JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 107/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.(AG.)

REGINA

VS

FRAY DIEDRICK

A.J. Nicholson, B.E. Frankson & Maurice Frankson
for applicant

Kent Pantry Deputy Director of Public Prosecutions
for Crown

14th, 15th & 22nd March, 1991

CAREY, J.A.

On 30th June, 1989, at the Home Circuit Court after a trial commencing 26th June, the applicant was convicted of the murder of Seymour Williams and was sentenced to death. He now applies for leave to appeal that conviction.

The facts and circumstances which gave rise to this charge are as follows: On 12th July, 1988 at about 11:00 p.m. the slain man assisted by his wife who thought he had had too much to drink, was walking on a road in the Charlemont Housing Scheme in St. Catherine when he was felled by a blow from the fragment of a building block held by the applicant. Before this attack, a man named Howie who was sitting in a group of men including this applicant, had greeted Mr. Williams who had responded. But the applicant, apparently displeased by these exchanges, told Mr. Williams that he should not respond to persons with whom he, the applicant, was in conversation. To this Mr. Williams retorted that he had not troubled the applicant. Thereafter, Mr. and Mrs. Williams were driven to the Linstead Police Station by Leacroft Williams, a brother of

the slain man. Their mission, reporting the incident, was unsuccessful however, because the station was locked and barred and no police officer reacted to their persistent rapping. On their way home, they did meet a police officer to whom a report was made. He gave them some advice. The Williamses then returned home but left shortly after that, in order to get to a phone booth.

Another attack was then launched by the applicant who hurled a bottle at Mrs. Williams, intimating at the same time that he intended to kill her and her husband. She told him he was not God. He then chased her son George who had saved her from being hit by the bottle. The applicant was armed with a knife 18 inches long, also described as a "butcher's knife." Having failed to overhaul the son, the applicant made a third assault. This attack was made upon Mr. Williams who received a blow on his ear from a stone which felled him. The applicant then proceeded to stab and cut him on his hand, over his neck and towards his shoulder. Mrs. Williams called for help and endeavoured to pull off the applicant by his locks. One Blackwood came to her assistance but he received a cut to his back for his pains and he retired from the list. Her son George who had returned was held by one Bennie, a friend of the applicant. Joining in the attack upon Mr. Williams, were Fitz who hit him with a piece of building-block and the applicant's daughter who was charged jointly with her father but acquitted. The proceedings were halted finally when Leacroft Williams came up and removed the applicant from off Mr. Williams who at that time was lying supine. The applicant then threw his hands up in the air three times, presumably in a victory salute.

Thereafter the injured man was taken to hospital where he died the same night. The medical evidence showed five wounds, four of which were described as "slashing type injuries" and the other a stab wound to the supra clavicular region which penetrated some 5 inches to 6 inches deep into the aorta. This was the fatal injury.

When the applicant was interviewed by the police, he said that the whole family attacked him and he defended himself. The police officer acknowledged that he saw bruises on the applicant's back.

The applicant made an unsworn statement. On his account of the events of that night, the slain man was the aggressor. Williams used indecent language and flung stones at him. He retaliated by hurling a beer bottle and to prevent any further discharge of missiles with which Williams was preparing to arm himself. Williams came at the applicant who withdrew to the sanctuary of his yard. Mrs. Williams, Blackwood and another man removed Mr. Williams. The Williamses left for the police station. Later Mr. and Mrs. Williams and a daughter returned to the vicinity of his premises. George also came by. Leacroft Williams arrived. He, it was, who held the applicant's hands insisting that he wished to speak to the applicant. George used this opportunity to deliver a blow to the applicant in the back of his neck. The applicant chased George who however eluded him. At this point, Mr. Williams who had a knife grabbed the applicant at the back of his neck. The applicant began wrestling Williams for the knife while Leacroft Williams held onto his "locks." Mrs. Williams also held onto his "locks." By this time he was on the ground and all these persons joined in beating him all over. Leacroft Williams and Mrs. Williams were beating his face against the asphalt.

The applicant then said he managed to get out his pocket-knife and used his teeth to open the blade. He used it "jooking" over his shoulder in a manner which he demonstrated to the jury. A "jook" to the best of our knowledge is a stabbing motion as opposed to a slash. People around, took off his assailants, and placed him in a car which took him to the police station. From there, he went to the Linstead Hospital where he received some tablets and was sent to the Spanish Town Hospital. Seeing the Williamses family gathered there, he withdrew.

These versions were plainly mutually exclusive. On the Crown's case, it was the applicant as the aggressor, who had set upon, and killed Mr. Williams. On the defence version the Williamses had attacked the applicant who had defended himself.

Leave was granted to argue a number of grounds of appeal which we set out -

"(1) The L.T.J's treatment of the evidence in the case tending to support the Applicant's contention that he was under attack and injured to the extent of requiring urgent medical attention was much to the prejudice of your applicant.

