[2010] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 45/2007

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A. (Ag.)

JERMAINE STEELE v REGINA

Ernest Smith instructed by Ernest A. Smith & Co. for the Applicant

Miss Sanchia Burrell Crown Counsel for the Crown

9 March; and 14 May 2010

HARRISON, J.A.

[1] On 6 March 2007, in the Clarendon Circuit Court before Beswick J. sitting with a jury, the applicant, on an indictment charging him with the murder of Leighton Gordon, was convicted of manslaughter and was subsequently sentenced on 8 March, 2007 to 10 years imprisonment at hard labour. From that conviction and sentence he now seeks leave to appeal.

The case for the prosecution

[2] On the Crown's case, Shashe Henry testified that on the day before the fatal stabbing, the applicant and her mother had an argument over some handkerchiefs that belonged to the applicant. They were hung on a post in close proximity to her mother's stall. The following morning, her uncle (the deceased) went to the stall and the applicant had his handkerchiefs displayed on the post.

[3] The deceased asked him to remove the handkerchiefs but he refused to comply. The deceased therefore took down the handkerchiefs. Both men then walked off and the applicant went over to his barrel. She next heard the deceased say, "A really stab the boy a go stab me." She heard a sound like "boi" and when she turned around, she saw the applicant "bracing" the deceased with one of his hands and was pulling a knife out of her uncle's body. According to her, the two men were facing each other and she demonstrated to the court how the applicant had pulled out the knife from the back of the deceased. She said the deceased's eyes "turned over" and as he was about to fall, someone held him.

[4] It is quite evident from Miss Henry's account of the incident, that she did not see the actual stabbing of the deceased and what had transpired immediately before the deceased was stabbed.

[5] Dr. Brennan, who performed the postmortem examination of the body of the deceased, found a six by two centimeters laceration to the back of the left shoulder. There was a second wound measuring three by one centimeter under the armpit. There was also a laceration to the top left lung. In his opinion, death was due to the stab wound to the lung and the bleeding which resulted from the stab wound. In explaining the injury under the armpit, Dr. Brennan said that that wound could possibly have been caused whilst the deceased had his arm outstretched parallel to the ground or it was possible it could have been inflicted whilst the deceased had his arm raised.

[6] Detective Constable Brown had carried out investigations into the murder of the deceased. He testified that he went to the lock-ups at Black River Police Station where he saw the applicant. He told him of the investigations and that he had a warrant for his arrest whereupon the applicant said, "Me no kill nobody. A Leighton friend dem kill him. A stab dem stab after me and miss and stab him".

The defence

[7] The case for the defence, which consisted of the statement made by the applicant from the dock, was that on the day in question the applicant was defending himself. He stated that the deceased had grabbed him and started choking him until his breath almost stopped. He said that at the "said time" he pulled out his knife and "jook" the deceased over his shoulder because if he did

not do that, the deceased would have killed him. Thereafter, he dropped the knife and ran off.

The grounds of appeal

[8] Mr. Ernest Smith, for the applicant, was granted leave to argue three (3) supplemental grounds of appeal. The original ground of appeal was abandoned. The supplemental grounds read as follows:

> "(i) That the learned trial judge failed to adequately direct the jury on the effect of self-defence where Manslaughter is also to be considered.
> (ii) That the learned trial judge did not properly or adequately direct the jury on the effect of them accepting or not feeling sure that the Appellant was acting in self-defence before they could consider the offence of Manslaughter based on provocation.
> (iii) That the learned trial judge in directing the jury as follows:
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> "*I now say to you that the three verdicts that are open to you, guilty of murder, or not guilty of murder or guilty of manslaughter or not guilty of manslaughter. You go out and you you (sic) consider the case, consider the murder first, you deal with that, you dispose of it or come to your conclusion and then you move on and consider verdicts open, guilty of murder, not guilty of murder, guilty of manslaughter, not guilty of manslaughter or not guilty of anything. Not guilty of anything*. **Page 44 lines 15-25.**
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> AND
>
> "*You consider the whole matter of murder first so that would involve deciding on self-defence or not. That's*

> *the first step and then you move on."* **Page 45 lines 11-16.**
>
> …may have confused the jury in believing that they had to consider the offence of Manslaughter even if they found that the Appellant was acting in self-defence. That by so doing the learned trial judge did not assist the Jury in coming to a true verdict and in so doing deprived the Appellant of a Not Guilty verdict based on self-defence."

