JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 155/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

CEDRIC WHITTAKER

Delroy Chuck, Leonard Green & Miss Helen Birch for applicant

Brian Sykes & Robert Brown for Crown

24th & 28th September, 1990

CAREY, J.A.

On 7th November, 1989 after a trial which had begun on the day before in the Trelawny Circuit Court before Ellis J., and a jury, the applicant was convicted of the murder of one Gerald Lewis and sentenced to death. He now applies for leave to appeal that conviction.

The facts of this case illustrate not for the last time that from seemingly trifling matters tragedy can spring. In the little district of Deeside in Trelawny, on a Sunday evening at about 10:30 p.m. a number of men were standing about a "sweat-table", which is a table used for gambling on the streets. A game called "Crown and Anchor" was in progress. The "sweat-table" had been set up in a passage-way close by a shop. Among the group, were the applicant, the slain man, one Clinton Peterkin who was the banker and the Crown's sole eye-witness, Delroy Dulgin. Light for this activity was provided by a "bottle torch" that is, a bottle into which a

wick was inserted and lit. The slain man made a bet by placing a $5 note on the sweat-table. The banker raised his cup and collected the money, the bet having been lost. The slain man protested. There followed a verbal exchange between the applicant and the slain man in the course of which the slain man observed that the applicant's conduct was a result of his association with policemen. Then the applicant, arming himself with the lighted bottle torch, jabbed it at the slain man. Both men grappled with each other. In the event, the torch went out when it fell. The scuffle was short-lived however and ended when Delroy Bulgin parted them and advised the applicant to "cool nuh".

The applicant, despite this counsel of peace, renewed his attack. The slain man was thereafter heard to exclaim that he had got cut. Indeed he had been stabbed in the left side of his chest by an instrument which had lacerated the lower lobe of the left lung and the pancreas perforated the diaphragm and the stomach. The penetration was quite deep according to the medical evidence read at the trial. He died of these injuries. When the applicant walked off, after this incident, he was observed by the witness to have a knife in his possession.

The version which the applicant told the jury under oath, was altogether different from that for the prosecution. He said that he was on his way to the cinema when the slain man who was by a gambling table called to him in derogatory terms, referring to him as "informer boy". There was a verbal passage-at-arms and he continued on his way. Then the slain man came at him with a knife. They wrestled for the knife, both of them fell to the ground. He noticed the slain man bleeding, realized he was injured and thereupon ran off to the police station. He left the knife behind, he said, and disclaimed that it was

ever in his possession. He was quite unable to give the jury any assistance as to their respective positions after they had fallen to the ground.

The issues for the jury, we would have thought, were quite straightforward. If the jury accepted the prosecution's case, the verdict was guilty of murder. On the defence, the jury would have to consider self defence. An indulgent judge could leave manslaughter on the basis of provocation for the jury's consideration. A jury we incline to think, if they accepted parts of both versions, could arrive at such a verdict.

In this case, the trial judge did, in the end leave these issues for the jury's consideration. He had at the outset expressly withdrawn these issues. He said - "they don't arise in this case." He did also leave accident for the jury's consideration, but with all respect, we are quite unable to appreciate why accident should be imported into the case. Killing which arises by misadventure or accident occurs where a person is killed without intention in the doing of a lawful act without criminal negligence. The examples given in the books do not include circumstances of self defence. A typical illustration is where a man is at work with a hatchet, the head flies off and kills a bystander - 1 Hawk. C29 S2. Similarly, where a huntsman shooting at game kills another by accident - Fost 259. Seeing that this direction could not prejudice the applicant in any way, we need say no more about it except that it seemed right to correct some misconceptions as to the true nature of the defence of accident.

Mr. Chuck put forward as his strongest ground - ground 3 which was stated in the following terms -

> "3. That the learned trial judge failed to adequately relate the facts of the case to the defence of self-defence. Indeed, in earlier withdrawing self-defence from the jury, the learned trial judge may have left the distinct impression that there were no facts to support this defence. Moreover, the comments of the learned trial judge tended to undermine this defence. For example, on Pg 92, the learned trial judge said:
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> > ".....The fact that you walk with a knife, does it make you a virago? ....."
>
> Surely that bit of evidence probably suggest that the knife was produced by the deceased, and tends to support the defence of self-defence which was the principal defence of the applicant.

