JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 29/94

BEFORE: **THE HON. MR. JUSTICE CAREY, J.A.**
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.(Ag.)

REGINA
vs.
ALEX EDGAR

Keste O. Miller and Miss Elham H. M. Bogle
for applicant

Norman Wright for the Crown

March 20 and April 7, 1995

PATTERSON, J.A. (Ag.):

The applicant was on the 20th April, 1994, convicted for manslaughter on an indictment which charged him for the murder of Charmaine Richards on the 8th November, 1987. He was sentenced to imprisonment at hard labour for four years. On the 20th March, 1995, we refused his application for leave to appeal

against conviction, and in keeping with our promise, we now put in writing our reasons for so doing.

The deceased died under very unfortunate circumstances. On the night of the 7th November, 1987, a wake was in progress at Bannister District in the parish of St. Catherine. Among the thousands of persons present were the deceased, a man named Rissett Scully and the applicant. The applicant was a member of the Island Special Constabulary Force and he was armed with a firearm. At about 1:00 a.m. an altercation developed between Scully and the applicant, and both men, it seems, exchanged well known Jamaican expletives. Scully was an inveterate inebriate person whose behaviour was most reprehensible, but he was not a violent man. The prosecution's case was that he turned and was walking away from the applicant when the applicant shot him in the back. The bullet entered Scully's back and exited from his left upper chest. It then struck the deceased, entering her left anterior chest and perforating the upper lobe of her left lung. Surprisingly, Scully survived. The defence contended that the applicant acted in self defence. In an unsworn statement to the jury, the applicant said that Scully attacked him by slashing at him with an old rusty knife, and believing that Scully would have killed him, he discharged one round from his firearm hitting Scully. Such then was the case in summary.

Before us, Miss Bogle submitted on behalf of the applicant, as a first ground of appeal, that the learned trial judge ridiculed the defence in his summation and in so doing denied the applicant a fair trial. She relied on a number

of sentences extracted from various areas of the summing-up, but we do not think it necessary to set them out in extenso; a few examples will suffice. Counsel relied on these words which appear at page 13 of the transcript: "It is a man who found himself in a vacuum." An examination of the context in which those words were said made their purport quite clear. The learned trial judge adverted to the evidence which clearly established that the applicant had on three different occasions, made statements explaining what had transpired on the fatal night, and then he continued:

> "You need to ask yourselves, is there a consistency or is there not a consistency? What do we have here? It is a man who having found himself in a vacuum, where someone has now died as a result of some act done by him, was seeking to cover up the truth or has he, from day one, shortly after the incident told the truth to the police in whatever he said thereafter; and that yesterday, when he gave his unsworn statement, continued in the same vein, continued to speak the truth? Mr. Foreman and your members, as the supreme judges of the facts, that is your task."

The learned trial judge again (at pages 27 & 28) adverted to the various inconsistent statements made by the applicant to the police on the night of the incident, and the position he said then that Scully was in when attacking him with the knife and when he fired the shot. The judge then asked the jury to consider Dr. Brown's evidence which established that Scully was shot in the back and then the applicant's unsworn statement. This is how the learned trial judge directed the jury:

> "You heard what the accused said in his unsworn statement. You heard what he said, 'I believe that this man going to kill me, so I reach for my gun and he was coming down on me with a knife and I pulled my service revolver; discharged one round which caught him' - no longer a question that the man was attacking him and he fired a shot. He said, 'I don't know if is the shoulder or where he got shot.' So, there is another version. There is a saying in Jamaica, you know that, 'When trouble ketch man, pickney suit fit him'. I don't know if that is the case here. You will have to determine this, you see. It would appear, and I am being very generous here, every time the accused in this case - from the incident happened that morning at Bannister everytime he opened his mouth, he says something different."

The other sentences relied on by counsel were similar in purport to those mentioned above, and likewise they were taken out of context. But we examined them, and when viewed in their true perspective, they amounted to no more than comments on the evidence. The issue that fell to be determined, therefore, was whether in the light of those comments, the applicant was denied a fair trial.

This court has considered this issue on many occasions. In the case of ***R. v. Dave Robinson*** S.C.C.A. 146/89 (unreported) (judgment delivered 29th April, 1991), Carey, P. (Ag.), in a careful review of the law, said this (Inter alia):

> "It is trite that a trial judge, as part of his duties to ensure a fair trial and to assist the jury on the facts of the case, is perfectly entitled to comment on the facts. Counsel for the Crown, as well as counsel for the defence, are equally entitled to do so. But the judge is neither counsel for the prosecution nor the defence: he represents neither side: he represents the interests of justice. His comments must therefore always be fair and just: they must be warranted on the

> "facts and issues which fall to be determined. His comments may be strong but he must not fail to warn the jury that they are entitled to reject his comments in favour of their own judgment if they consider his views erroneous or fanciful or misconceived or for any good reason unacceptable to them because they are the judges of the facts. The verdict that is sought is theirs. Where therefore the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have overstepped the line of proper judicial comment. He would be failing most seriously to ensure the fair trial that the Constitution guarantees and would lead to a substantial miscarriage of justice."

