[2014] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 37/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

GARETH DOUGAL v R

Lord Anthony Gifford QC and Zephaniah Forrest for the appellant

Miss Meridian Kohler and Mrs Christine Johnson-Spence for the Crown

20 November 2012; 25 January 2013 and 30 January 2014

MCINTOSH JA

[1] On 8 February 2010, in the Circuit Court for the parish of St Ann, the appellant's trial commenced before P Williams J and a jury on an indictment for the offence of murder, arising from the death of Lee Walsh on 30 March 2005, in the said parish. However, on 11 February 2010, the jury returned a verdict of guilty of the lesser offence of manslaughter after which he was sentenced to serve a term of 15 years imprisonment.

[2] He then applied for leave to appeal his conviction and sentence and, by order of a single judge of this court, leave was refused to appeal his conviction but was granted in

relation to his sentence. Thereafter, he renewed his application to the court in respect of his conviction and on 20 November 2012 we heard his application and his appeal together and gave our decision on 25 January 2013, as appears below, with a promise, now being fulfilled, to reduce our reasons into writing:

> "Application for leave to appeal against conviction refused. Conviction affirmed.
>
> Appeal against sentence allowed. Sentence of 15 years imprisonment set aside and a sentence of ten years imprisonment is substituted therefor. Sentence to commence on 11 May 2010."

The prosecution's case

[3] Briefly, the prosecution alleged that on 9 March 2005 the appellant was assisting Conrad Walsh, a brother of the deceased, in a particular business activity which was being conducted on premises belonging to the Walsh family, known as Walsh Plaza. An argument developed between the appellant and the deceased during which, according to prosecution witness Conrad Walsh, the appellant was observed to have a knife which he pulled from his waistband, still in its wrapping, as he backed away from the deceased who then demanded that the appellant leave the premises and not return. The appellant eventually left but returned later that day and while he was talking to another brother of the deceased, Edward Walsh, the deceased was seen approaching him, asking him what he was doing there as he had been told not to return.

[4] It was the evidence of Edward Walsh that the appellant had a white handle knife in his hand as the deceased approached him and he was waiving it about. As the

appellant moved swiftly towards the deceased with the knife in his hand, the deceased reached for a bicycle which was nearby, holding it in front of him as if to protect himself from being injured by the knife. The two struggled with the bicycle until it fell to the ground. The deceased also fell to the ground on his knees with his hands raised. Then, according to Edward Walsh, the appellant stood over the deceased and stabbed him with the knife. Some 21 days later the deceased died as a result of infection which had developed from the stab wounds he received.

[5] The forensic pathologist, Dr Murari Sarangi testified that his examination of the body of the deceased revealed two stab wounds, which, in his opinion, were consistent with injuries inflicted by a sharp instrument such as a knife travelling downwards and inwards, one to the left chest and the other going into the chest and abdominal cavity with a great force damaging several abdominal organs such as the transverse colon and the spleen. It was his further opinion that the person who inflicted the injuries would have done so from a position above the deceased. In cross-examination, Dr Sarangi said the injuries could not have been inflicted by both persons facing each other but could have been inflicted with both in a frontal position at an angle, to the extreme left side.

The case for the defence

[6] The appellant's account of the stabbing was seriously at variance with the prosecution's account. In his statement from the dock, he told the jury that it was the deceased who made the first move attacking him with the bicycle and he used the knife

he had in his possession to defend himself. He said after an earlier incident between them that day, the deceased had approached him in a rather menacing manner, causing him to move to the other side of the road out of harm's way. He had backed away to give himself qualified space to avoid being physically damaged. He continued: "[a] knife that I had purchased for domestic use, which was still in the case that it was bought, was raised from my pocket". This allowed him ample distance to retreat out of harm's way and allowed Conrad Walsh to act as a barrier between the deceased and himself. He left the area but returned later. He then saw Edward Walsh who enquired of him what had happened earlier but before anything could be said the deceased shouted to him asking him if he did not know that he was not to come back there or he would kill him. It was then that the deceased had picked up the bicycle and swung it at him repeatedly, hitting him in the chest area (also hitting Edward, as acknowledged by him in his evidence) and he had used his hands to block the blows from the bicycle thereby receiving some injuries in the process.