We may say at once that there was no basis whatsoever for the firstcomplaint and insofar as the last assertion in the ground that the trial judge's comments undermined the defence, the directions quoted hardly support that contention. In the first place the trial judge faithfully and accurately related the version as given by the applicant and said this at p. 98 -

> ".....What he is telling you there Mr. Foreman and members of the jury, is that he saw this man attacking him and where a person is attacked in circumstances where he honestly apprehends danger to himself, he is entitled to resist that danger even if he does so to the death. But there must be circumstances for this honest apprehension. If there is no circumstance for it, then it gives no rise to self-defence. It must be honest belief looking in all the circumstances; and he says he apprehended danger because the man stabbed at him twice and he had to jump back and he grapple up. If that happened in the circumstances and even if he was not holding the knife himself and in trying to save himself against this apprehended attack, this honest belief that he was being attacked and the man suffered injury, then he does not commit any offence. An assault or a killing in law through self-defence is no offence."

To put the matter beyond doubt he continued -

> " Self-defence is necessary, is lawful when it is necessary to use force to resist or defend yourself against an attack or a threatened attack and also when the amount of force that is used in repelling the attack is reasonable; and if a man attacked you Mr. Foreman and members of the jury, if you find that there was the attack, if a man attacked you with a knife, then you haven't got to weigh the niceties of the situation to defend yourself anyway you have to defend yourself, but you have to when you are looking at this self-defence, because if you find that he acted in self-defence, that is the end of the matter, he doesn't commit any crime. Equally, if it leaves you in any reasonable doubt you have to acquit him also, because the Prosecution would not have negatived self-defence. It is the Prosecution who must nagative self-defence and if you find that he acted in self-defence acquittal; if it leaves you in any doubt, acquittal also."

It is true to say that the language of the judge might not have been as precise as one would like. For example, he spoke of an apprehended attack, when the applicant in his defence was asserting that the slain man actually attacked him. Plainly therefore, directions as to honest belief in an apprehended attack would not be apt. But if a person acted perfectly justifiably in resisting an apprehended attack, a fortiori he was in a better position if he resisted an actual attack. The directions therefore cast a wider net than the facts warranted. In this case, we do not think the jury could have been in the slightest doubt however that this applicant was entitled to resist the felonious attack upon him by the slain man and that if they, the jury, accepted his word, he was entitled to be acquitted. In our view, a jury is better assisted if, in his directions, a trial judge states only so much of the law as is applicable to the facts upon which the

jury are called upon to adjudicate. Having said that however, we remain unconvinced of any merit in the complaints contained in this ground.

Counsel also sought to impugn the trial judge's direction on the issue of provocation but desisted when his attention was called to a direction which he said had not been given.

In his ground, he complained in these terms -

> "1. (a) The learned trial judge failed to direct the jury that if they were left in doubt on the issue of provocation then they should find the applicant guilty of manslaughter."

But at p. 88, the trial judge gave the following directions -

> " If you find that the person was provoked and would have acted in that way as any reasonable person would have done, then it is provocation, lawful provocation and it reduces murder to manslaughter.
>
> Equally, if you are in any doubt, it reduces the murder to manslaughter. It is not the accused who must prove to you that he acted in provocation, or under provocation, it is the prosecution who must negative any action under provocation."

His next challenge related to the judge's alleged shortcoming in mentioning only a part of facts which could amount to provocation. We can only suppose that this complaint was made without a careful reading of the transcript - a circumstance which we very much regret. The learned trial judge expressed himself in these terms - (at p. 90)

> " This argument started Mr. Foreman and Members of the Jury, that is the word there, because provocation is things done and said, that is on the crown's case, and that could be the provocation which started there, 'a rat you know, a going set puss fi yu', and then Gerald said, 'through you have police friend, that is why you going on so'.

> " Those statements Mr. Foreman and Members of the Jury, could be the provocative acts. I am not saying that they are, because you haven't got to accept what I say, but I point them out to you as being possibly provocative and can be provocative acts.
>
> Whittaker, he said, took up the bottle torch and jook after Lewis with it. Lewis held on to him and the two two of them was wrestling and the torch dropped. The two of them held up, 'I went between them, part it and said 'cool it Bob'. Bob is the accused. 'I pushed them apart and Whittaker went back and held up Lewis again and then he said he heard Gerald say 'me get cut'."