(2) The Learned Trial Judge misdirected the Jury when at page 229 he stated thus "Was it the Williams family who attacked the male Defendant or was it the male Defendant who attacked Mr. Seymour Williams and his wife in the first instance? <u>That is the Critical Issue in the case.'</u> This direction could only confuse the Jury on the Critical Issue of Self Defence.

(3) The Learned Trial Judge misdirected the Jury on how they should approach a previous inconsistent statement given by a witness as was evidenced by Exhibit 1 which said misdirection operated to the prejudice of the Applicant.

"(4) The Learned Trial Judge erred in law when he withdrew the issue of Manslaughter for the consideration of the Jury.

(5) The Learned Trial Judge in his summing up failed to adequately direct the Jury on how inferences should be treated from facts which they find proved. Further the Learned Trial Judge asked the Jury to draw inferences which were favourable to the Crown and neglected to direct the Jury to draw inferences which were favourable to the accused which operated to the prejudice of the Applicant and deprived him of an opportunity that was reasonably open to him of being acquitted.

(6) The verdict of the Jury is inconsistent and manifestly unreliable and cannot be supported by the evidence."

We propose to consider these grounds seriatim although that was not the order in which they were argued. Mr. Nicholson argued ground 1. The essence of this complaint was that there was evidence on the prosecution's case that the applicant had received serious injuries necessitating urgent medical attention and this factor supported his case that he had been attacked. Accordingly, the learned trial judge ought to have dealt with the factor in the course of his summation.

The only evidence of any injuries received by the applicant emerged in the cross-examination of Sergeant Moore who said he saw injuries on the applicant's back but he firmly rejected the suggestion that the applicant had any cuts. So far as the bruises seen by the police, can be explained, there was evidence from Mrs. Williams that when the applicant armed with a knife made his final attack upon her husband, a struggle took place in which her husband was at one time on top of the applicant. In that position, it was possible that he could have received these bruises. On the applicant's statement, when he was being beaten, he was lying on his back. He also

spoke of having his face pummelled into the asphalt but there was no evidence of any injury to his face.

The injuries about which there was evidence, did not, in our view, suggest the need for urgent medical attention. When he attended at Linstead Hospital, he received, he said, tablets and advice to attend the Spanish Town Hospital. But these "serious injuries" did not impel him to remain and obtain any treatment, because the presence of his antagonists prompted a hasty withdrawal. In that factual situation, we do not share counsel's view that there were serious injuries suffered by the applicant consistent with his story of an attack being made on him. The learned trial judge dealt with the matter of injuries allegedly suffered by the applicant. At p.260 he said this -

> ".......and then he (Sgt. Moore) said 'I saw no injuries to the accused face or head.' Here again, Mr. Foreman and members of the jury, you have to ask yourselves whether you believe this witness. He said he saw bruises on this accused man's back but no cuts anywhere on his body and particularly no injuries to his face or head.
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> When this accused man gave you his statement from the dock, what did he tell you? He said that after being attacked by the Williamses family at one time, Vet and Mrs. Williams started to beat his face on the asphalt. So if he is speaking the truth and they are beating his face on the asphalt, wouldn't you expect to find some injury, no matter how minor, even a bruise on his face if there are two people beating his face on a rough surface like asphalt? But when the policeman sees him not a thing is wrong with his face, he sees no injury to his face or head. You decide whether you believe that this witness is speaking the truth when he says he saw no injuries to the accused's face nor head, and if he did not see any, could the accused be speaking the truth in giving his statement?"

This was not a case where there was evidence of any serious injury requiring urgent attention. This was a situation where there were essentially two separate and distinct versions of the circumstances in which the victim met his death, circumstances involving some injuries to the applicant and serious injuries to the victim who succumbed to those injuries. The evidential basis for this argument, in our view, plainly vanishes and with it any duty on the part of the trial judge to treat "the evidence" as affording support for the defence.

The learned trial judge dealt with the injuries allegedly received by the applicant in this way at p. 269 -

> " Just pausing here, Mr. Foreman and members of the jury: If a man is injured, sustained cuts all over his body as he said; he told his daughter, and was in need of medical attention, if such a man gets to a hospital, does he turn back merely because he sees a family of persons there? Does he turn back? It is something for you to consider. Is he afraid that he would be further attacked at the hospital? Was he afraid of them at that time, still afraid of them? Wouldn't the need for medical treatment over-ride all other considerations? I don't know, Mr. Foreman and members of the jury, it is something for you to consider. But it seems to me, if a man is in need of medical attention and reaches a hospital, if a man is really in need and reaches a hospital, that is not the time to turn back, because you see other persons there who you think are opposed to you. It is something that you may wish to consider, whether he was really in need of medical attention, if he went to the hospital in those circumstances and turned back."