[7] According to the appellant's account, it was he who was hit to the ground and it was the deceased who had come over him with the bicycle resting it on his stomach. In an effort to prevent injury to himself, as the deceased was using the frame of the bicycle to squeeze his neck, he said he pointed the knife downwards and realized that the deceased was injured. He called as his witness the doctor who treated him for injuries to his left thumb and index fingers, superficial abrasions to the left wrist, abrasion to the left elbow and the left shoulder and left forearm. In the doctor's opinion, none of the injuries was serious. The appellant further stated that he told the

police he had nothing against Lee Walsh and that whatever he did was simply to avoid being killed.

The grounds of appeal

[8] With the leave of the court, Lord Gifford QC abandoned the original grounds filed by the appellant with his application for leave to appeal and argued instead three of four supplemental grounds which he filed on 5 March 2012, one in relation to the appellant's conviction (ground 2) and two in relation to his sentence.

The application for leave

[9] Under the heading 'misdirection' the complaint against his conviction read as follows:

> "(2) The learned trial judge erred in law in failing, in her summation to the jury, to direct the jury accurately and sufficiently in relation to the defence of self-defence advanced by the Applicant, and in particular in relation to the reason advanced by the Applicant for possessing the knife which he used upon the deceased."

[10] In his oral submissions, Lord Gifford QC contended that the Crown's case was that the appellant had gone off and deliberately got a knife and returned with it to use it while the appellant's case was that he had the knife which he had purchased for domestic purposes and had innocently shown it, in the first incident, to get away and used it in the second incident to defend himself. Learned Queen's Counsel argued that if the jury thought he had gone away, purchased the knife and came back and used it for an unlawful purpose that would be fatal to his defence of self-defence. He

contended that the Crown was clearly relying on the evidence of Conrad Walsh to invite the jury to find that the appellant's possession of the knife was not innocent and the learned trial judge's sentencing remarks questioning why he was armed with a knife that day clearly showed the importance that was attached to that aspect of the case – tending to show that he had armed himself for an unlawful purpose and then carried it out.

[11] It was learned Queen's Counsel's further contention that the intent of the appellant in carrying a knife was a crucial factor for the jury to consider, when evaluating the defence of self defence. The learned judge, he argued, in omitting the appellant's assertion that he had purchased the knife for domestic purposes and telling the jury that the appellant said he had taken the knife to avoid being physically damaged, that tended to suggest to them that he was saying that he had the knife with him to defend himself against a possible attack by the deceased or some other party but that was clearly not what he was saying. This was a misdirection which was so grave as to amount to a miscarriage of justice, Lord Gifford QC submitted.

[12] Learned Queen's Counsel referred us to the dictum of Scarman LJ in **R v Wright** [1974] 58 Cr. App Rep 444 as quoted in the Jamaican case of **R v Kevin Grant** SCCA No 161/2004, delivered on 10 November 2006 to the effect that if the appellant's complaint is that the judge erred in his handling of the facts, questions must be asked whether there was an error and if so, whether, it was significant enough as to mislead the jury. In **R v Wright**, His Lordship pronounced that if the court had a lurking doubt

about the safety of the conviction then the court's duty is to quash it. In the instant case, Lord Gifford QC submitted, there was error in the learned trial judge's handling of the facts and it was significant enough to have misled the jury.

[13] Miss Kohler for the Crown conceded that there was an omission in the summation of the learned trial judge but submitted that the entire body of the evidence must be considered in assessing the impact of the omission. She argued that the case for the appellant, being based on section 14 of the Judicature (Appellate Jurisdiction) Act, requires the appellant to establish not only that there was a miscarriage of justice but that it was one of such a substantial nature that it would not be appropriate to apply the proviso to the section. It was her submission that the learned trial judge's omission to repeat one element of the appellant's case, namely, the reason he gave in his unsworn statement for his possession of the knife, did not satisfy the threshold to result in a miscarriage of justice and as no substantial miscarriage of justice had occurred, it was entirely appropriate to apply the proviso. She relied on such authorities as **Stafford v The State (Note)** [1999] 1 WLR 2026; **Woolmington v Director of Public Prosecutions** [1935] AC 462; and **Stirland v Director of Public Prosecutions** [1944] AC 315 to reinforce her submission.