Then the trial judge used words which seem to us, to summarize the acts which he thought, amounted to provocation - viz., the words which he said started things and the scuffle over the bottle torch. He said -

> " There are two things, according to Bulgin, grab up first with this bottle torch, it dropped, they still grab up, he went between them, part them and the accused went back again after he parted them and that is the time, the second time when he heard Gerald say he get cut. He looked at him. When he said he get cut, Whittaker walked off and then he had a knife in his hand."

In the face of those directions, it is plain beyond a peradventure that this complaint is wholly unsupportable.

We have already mentioned that the trial judge had withdrawn provocation but eventually restored it for consideration. Having given the matter further thought he left this issue in these words at p. 87 -

> " You remember Mr. Foreman and members of the jury I told you that this case is a murder or nothing. On reflection I withdraw that. I put to you provocation."

Finally, just before he concluded his summation, he spoke of the verdicts which were open to the jury. Having dealt with self defence and accident, he then spoke of manslaughter arising from provocation. He said this at p.102 -

> ".....But remember Mr. Foreman and Members of the Jury, when you go to deliberate, you have to consider the sequence I told you, accident, self-defence then you consider murder. Get murder out of your minds, you have to be unanimous one way or the other as to whether the accused man is guilty of murder, that is how you have to deal with it, then you can consider the question of provocation, or manslaughter."

He ended with an exhortation for unanimity. The last issue with which he dealt was therefore provocation. The ground is without vestige of merit.

There was another ground which we mention merely to dismiss it. Mr. Chuck never made clear to us what factual basis existed on which the trial judge could properly have left the issue of involuntary manslaughter for the jury's consideration. The Crown's case if accepted by the jury showed the applicant using a knife to inflict an injury in his victim's chest which penetrated through the chest wall into the pancreas. The only reasonable inference which the jury could draw in these circumstances was that the applicant as a reasonable man intended to kill his victim or cause him serious bodily harm.

Finally, Mr. Chuck submitted that the verdict was unreasonable and could not be supported having regard to the evidence. He pointed to conflicts between the versions and other discrepancies in peripheral matters in the Crown's case on the one hand, and contrasted that with the defence story which he thought showed an internal consistency, on the other.

We desire to say this. The jury had before them two starkly different versions. One told by a witness for the Crown and the other by the applicant. Although he called a witness, viz Clinton Peterkin, the banker, that gentleman's assistance was to the effect that nothing happened there. Indeed he did not see the Crown witness Bulgin nor did he see the applicant. Nothing happened to the bottle torch. There was no cursing nor was there a fight. As regards the victim, he acknowledged that he was at the gambling table but left before "the occurrence." Peterkin might well have seriously damaged the applicant's story. At all events, the jury who saw and heard these stories were in the best position to resolve these conflicting stories.

We can find no internal discrepancies in Mr. Bulgin's story which make his story incredible. In our view, there was every reason to reject the applicant's story. According to Mr. Bulgin, after the injury was inflicted, the applicant went off with the knife. The applicant said that after Lewis received the injury, he went off to the police station and made a report. We would have thought that having regard to the report he gave, he would have handed over the knife used by his attacker, to the police. Instead, he handed over his shirt which showed a 3" - 4" cut to demonstrate the attack on him by the slain man. However, no injuries were observed on his person. These were circumstances which the jury could and may well have considered in deciding between the rival stances. In our view, there was evidence upon which the jury could have come to the decision at which they eventually arrived. It follows therefore that this ground too, cannot succeed.

Before leaving this case, we desire to call the attention of trial judges to the guidance given by this Court in

R. v. Locksley Carrol (unreported) S.C.C.A. 39/89 delivered 25th June, 1990, where Rowe, P. stated that "it is advisable for a trial judge to take a short adjournment in a trial with a jury, in all but the simpliest cases, to prepare his summing up....." Had the learned trial judge in this case adopted this course he would not have found himself in the embarrassing position of withdrawing issues and then having to restore them. In our view, it can be no reflection on a judge's competence or professionalism if he prepares himself to effectively perform an essential element in a criminal trial.

In the result, the application for leave to appeal is refused.