[9] The applicant therefore sought to have his conviction of manslaughter set aside and asked that a verdict of acquittal be entered.

The issues arising and directions by the trial judge

[10] The jury were directed on the issues of self-defence and provocation. In her directions to the jury the learned judge said at page 9:

> "….But, a deliberate and intentional killing is not necessarily Murder. Such a killing, which is done is (sic) lawful self-defence is no offence. So, if a person kills another in lawful self-defence, he commits no offence and would be not guilty of Murder."

At pages 35 and 36 she continued:

> "Now, naturally when one person uses deliberate violence towards another and (sic) kill him he acts unlawful. However, it is good law and good sense that a person who is attacked or (sic) believe that he is about to be attacked may use such force as he reasonably (sic) think is necessary to defend himself. If that is the situation his use off (sic) force is not unlawful and he would be acting in lawful self-defence and would be entitled to be found not guilty. Since it is the Prosecution's duty to prove the case

> against Mr. Steele, it is for the prosecution to make you sure that he was not acting in lawful self-defence, not for him to prove that he was…"

[11] The learned judge also gave directions on the state of mind of the applicant at the material time and the force used. At pages 37, 38 and 39 she said:

> "….You must bear in mind that a person who is defending himself cannot be expected in the heat of the moment to judge the exact amount of force which he must use. The more serious the attack or the threat of the attack upon him, the more difficult is the situation. If, in your judgment Mr. Steele believed that he had to defend himself, against Mr. Gordon, and if he did no more than what he honestly, instinctively thought was necessary to do, that would be very strong evidence that the amount of force used by him was reasonable.
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> So Mr. Foreman and your members, if bearing these matters in mind you are sure that the force used by Mr. Steele was not reasonable, then it would mean that he was not acting in lawful self-defence and he would be guilty. If he was acting in lawful self-defence or may have been acting in lawful self-defence then he would not be guilty. Remember it is not for Mr. Steele to prove to you that he was acting in self-defence. It is for the prosecution to prove to you that he was not acting in self-defence."

[12] After her general directions on self-defence and before the jury retired to the jury room, the learned judge went on to say at pages 40 and 41:

> "So now, Mr. Foreman and your members, the position is this. If you accept Mr. Steele's version of what occurred and you form the view that he was defending himself in a lawful manner, then he would

> not be guilty. If it is, Mr. Foreman and your members, that you do not accept what Mr. Steele said as being true, that's not the end of the matter. Turn around, consider everything that has been placed before you and decide if the prosecution has satisfied you so that you are sure of his guilt. If you are sure of his guilt, your verdict must be guilty. If you are not sure then your verdict must be not guilty. So the verdicts that are (sic) opened to you, Mr. Foreman and your members are guilty of murder or not guilty of murder."

[13] Crown Counsel was asked by the learned judge if there was anything she had omitted and he informed her that it was his view, that the defence of legal provocation should be left bearing in mind the facts of the case. The learned judge thereafter gave detailed directions on legal provocation.

[14] In her final directions to the jury, the learned judge directed the jury on the verdicts open to them. She said at page 44:

> "If, on the other hand, your answer is that what was done and/or what was said would have caused or might have caused an ordinary, sober person of this accused's age and sex to do as he did, then your verdict would not be guilty of murder but guilty of manslaughter by reason of provocation. So having told you this, Mr. Foreman and your members, I now say to you that the three, the verdicts that are open to you, guilty of murder, or not guilty of murder or guilty of manslaughter or not guilty of manslaughter. You go out and you you (sic) consider the case, consider the murder first, you deal with that, you dispose of it or come to your conclusion and then you move on and consider the verdicts open, guilty of murder, not guilty of murder, guilty of manslaughter, not guilty of manslaughter, or not guilty of anything. Not guilty of anything."