In the instant case, the learned trial judge referred to the long and weighty addresses of both prosecuting and defending counsel in which they made comments and asked the jury to accept certain facts. Having told the jury that he too may make "some comments" in his summing-up, he then quite properly directed them of the way in which they should treat the comments. This was how he put it:

> "All these submissions made by Defence Counsel and Crown Counsel, as well as, the comments that I make all have one aim in mind; one aim in view and that is, to assist you to arrive at the correct verdict based on the facts in the case. Anything that is said to you with which you agree, you are free to adopt it and to use it. In the same manner, anything I say to you, my comments on the facts; if you agree with them then you are free to use, as well as, adopt it in accordance with your verdict in this case. If they said anything to you in their submissions or anything I might say to you that you don't agree with, you don't accept it, then, by all means,

> "reject it; put it aside and substitute your own views. It is your views, your determination of the facts, what you find to be the facts that matters in the final analysis. It is your verdict that will be finally asked for, not the verdict of either Counsel or myself. So, you see, that is what is asked for; your findings of the facts."

In our judgment, the comments of the learned trial judge were justified and fair in the circumstances of the case, and they must have been viewed by the jury in the light of the clear directions given in that regard. The facts were properly related to the jury and left for their decision without any usurpation whatever of their function by the learned trial judge. We found no merit in this ground.

The next ground, which was argued by Mr. Miller, complained of the directions given by the learned trial judge as regards the view to be taken of the evidence of Dr. Brown. The doctor testified that Scully was shot in the back and the bullet went through the chest cavity and exited from his left upper chest. That was the uncontroverted and unchallenged evidence of the doctor, who was called as an expert witness. He based his opinion on the fact that shortly after the incident he examined Scully and observed a gunshot entry wound to his back, "a small hole", and an exit wound to the upper chest "larger hole - jagged wound". The learned trial judge pointed to the difference between the prosecution's case and the defence and it was in that context that he told the jury that "what will assist you in determining which of these two accounts is true is Dr. Brown." He then went on to explain why that was so and, in our view, those directions cannot be faulted. We are satisfied that although the learned trial judge referred to the

evidence of Dr. Brown on a number of occasions, he nevertheless left it to the jury to form their own independent judgment as to what reliance ought to be placed on it. In the event, we did not agree with the submissions of counsel on this score.

With regard to the third ground of appeal, it was contended that the learned trial judge failed to direct the jury on the way in which they should resolve a reasonable doubt as to guilt. We do not agree. A general direction was given on the burden and standard of proof at the very outset and again towards the end of the summing-up. In dealing with the question of self defence, the learned trial judge made it quite clear that the burden of negativing self defence was on the prosecution and that there was no burden on the applicant to prove anything. He told the jury, and rightly so in our view, that "the defence (self defence) will fail and will only fail if, based on the evidence which you accept in the case, the crown establishes that the accused was not acting in self defence... If you accept that the accused was acting in self defence or his evidence leaves you in a state of reasonable doubt that he was so acting, you will find him not guilty of any offence; not guilty of murder, not guilty of manslaughter."

On the issue of provocation, the learned trial judge directed the jury that if they had any reasonable doubt as to whether the applicant was provoked or not, "then you could probably find provocation." That direction may have been somewhat confusing to the jury. After retiring for over one hour, they returned for further directions on the issue of provocation. They were then directed further and told the circumstances which gave rise to provocation in law, and that:

> "Then, in those circumstances, the defence of provocation would have been made out, established and your proper verdict would be not guilty of murder, but guilty of manslaughter based on that provocation, that would be your verdict if you find you are wavering between whether he was so provoked or not."

The jury were asked if it was now clear and if they required further assistance, and the reply was, "No, M'Lord."

In the face of the foregoing directions, we agreed that there was absolutely no merit in this ground of appeal.

The fourth ground of appeal was this:

> "4. The Learned Trial Judge failed to put the Defence to the Jury but emphasized the case for the prosecution in an unbalanced way to the prejudice of the defence."