We think this comment perfectly fair and cannot agree with Mr. Nicholson that this was in any way unfair to the applicant.

Mr. Nicholson also made submissions in respect of ground 2. It was not clear to us what was the nature of this misdirection. Learned counsel did not condescend to state

whether it was a misdirection of law or fact. We understood him to be saying that which side made the attack in the first instance, was not the critical issue in the case.

We have already stated that on the Crown's case, the applicant was the aggressor because, he it was, who had initiated violence, while the applicant's version was to the contrary. On the Crown's case, there were three episodes in which the attacks by the applicant were continued culminating in physical contact between the men. On the occasion of each episode, the attack was begun by the applicant. In the context of these facts, the critical issue for the jury was whether it was the applicant who had first launched the attack, i.e. initiated violent action.

We think the learned trial judge put the issue of self defence in its proper perspective when he directed the jury in these terms at p. 229 -

> ".......because it is your duty to determine where the truth lies, because you have heard two different stories in this case, and both stories cannot be true, one is not true. Was it the Williams family who attacked the male defendant, or was it the male defendant who attacked Mr. Seymour Williams and his wife in the first instance? That is the critical issue in the case. Each says that the attack came from the other side, and it is your duty to determine what is the truth of the matter."

In our view, that was the critical issue in the case, and far from confusing the jury the directions set out the issue fairly and with clarity. We are not persuaded that there is any substance in this ground.

Ground 3 was argued by Mr. B.E. Frankson. Under this ground, counsel contended that the trial judge should have brought to the jury's attention other areas of conflict between

the witness George Williams' evidence and other witnesses because that witness had been shown to have made a previous inconsistent statement. Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with other witnesses in the case.

The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses.

In the instant case, counsel for the Crown drew the trial judge's attention to his failure to deal with a specific instance in the case where in the course of the witness George Williams' testimony, his deposition on one matter was admitted in evidence. At the trial, the witness had given a demonstration of how he had been held during the course of the incident by one Bennie but this contrasted with his deposition. The judge dealt with the matter in this way - at p. 283 -

> "........What the defence is saying in relation to this aspect of the matter is that he has contradicted himself. At one time he said it was around his waist, at another time he demonstrated a hold which was entirely different from around the waist. So the defence was saying that that was a contradiction. I have instructed you how to deal with contradictions and discrepancies. If you find that it was a contradiction, when he says Bennie did hold me, he held me all quality ways, which means, according to my interpretation, in all different

> "ways, you interpret what he means by 'in all quality ways.' When he demonstrates to the Court how it was that Bennie held him, he showed you under his armpits and with the hands clasped at the back of his head. You decide whether it was a contradiction, and if so how does it affect this case, how Bennie held him. The defence is saying it affects his credit when he said one thing at one time and another thing at another time, therefore he is not a witness who is capable of belief. That is what the defence is saying. Do you find that the difference in his evidence destroys his credit altogether? Do you find that as a result of that you cannot believe Mr. George Williams on anything else that he says? Do you think, if you find that this is a contradiction, that it is as serious as that?"

The trial judge, it should be noted, had earlier in his summing up dealt with the matter of the jury's treatment of discrepancies and inconsistences. In this passage quoted, he merely reiterated what he had already stated. We do not think counsel was saying that the directions were incorrect for, plainly they were not, but that the judge was obliged to deal with other conflicts between this witness and others. We invited counsel to indicate the areas of conflict which he thought should be brought to the jury's attention, but he was less than helpful.

It is right to point out that the trial judge had in the course of his review of the evidence (at page 241) alluded to the discrepancy and reminded them of his directions in respect to discrepancies. He expressed his opinion that the manner in which George Williams was held, was hardly of importance when all the other witnesses who spoke on the matter were at one in saying that he was held. The more important consideration, he told them, was the reason why he was held. We have no doubt that the learned trial judge was right.

Mr. Frankson also complained under this ground, that the trial judge failed to tell the jury that the previous statement was not evidence on which they could act. As a general principle we think that to be right. See **R. v. Golder, R. v. Jones, R. v. Porritt** [1960] 3 All E.R. 457. But in the particular circumstances of this case, where the trial judge dealt with the previous statement specifically telling the jury correctly and clearly that the function of the previous inconsistent statement was to destroy the witness' credit, the jury could not but act in consonance with his directions. At all events, the discrepancy related to a plainly peripheral matter in respect of which, the jury were not obliged to make any finding. This ground fails.