[14] Miss Kohler also cited **R v Copeland Johnson and Roland Lawrence** (1989) 26 JLR 45 (CA) and **Anderson (Rupert) v R** (1971) 43 WIR 286 PC (Jamaica) as cases showing how the courts have treated with complaints of misdirection/non-direction. In the former, counsel submitted, the court held that (i) though the judge

had lapsed into error, the jury could not be unaware of the error; and (ii) the misdirection was minor but even if it were not so, it did not result in a miscarriage of justice because of other evidence in the case. In the latter case, it was argued that the learned judge had erred in his summation in relation to three factual circumstances, two of which were considered material, but the Privy Council held, agreeing with the Court of Appeal, that though the misdirections were material the proviso should be applied as the series of facts in the case would have inevitably led a jury properly directed to a conclusion of guilt. Similarly, Miss Kohler submitted, having been given proper directions, the jury, in this case, would inevitably have come to a conclusion of guilt.

[15] The learned trial judge treated the evidence discreetly, counsel submitted and as the stabbing occurred at the second incident, reminding the jury of the physical damage assertion would capture the essence of why the knife was brought into play even in the absence of the reason put forward for its possession. She further contended that the omission on the part of the learned trial judge could not have the effect of depriving/watering-down/weakening the appellant's defence. Self-defence and provocation were squarely left to the jury as evidenced by the fulsomeness of the summation, the fair and measured manner in which the learned trial judge juxtaposed the cases for the prosecution and for the defence, her reference to the state of the knife when first mentioned as still sheathed, her reference to the [appellant] not troubling anyone when the deceased began taunting him, the generous description of the deceased in the role of the aggressor, the direction to the jury to have regard to all

that was said taking into account whatever they considered relevant, all of which went toward ensuring that the case of the appellant was fairly left to the jury, counsel submitted.

[16] It was her further contention that the appellant cannot make a strong case for a significant error where there was already an altercation between him and the deceased and where he had pulled a sheathed knife then six hours later returned with an unsheathed knife which was clearly to be considered with his mode of carrying it, namely in his waistband. In all the circumstances, Miss Kohler argued, this is a fit and proper case for the application of the proviso as no substantial miscarriage of justice has occurred.

Analysis and conclusion

[17] We found the submissions of Miss Kohler to be compelling. Following the evidence, it was the second incident that the jurors had to carefully consider to determine whether they were satisfied that the appellant had acted in self defence or whether they accepted that he had acted under lawful provocation as the learned trial judge had explained it to them. By the time they got to the second incident, his innocent possession of the knife at the time of the first incident was no longer relevant. It is well settled that a trial judge is not obliged to rehearse all that is said in an unsworn statement from the dock and is obliged only to review the prominent features of the prosecution's case. To that end, it was sufficient for the learned judge to review what she considered relevant to the stabbing incident having already told the jurors

that it was for them to consider all the evidence that they heard and to afford such importance as they felt anything which was not mentioned by her, deserved. She also directed them at page 50 of her summation to consider the contents of the appellant's unsworn statement attaching such weight to it as they thought it deserved, as follows:

> "You consider it and you decide for yourself, what weight to attach to it, because as I said, the accused man exercised his right in law, and having so exercised it, you should consider the contents of his unsworn statement, in relation to the whole of the evidence, and it is exclusively for you to make up your mind, whether the unsworn statement has any value, and if so, what weight you should attach to it.

Continuing her review of his unsworn statement at page 55, the learned judge reminded the jurors of the treatment to be accorded to it:

> "Matter for you to consider what value his statement to you has and how it helps you in your assessment of what took place on that day. Bearing in mind always that I said the accused man does not have to prove anything. It is the Crown who must prove their case against him".

[18] In the evidence as it unfolded, the jury could not have formed the view that the prosecution was maintaining that the appellant had left the area and armed himself with a knife for an unlawful purpose which he carried out on his return. The appellant himself admitted that he had a knife in the first incident and had brought it into play, that is, "raised it from his pocket" as a reaction to the aggressive approach of the deceased and had a knife in his possession, when he returned to the area. This, the jurors would have been entitled to consider, was in circumstances where it was likely that he would again encounter the deceased. Therefore, his state of mind in the

innocent possession of the knife was no longer the issue. However innocently he had come into possession of the knife, by the second incident, the prosecution's evidence is that he pulled the knife and approached the deceased "in a swift manner" and that it was when he pulled the knife that the deceased reached for the bicycle.