The applicant did not testify, but he made an unsworn statement. It is surprising that the applicant, a constable in the Island Special Constabulary Force, elected to make an unsworn statement after the prosecution presented such a strong case. His cardinal defence was self defence, and it is fair to say that three different versions of what the applicant alleged was presented to the jury for their consideration. Those versions differed in material aspects, and the jury were reminded of that. They were also directed as to the quality and value of an unsworn statement along the guidelines given by the Privy Council in ***Director of Public Prosecutions v. Walker*** [1974] 1 W.L.R. 1090 at page 1096, and the learned judge was most generous in inviting the jury to consider "whether you accept what he has said in his unsworn statement or whether you don't believe

what he has said, in the same way as when you come to really examine the evidence called by the crown."

The issue of provocation which arose on the evidence was left for the jury, and it is on that issue that the verdict of manslaughter was returned. We were of the view that the defence of self defence was properly left for the consideration of the jury, and that it was not left in an unbalanced manner.

The only other issue that arose before us was whether the verdict was properly taken in the circumstances of the case. This was what transpired: The jury retired at 4:25 p.m. and returned at 5:50 p.m. They were not unanimous, and they were told that a unanimous verdict was required for murder. They were given further instructions and they again retired at 6:00 p.m. and they returned at 7:21 p.m. It is plain from what transpired then that the jury were in some doubt, not as to what their verdict would be, but how to answer the questions of the registrar. The learned trial judge in simple language, directed them as to what was required of them, and the foreman, having expressed his understanding, the verdict was taken in the following manner:

> "**HIS LORDSHIP:** 'Are you unanimous in relation to murder', that is the first question you are going to be asked.
>
> **FOREMAN:** We are not unanimous - we are unanimous that he is not guilty of murder.
>
> **HIS LORDSHIP:** Oh, take the verdict then.
>
> **REGISTRAR:** Members of the Jury, have you arrived at a verdict?
>
> **FOREMAN:** Yes.

> "**REGISTRAR:** Is your verdict unanimous, that is, are you all agreed?
>
> **FOREMAN:** Yes.
>
> **REGISTRAR:** Do you find the accused, Alex Edgar guilty or not guilty of this indictment which charges him with murder.
>
> **FOREMAN:** No, not guilty.
>
> **HIS LORDSHIP:** Not guilty?
>
> **FOREMAN:** Not guilty.
>
> **REGISTRAR:** Do you find the accused Alex Edgar guilty or not guilty of manslaughter?
>
> **FOREMAN:** Guilty.
>
> **REGISTRAR:** Members of the Jury, you say the accused is not guilty of murder, but guilty of manslaughter, that is your verdict and so say all of you?
>
> **FOREMAN:** That is correct.
>
> **REGISTRAR**: Thank you, Mr. Foreman."

Just before the day's business came to a close, counsel for the applicant, Mr. Miller, informed the court that it appeared that one juror did not agree with the verdict of manslaughter, and he said he "would be more than satisfied" if the registrar took the verdict again. This is what followed:

> "**HIS LORDSHIP:** Members of the Jury, you are unanimous on manslaughter, Mr. foreman?
>
> **FOREMAN:** Yes, sir, unanimous on - apparently one...

> "**HIS LORDSHIP:** No, you are not unanimous on manslaughter. So, how you say you on manslaughter? First, how are you divided?
>
> **FOREMAN:** Nine to three.
>
> **HIS LORDSHIP:** How does the majority of you find the accused, Alex Edgar? Is he guilty or not guilty of manslaughter?
>
> **FOREMAN:** Guilty of manslaughter, sir.
>
> **MR. SYKES:** Thank you.
>
> **HIS LORDSHIP:** Very well. I am sure that satisfied you now, Mr. Miller.
>
> **MR. MILLER:** Yes, very well, M'Lord.
>
> **MR. SYKES:** Very well."

Before us counsel argued that the learned trial judge, having been given an erroneous verdict, he should have invited the jury to retire. The logic of this argument escaped us. We were quite unable to fathom what useful purpose would have been served in inviting the jury to retire once again. The learned trial judge did what was required in the circumstances, and the true verdict of the jury emerged, to the satisfaction of both counsel for the prosecution and the defence.

We were of the opinion that the primary complaints made by counsel on behalf of the applicant were directed at the summing-up of the learned trial judge. In such a case, it was incumbent on the court to look at the summing-up as a whole and then make a true assessment of the complaints in light of the full picture. What really matters is the effect of the summing-up as a whole. Looking at the summing-up as a whole, and without considering the passages complained of

in isolation, we came to the view that the summing-up was fair and we saw no reason to interfere with the verdict of the jury. Accordingly, we refused the application for leave to appeal against conviction.