[15] There was dialogue between Mr. Smith (who had also appeared at the trial) and the learned judge. Page 45 of the transcript is now reproduced:

> "MR. SMITH: I think your Ladyship has said it in a nutshell although, m'lady, if the jury finds that he was acting in self-defence, or if they are not sure he was acting in self-defence then the question of manslaughter would not be considered. If the jury finds that he was acting in self-defence then they wouldn't have to go to manslaughter.
>
> HER LADYSHIP: You consider the whole matter of murder first so that would involve deciding on self defence or not. That's the first step and then you move on…."

The submissions

[16] In this court, Mr. Smith, for the applicant, took issue with the learned trial judge's direction on self-defence. He submitted that the learned judge failed to direct the jury that once they found that the applicant was acting in lawful self-defence or were in doubt about it, then they should acquit because self-defence once accepted by them is a complete defence to the charge of murder. He argued that in the circumstances of the case it would not be necessary for the judge to direct the jury to consider manslaughter based on provocation.

[17] It was also contended by Mr. Smith that the directions given at page 45 (supra) that they had to "move on" after considering the offence of murder would have left the jury in a state of confusion into believing that they had to return a verdict of manslaughter. He finally submitted that the learned judge had

failed in assisting the jury on the law of self-defence and provocation where both defences arose in the case.

[18] For her part, Miss Burrell submitted that the learned judge had adequately dealt with self-defence in the earlier stage of her directions to the jury. She submitted however, that regrettably, the learned judge had given directions at page 45 of the transcript which were "a bit vague" but that the charge to the jury cannot be taken by itself in a vacuum. She contended that the judge ought to have directed the jury that they must first consider self defence and if it is rejected then they should go on to consider provocation. She submitted however that even though these directions were not as precise as they should be, they did not amount to misdirection, so the appeal should be dismissed.

Conclusions

[19] On the evidence presented to the court, the issues of self-defence and provocation quite clearly arose for consideration and the learned judge had directed the jury on the law in respect of both defences. No objection has been taken by counsel on behalf of the applicant, to the directions on provocation. It is in relation to the directions on self-defence that objection has been taken. The real complaint is that the learned trial judge failed to adequately direct the jury on the effect of self-defence where manslaughter is also to be considered.

[20] We are of the view that the general directions on self-defence were correct. They spoke to the specific element of self-defence, that is, the

applicant's honest belief and the force used by him to prevent or resist the attack.

[21] The learned judge had directed the jury in these terms:

> "You consider the whole matter of murder first so that would involve deciding on self defence or not. That's the first step and then you move on…."

But we do not discern from these directions that they may have confused the jury into believing that they had to consider the offence of manslaughter even if they found that the appellant was acting in self-defence. In our judgment, it would have been more ideal for the learned judge to have directed the jury along the following lines just before the directions were given as to the verdicts open to them:

> "If you find that the accused acted in self-defence, that's the end of the case. If you are in doubt as to whether or not he acted in self-defence, that is also the end of the case; he is not guilty;
>
> If you find however that he did not act in self-defence then you consider whether or not there was legal provocation. If you find there was provocation then the accused would be guilty of manslaughter, not murder. If you are in doubt as to whether or not there was provocation, then you would have to find him guilty of manslaughter, because the crown would not have presented a case free from provocation. But if you find that he was not acting under self-defence, he was not acting under provocation, then, of course, he would be guilty of murder."

[22] It is our view however, that the failure of the trial judge to give the above directions would not have caused a miscarriage of justice. After deliberating for some 26 minutes, the jury returned a verdict of guilty of manslaughter. The jury's verdict, therefore, can be seen as justifiable on the ground that the applicant acted under the stress of provocation in killing the deceased.

[23] We have carefully considered the submissions made by Mr. Smith and it is our view that there is no merit in the supplemental grounds. They therefore fail. In our judgment, when one reads the relevant passages in the summing-up as a whole, the issue of self-defence was properly left to the jury. The summing-up by the trial judge was in our view adequate and in all respects fair.

[24] We accordingly dismiss the application seeking leave to appeal. The sentence shall commence as of 8 June 2007.