[19] As Miss Kohler quite rightly submitted, the omission of the learned trial judge to remind the jurors that the appellant had given an innocent explanation for his possession of the knife that fateful day when he first encountered the deceased could not have impacted the outcome of the trial "so as to deprive/water-down/weaken the appellant's defence". We certainly agree with Miss Kohler that in her summation, the learned trial judge ensured that the case for the appellant was fairly left to the jury. She placed before them squarely for their evaluation, the conduct of the deceased in their assessment of the appellant's defence. At page 30 of her summation the learned trial judge had this to say:

> "So it was clear, and it came out in cross-examination that, although Dougal wasn't really troubling anybody, wasn't interfering with anybody, lee, [sic] Eddy said, he was standing on that section of the place where Walsh plaza was and he was ordering him to leave the place. On the Crown's case that is what they said Lee did.

[20] At pages 35 to 37, the learned trial judge explained why she gave a direction in relation to provocation. She referred to the evidence that the deceased had ordered the appellant to leave the area, "in a very loud and vexed tone" and then continued:

> "So this is why I am leaving for your consideration, the issue of provocation for you to say that these things said by the

> accused - deceased man, could have provoked the accused, to temporarily lose his self control and acted in the way he did. You look at all the circumstances that Mr Edward Walsh described for you, and consider whether or not, on those circumstances, the issue of provocation would arise."

[21] She reminded them of the evidence relating to the physical structure of the deceased and to the movements of the two men as they struggled with the bicycle:

> "You heard Mr. Smith, for the defence, suggested ... that this was an indication that Mr. Walsh was able to move Mr. Dougal back into the street, because they had gone from where the fuss had started to some distance, and Mr. Smith urged you to consider whether or not that proved that Walsh was the aggressor and not Dougal. Matter for you to consider, bearing in mind, what has been brought out by the defence, is that Mr. Walsh was a big man, muscular fellow. So, you have to determine how that fact help you to determine who advanced upon who, because at the end of the day, as I said, that is the critical issue for you to decide."

[22] We agree with the learned single judge that the learned trial judge dealt adequately with all the issues which arose and we find commendable the fair and balanced manner in which she dealt with both the case for the prosecution and for the defence. We certainly cannot agree with learned Queen's Counsel that the omission of the learned trial judge, of what to us was a minor aspect of the case for the appellant in all the circumstances, could have adversely affected his defence of self defence. What the jury had to be concerned with was whether they believed that it was the deceased who attacked the appellant with the bicycle causing him to fear for his life and to honestly believe that it was necessary for him to defend himself or whether it was he who attacked the deceased as the prosecution maintained. Having seen and heard

him, they clearly rejected his defence of self defence, showing on their return for further direction on the issue of manslaughter that they were concerned only with the issue of provocation and having the opportunity to see and hear Edward Walsh they clearly accepted that the appellant was acting under legal provocation as carefully explained to them by the learned trial judge.

[23] Without the need for any reference to decided cases on the particular circumstances of this case, we considered that no miscarriage of justice was occasioned by the omission complained of which, in our view, could not and did not amount to a misdirection. We accordingly dismissed the application for leave to appeal his conviction in terms of the order at paragraph [2] above.

The appeal against sentence

Ground 7-The sentence of 15 years imprisonment was manifestly excessive having regard to all the mitigating circumstances of the case, including the good character and reputation of the Applicant and the aggressive behaviour of the deceased. The jury's verdict was consistent with their finding that the Applicant was acting in self-defence but used excessive force.

Ground 8- Further the learned trial judge was influenced in passing sentence by the incorrect assumption that the [Appellant] had armed himself with a knife for the purpose of using it upon the deceased. See Short Transcript page 79 "Why were you armed with a knife that day?" Thus the apparent error made by the learned judge in citing the words of the Applicant in his unsworn statement (see paragraphs 3 and 4 above) may have led to a further error in the sentencing process. The learned judge passed sentence on the basis of some degree of premeditation but, if there were no evidence of premeditation the sentence should have been much shorter.

We considered these two grounds together.

[24] Lord Gifford QC highlighted the factors disclosed in the course of the trial which he submitted inured to the benefit of the appellant, including: his good character; his educational achievements in spite of his difficult background circumstances; his voluntary return to Jamaica from the United States to face the charge; the indications on the Crown's case that the deceased was the aggressor and the fact that the appellant sustained injuries that were consistent with his account of being struck with a bicycle by the deceased.

