JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 77/98

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN , J.A. (Ag.)

REGINA
vs
MARCELLO D'ANDREA

Mr. Ian Ramsay, Q.C., Mr. Delroy Chuck and Miss Deborah Martin for the Applicant
Miss Kathy Pyke for the Crown

8th, 9th, 10th, 11th, 15th & 16th February, and 26th March, 1999

LANGRIN, J.A. (Ag.)

The applicant Marcello D'Andrea was convicted on 25th June, 1998 at the Home Circuit Court for the offence of murder. He was sentenced to life imprisonment at hard labour with eligibility for parole after twenty (20) years. From this conviction and sentence he has appealed. His appeal against his conviction was allowed on 16th February, 1999, the conviction was quashed and the sentence set aide. A retrial was ordered in the interests of justice. We set out below the reasons for our decision.

The case for the Crown rested mainly on identification evidence.

THE SETTING OF THE MURDER

There was a party at Barbican which the deceased attended with others. Sometime during the night there was a fight in which the accused came up and stabbed the deceased.

Having regard to the decision which we have arrived at we do not find it necessary to refer in any detail to the facts of the case.

THE GROUNDS OF APPEAL

Several grounds of appeal were argued but we propose to discuss only the grounds which we consider have merit. Those grounds can be examined under the following headings:

1) Evidence of similar offence;

2) Defence of another from violence;

3) Inadmissible evidence - supportive of identification

EVIDENCE OF SIMILAR OFFENCES

The complaint of the applicant argued by Mr. Ramsay, Q.C. is that the evidence relating to the wounding of the witness Kow was inadmissible in the applicant's trial for murder as showing or tending to show that the applicant had committed an offence other than the one for which he was indicted.

Christopher Kow gave evidence that he went to a party on the 27th August, 1994 along with Damion Edwards, Kim Wilson and the deceased Sheldon Lyn. There was a fight whilst he was at the bar and he got stabbed in the back. When Kow turned around he saw a "tall clear guy" with a shine object in his hand whom he identified to be the accused. During the fight he was unable to see Sheldon or what was happening.

The learned trial judge directed the jury as follows:

> "So , Madam Foreman and your members when you go to the jury room to consider your verdict; you will have to determine whether these witnesses are witnesses of truth, in particular Richard Chin, Christopher Kow and the witness Richard Gallimore, because they are saying they saw the accused, one witness saying he saw him with a shine object and two witnesses are saying they saw him with this knife and he plunged the knife in the back of the accused. Is it that he is a person who has a violent, is of a violent propensity? You have to have answer because what the prosecution is saying, not only Sheldon that he stabbed, but he also stabbed another man; he also stabbed Christopher Kow".

The wounding of Christopher Kow was not an issue before the jury. The applicant was not indicted for the offence, neither was the issue raised as being relevant to bear upon the question whether the acts alleged to constitute the crime were designed or accidental or to rebut a defence which would otherwise be open to the accused.

Evidence cannot be given for the prosecution to prove that a defendant has a propensity to commit criminal acts of the same nature as the offence charged merely for the purpose of leading to the conclusion that the defendant is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

Even if it were brought in as part of the narrative, the probative value must far outweigh its prejudicial effect.

There was therefore a material misdirection and even though the prosecution case was cogent these errors were too fundamental and too prejudicial to permit the application of the proviso.

THE DEFENCE OF ANOTHER FROM VIOLENCE

The learned judge indicated early in his summation that the question of self defence did not arise. It is therefore necessary to ascertain if having regard to the evidence in this case he was obliged to put the issue of self defence to the jury.

Section 14(1) of the Constitution of Jamaica gives to every citizen a fundamental right enshrined in our Constitution for the defence of any person from violence:

> **"14.**--- (1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
>
> (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of force to such extent as is reasonably justifiable in the circumstances of the case--
>
> (a) for the defence of any person from violence or for the defence of property;
>
> ..."

The applicant in his defence elected to make an unsworn statement from the dock. The transcript reads:

> "On August 27, 1994, I went to a party at Edgecombe Drive. At this party two fights broke out. The one nearer to me three persons were fighting. They bounced into me and I thumped the Chinese guy.
> ... The two of them fell to the ground, the Chinese guy was choking the dark guy so I tried to kick him. The security guard came up and broke up the fight. The D.J. turned off the set and I left".

From this brief statement the defence of another from violence arose. In ***R v Duffy*** [1967] 1 Q.B. 63 [1966] 1 All ER 62 SCCA, it was held that a woman would be justified in using reasonable force when it was necessary to do so in defence of her sister, not because they were sisters, but because, 'there is a general liberty as between strangers to prevent a felony'.

The principles applicable are the same whether the defence is put on grounds of self defence or on grounds of prevention of crime. Similarly, the principles would apply in the case of a complete stranger coming to the defence of another under unlawful attack. The unreported judgment of Downer J.A. in ***Regina v Bryan Davis,*** SCCA 97/96 delivered 12th May, 1997 is apposite. The facts bear some similarity to the instant case. It was there held following ***R v Duffy*** (supra) that the failure of the judge to direct the jury in respect of Section 14 of the Constitution deprived the defendant of a lawful defence.

In the instant case the judge was under a duty to leave the matter to the jury although it was not the cardinal line of defence. It was open to the jury to find that if he did stab the deceased it was in order to prevent the deceased choking another to death.

The trial judge's direction was defective when he failed to bring home to the jury that where justification arose on the issue of defence of another from violence the accused was entitled to have this issue left to the jury for its deliberation.

INADMISSIBLE EVIDENCE -SUPPORTIVE OF IDENTIFICATION

The alleged conversation between the applicant's mother and the witness Richard Chin at the Police Station and in the absence of the applicant previously

alluded to was inadmissible and damaging to the applicant. It conveyed the impression that the witness Richard Chin's identification of the applicant was thereby supported. It was the duty of the trial judge to instruct the jury to disregard it, but instead he left it for the jury's consideration. Crown Counsel conceded that a special direction would be required.

We consider that such non-direction amounts to a grave error on the part of the trial judge.

DISPOSAL OF THE APPEAL

The Court recently dealt with the principles on which a new trial should be ordered in ***Oniel Williams v R,*** SCCA 22/95 delivered February 23, 1998. Section 14(2) of the Judicature (Appellate Jurisdiction) Act provides as follows:

> "(2)... the Court shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered and, if the interests of justice so require, order a new trail at such time and place as the Court may think fit".

On an application of the principles to the facts of this appeal we are satisfied that the offence is not only serious but it is prevalent. The trial was fairly short and the issues are not complex. The case for the prosecution on the record was strong and the applicant called no witnesses except for character. Therefore, there can be no prejudice to the applicant if a retrial is ordered. Accordingly, an order for a retrial can only be in the interests of justice.