the relevant facts of **Walker** in some detail, since it is only necessary to state them to demonstrate the correctness of Mr McEkron's submission that that was a wholly different case from this case.

[39] Perhaps more to the point is **Everton Clarke v R**[15], the decision of this court to which Mr McEkron referred us. In that case, the jury's deliberations, which took place during the usual lunch hour, lasted for 43 minutes. The appellant complained that the jury may have somehow succumbed to inadvertent pressure to arrive at their verdict, presumably as a means of compensating for the loss of their customary lunch break. As in this case, the appellant placed reliance on **Walker**.

[40] Delivering the judgment of the court, McDonald-Bishop JA made short shrift of this submission[16]:

> "[75] We agree with the submissions of learned counsel for the Crown that there is no evidence to support the view that the jury may have succumbed to unintentional, accidental or inadvertent pressure to arrive at a verdict. It was their decision to forego the luncheon adjournment and to proceed with their deliberations. Nowhere is there evidence or the slightest indication that this election had affected or influenced their verdicts. The issues in the case were quite uncomplicated. It was a simple question of whether they believed the complainant or the applicant in the light of the directions in law. The time the jury deliberated is not reflective of them being pressured by anything in their circumstances as contended or by anything said or done by the learned trial judge."

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[15] [2017] JMCA Crim 31
[16] At para. [75]

[41] There is no evidence in this case that the jury had any say in the decision to commence their deliberations just before the beginning of the usual luncheon break. However, save for that, we find McDonald-Bishop JA's observations in **Clarke** equally applicable to this case. There is absolutely no evidence to support the view that the jury were or may have been pressured in any way to arrive at a verdict. As in **Clarke**, the issues in this case were quite uncomplicated and there is nothing at all in the evidence to suggest that the just over an hour and a half that it took the jury to arrive at a verdict would have been insufficient in the circumstances.

Conclusion and disposal

[42] We have accordingly come to the conclusion that the application for leave to appeal against the conviction must be refused. No argument was addressed to us on the question of sentence and, in our view, the sentence imposed by the judge was well within the usual range of sentences for like offences. We therefore dismiss the application for leave to appeal and order that the applicant's sentence is to be reckoned from 18 May 2016.