Ground 4 was argued by Mr. Nicholson who said the issue of manslaughter on the ground of provocation arose, and should not have been withdrawn. When asked to set out the evidence establishing the three pre-conditions constituting provocation, he identified circumstance which plainly raised the issue of self defence which was the applicant's defence at the trial. In those circumstances, were the trial judge to leave provocation, an argument that he had effectively eroded the cardinal defence of self defence would be bound to succeed. There are indeed some cases where although the defence puts forward self defence for tactical reasons, the circumstances really amount to provocation. See for example **R. v. Wilfred Pennant** (unreported) C.A. 126/84 delivered 15th May, 1986, **R. v. Albert Thorpe** (unreported) C.A. 7/84 delivered 4th June, 1987, **R. v. Trevor Johnson** (unreported) C.A. 59/88 delivered 29th November, 1988. This ground is without merit.

Ground 5 was Mr. Maurice Frankson's responsibility. So far as the first part of the ground is concerned, we can do no better than quote the trial judge's directions on inferences which appear at p. 232. He said this -

> " Apart from finding the actual facts proved in this case, you are entitled to draw reasonable inferences from such facts in order to assist you in coming to your decision. There are certain matters that cannot be proved by direct evidence, that is, by the evidence of a witness who can say I saw or I heard it happen. There are certain matters that can only be proved by inferences drawn from other proved facts, and it is for this reason why you are entitled to draw reasonable inferences. You are entitled to infer from facts proved, facts that you find proved, other facts necessary to complete the elements of guilt or establish innocence.
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> You may draw inferences from proved facts but only if those inferences are quite inescapable. You must never draw an inference unless you think it is a reasonable one. You must be quite sure that it is the only reasonable inference which can be drawn in all the circumstances. Where the evidence is capable of two or more interpretations, my duty is to point out those possible interpretations to you, leaving it to you to see which one of them you are going to accept, having regard to the totality of the evidence in the case. When I leave all the possible interpretations to you, what you do then is to look at the whole picture and then decide which interpretation you are going to accept and act upon it."

We can find no fault whatever with these directions which have been approved by this Court in R. v. War War [1969] 11 J.L.R. 370

As to the second limb of the ground, we think that there is a misconception of the trial judge's function and the jury's responsibility. In a criminal trial, the duty of the prosecution is to prove guilt so that the jury can feel sure of it. In their task of finding facts by means of

drawing inferences, the jury are entitled to draw from the proved facts, an inference which is reasonable and inescapable. If those conditions are not met, then the jury cannot draw any inference. The result is a lacuna in the proof of the prosecution case and this enures to the benefit of the accused. Thus a judge may from the possible inferences, identify the inference which the prosecution would invite the jury to draw, for them to determine in the light of his directions, whether the suggested inference can be drawn. It is, not in our view, any part of the trial judge's duty to examine the evidence to see whether one inference favourable to the Crown and one favourable to the defence can be drawn and then point these out to the jury. But the jury would cease to be supreme on the facts in that case. Counsel was quite unable to cite any authority which supported this duty laid upon a trial judge. It seems to us certainly more efficacious and practical to direct the jury in the terms which he used, than to leave alternative inferences of guilt and innocence.

This can be demonstrated by an example provided by Mr. Frankson where there was evidence that after the applicant had been removed from his fallen foe, he lifted up his arms which the trial judge described as in triumph. Counsel suggested that it could have been in remorse, but this was visual evidence which did not evoke any such impression on the part of the witness who demonstrated it to the Court.

Another example provided by counsel in which he argued that the trial judge should have provided an innocent inference was after the applicant had been removed from his victim, he said "I killed him. Bennie, look whe unoo mek me do." The trial judge then continued at p. 248 -

> "......Because it would mean that the accused knew exactly what he had done, and was blaming Bennie and others for making him do it."

It was said the trial judge should have also identified an innocent interpretation. But as the learned trial judge pointed out, the applicant had not admitted causing any injury to this victim. In this context, we cannot appreciate what innocent interpretation the judge should have put forward. The prime consideration in a criminal trial is whether the prosecution has proved its case to the required standard, and in that exercise, the jury must draw only such inferences as are reasonable and inescapable in the circumstances. There was no prejudice in the directions given and where a possible interpretation on inference was suggested, it was left to the jury as judges of the facts to determine whether they would draw the suggested inference. We are not persuaded that there is any merit in this ground.

Finally on ground 6, Mr. B.E. Frankson submitted that there were so many material conflicts between the witnesses that the jury ought not to have found against the applicant. Counsel asserted that there were conflicts as to when and how the murder took place. But he was not able to isolate these conflicts for our scrutiny. We would say that such conflicts as there were, related to peripheral matters and did not bear on or affect the crucial issue which the learned trial judge identified and which we have stated earlier in this judgment. The jury had two stories before them and came to a decision which we think was justified on the evidence. As the trial judge correctly pointed out, the injuries received by the victim were consistent with infliction with a knife such as a butcher's knife. The gaping stab wound which proved fatal could not be caused by the pen-knife which the applicant said he was constrained to employ in his defence.

The Crown was not called upon to assist us as we did not think any of the grounds called for a response.

The application for leave to appeal is therefore refused.