[2011] JMCA Crim 62

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 85/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

OMAR REID v R

Hugh Wilson for the applicant

Dirk Harrison and Mrs Denise Samuels-Dingwall for the Crown

24 and 28 October and 9 December 2011

HIBBERT JA (Ag)

[1] On 24 October 2011, we heard the application for leave to appeal against conviction and sentence and delivered our decision on 28 October 2011 refusing the application for leave. As promised we now give our reasons in writing.

[2] The applicant Omar Reid was on 22 July 2010 convicted in the Circuit Court for St James for the offence of murder and was on 30 July 2010 sentenced to be imprisoned and kept at hard labour for life, with a specification that he should not be eligible for parole before serving 25 years.

[3] The charge against the applicant arose from the discovery of the body of Barbara Scott in a pit at her home on 14 March 2008 after she was declared missing as a consequence of the inability of her daughters, who reside in England, to contact her. The post mortem examination revealed that she died as a result of great blunt force trauma to the right side of the head resulting in a fracture to the skull and inter-cranial bleeding.

[4] The applicant was apprehended by the police on 2 April 2008, when a motor car in which he was travelling was stopped by the police along the Westgate main road. Detective Sergeant Everton Ferguson who was present, observed what he considered to be suspicious behaviour on the part of the applicant and so proceeded to search him. During the search the applicant took a piece of newspaper from his pocket and threw it towards the embankment. Detective Sergeant Ferguson retrieved this piece of newspaper and found that it contained an article concerning the disappearance of Barbara Scott and the applicant with photographs of both of them. Consequently, Detective Sergeant Ferguson decided to take him to the Freeport Police Station.

[5] On the way to the police station the applicant started to speak, and after being cautioned by Detective Sergeant Ferguson, related a story which was first recorded in note form by Detective Sergeant Ferguson and then fleshed out on arrival at the station.

[6] On 4 April 2008, Deputy Superintendent of Police Michael Garrick conducted an interview with the applicant and on their way back to the lock up the applicant started

to speak. He was cautioned by Deputy Superintendent Garrick and afterwards he made a statement which was recorded by Deputy Superintendent Garrick in his notebook.

[7] At the trial the prosecution relied heavily on these two statements. The first statement at page 119 line 15 - page 120 line 21 of the transcript reads:

> "yuh know how long mi nuh get a good night sleep? A true oonuh nuh know. Mi even try fi hang mi self but di wist never strong enough. Look here, oonuh look a mi neck, oohnu si di bruises dem? Is when mi try fi hang mi self, di wist cut me up. Boy, mi let dung everybody. Barbara an har daughter was very good to mi, but now mi let dem dung. Is Barbara cause dis. A she mek mi haffi kill har. Imagine, mi do some wuk fi har and charge har $40,000. Mi go to har di Wednesday night and she decided dat is only Ten Thousand Dollars she a gi mi. She come wid dis sex business. Mi tell har seh a mi money mi want, mi nuh inna nuh sex business. Anyway, me and har have sex and after dat, we start to quarrel. Mi thump har inna har face and she fell and lick har head on di concrete. Mi did frighten and panic so mi put har body inna di pit. People a talk all kind a tings say a nuh one person do dis, but a mi alone. Nobody nuh help mi. Mi just slip off di pit cover and throw har dung inna it an put on back di cover and fix it up neat. Dem a talk 'bout Barbara dead since Friday di 14th, but is from Wednesday di 12th, she dead. All dis time, mi up inna di hills, a look dung 'pon oonuh, a put up oonuh crime scene tape and a visit, visit Barbara yard. Mi hear seh mi name deh 'pon t.v. an all di radio station an di newspaper. Mi hear seh di people dem inna mi community a plan fi search out di bush fi find mi and kill mi, so a Kingston mi did a plan fi goh."

The second statement at page 203 reads:

> "… A wha' dis mi get myself into, mi can tek dis, mi can tek dis. … I really did not -- I did not really want to kill her. … Can you contact the J.P. counselor at Somerton for me, his name is Mr. Davis."

[8] The applicant, at the end of the case for the prosecution made an unsworn statement. In it he stated that he was in Trelawny when he heard that he was wanted by the police. He said he telephoned his uncle to take him to the police station. His uncle came from Kingston days later and on their way to the station the car was stopped by the police and he was taken to the station. He denied making any statement to the police.

[9] The learned trial judge in her summing up to the jury left for their consideration the question of manslaughter on the basis of lack of necessary intent required in order to establish the offence of murder. No doubt this was done on the basis of the statements attributed to the applicant. She, however, went on to say at page 233:

> "The Crown must also satisfy you that the killing was unprovoked and that it was not in self-defence. Those matters do not arise in this case so, I will not go into them in details with you."

[10] This direction to the jury gave rise to the only ground of appeal which was argued before this court. It reads:

> "The learned trial judge erred in law by withdrawing from the consideration and determination of the jury the issue of provocation."

In support of his arguments, Mr Wilson relied on section 6 of the Offences Against the Person Act, and the decisions in **R v Acott** [1997] 2 CAR 94, **R v Benjamin Stewart** [1996] 1 CAR App R 229 and **Joseph Bullard v R** [1957] AC 635.

[11] In reply, Mr Harrison submitted that there was no evidence before the court capable of causing the learned trial judge to leave the issue of provocation to the jury. To do so, he submitted, would cause the jury to speculate.

[12] Section 6 of the Offences Against the Person Act states:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[13] In **Joseph Bullard v R,** the question of whether or not the issue of provocation should be left to the jury arose. In addressing that issue Lord Tucker at page 642 of the judgment of the Privy Council stated:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

[14] The issue also arose in **R v Benjamin Stewart**. At page 236 of the judgment, Stewart-Smith LJ stated:

> "It is now well established that even if the defence does not raise the issue of provocation, and even if they would prefer not to because it is inconsistent with and will detract from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked; and this is so even if the evidence of provocation is slight or tenuous in the sense that the measure of the provocative acts or words is slight."

[15] In **Regina v Acott** the question of the judge's duty to leave the issue of provocation to the jury was also raised. This was addressed by Lord Steyn at page 102 where he stated that:

> "There must be some evidence tending to show that the killing might have been an uncontrolled reaction to provoking conduct rather than an act of revenge."

He later stated:

> "It follows that there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control. It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation. In such a case there is simply no triable issue of provocation."

[16] It is quite clear from the statutory provisions and the authorities cited, that before the issue of provocation can properly be left to the jury, there must be some evidence of a specific act or words of provocation resulting in a loss of self control.

[17] We agree with Mr Harrison that the required evidence does not exist in this case. Clearly, Mr Wilson misconstrued the evidence when he submitted that a quarrel

developed when the offer of $10,000.00 and sex, for work valued at $40,000.00 was made. In his statement to Detective Sergeant Ferguson, the appellant clearly stated that the quarrel only started after sexual intercourse. To determine what was done or said by the deceased which could be said to be provocation would only lead to speculation.

[18] It is for these reasons that we refused the application for leave to appeal against conviction and sentence. The sentence is to commence on 30 October 2010.