[25] While accepting that each case must be examined on its own merits and facts, learned Queen's Counsel referred to some sentences imposed in cases of provocation manslaughter which he said may be of assistance to the court in considering whether there should be an adjustment to the sentence in this case. He submitted that in the case of **Kevin Grant** on facts more serious than in the instant case, a stabbing after a quarrel in a domestic setting, resulted in the imposition of a sentence of nine years imprisonment. Similarly, in **R v Herron Spence** SCCA No 150/2004 a decision handed down on 28 July 2006, the sentence of 10 years imprisonment was upheld by this court. This was a far more serious case than the instant case, learned Queen's Counsel argued, as the appellant, reacting to a report of an incident between the deceased and the mother of his son, threatened to chop off the deceased's head and about 15 minutes later the deceased was seen suffering from a fatal stab wound to the neck. He named the appellant as the person responsible for his injury.

[26] Finally, learned Queen's Counsel referred us to the case of **Dwight Wright v R** [2010] JMCA Crim 17 where the appellant had been convicted for murder but a conviction for manslaughter was substituted by the Court of Appeal on the basis of provocation where the appellant used a knife to stab the deceased after an argument and a sentence of seven years imprisonment was imposed. It was learned Queen's Counsel's contention that this case was similar to the instant case because although Wright was 16 years old at the time of the commission of the offence which was a mitigating factor in his case, the positive features in the appellant's case were similarly mitigating.

Disposal

[27] As learned Queen's Counsel readily accepted, each case must be decided on its own particular facts and circumstances. Sentencing is a matter within the discretion of the sentencing judge. However, although it is a discretionary matter this court may alter a sentence imposed if it appears to be excessive. In the execution of the sentencing exercise the objective is to achieve a fair and just result, always bearing in mind that each case must be decided on its own merits. An offender who pleaded guilty and has a good record may have his sentence reduced and this is applicable even in circumstances where an offender who is indicted for murder pleads guilty to manslaughter.

[28] In **Smith (Keith) v R** (1992) 42 WIR 33 Sir Denys Williams CJ, speaking to this proposition, had this to say at page 33:

> "It is accepted that a plea of "Guilty" may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done. It is also clear that an offender with a good or relatively good record may have his sentence reduced to reflect that record. On principle, too, an offender who is indicted for murder and who is found guilty of manslaughter or whose plea of "Guilty" to manslaughter is accepted, is entitled to have his sentence reflect the factual implications of the verdict or acceptance of the plea: See **R v Hudson (Williams)** (1979) 1 Cr App, App Rep (S) 130."

Applying this proposition to the circumstances of the instant case, the appellant was therefore entitled to have his sentence reflect the factual implications of the verdict

[29] A sentencer, in determining an appropriate length of a sentence, must take into consideration the circumstances of the offender, his antecedents and his general character – see **R v Dayall Whittaker** (1974) 12 JLR 1641. In the instant case the appellant's antecedent report spoke to his impressive educational background and he was described as "an astute and hardworking person" with a good relationship with members of his community. Although in her sentencing remarks, the learned judge had stated that the appellant was a young man of 37 years without any previous convictions who might be among the finest Structured Network Engineers in Jamaica and described him as someone who had a lot to contribute, in arriving at the sentence she imposed these factors do not seem to have been given any weight by her.

[30] In assessing the appropriate sentence the learned judge's focus appeared to have been on the fact that prior to the killing there had been issues between the

deceased and the appellant and on the day of the event the appellant was armed with a knife. At lines 5 to 17 of page 79 of the transcript the learned judge had this to say:

> "When I think about this case, Mr Dougal I must admit that you and Mr Lee Walsh had problem in the past, quarrel, disagreement, why it is that on this day, you have [sic] to arm yourself with a knife. This is one of the things I have to wonder about. True it is, the jury -- well they accepted that Mr Walsh said and did things to cause you to lose your self-control. Why were you armed with a knife that day? You said he approached you menacingly, but you were armed with that knife, which you plunged into his body and took his life. So, I can't lose sight of that fact."

It seemed to us that these comments of the learned judge support the submission of Lord Gifford QC that she might have taken into account an element of premeditation in arriving at the sentence she imposed as they suggest that she was of the view that the killing of the deceased was premeditated.

[31] We were of the opinion that in the sentencing exercise sufficient consideration was not given to the appellant's character, his educational background and his community profile as disclosed in his antecedent report. In our judgment, the level of provocation to which the appellant was subjected would have been significant when viewed in the light of a person of his background and education and the public embarrassment that would have been occasioned by the behaviour of the deceased towards him. When all the factors were taken into account it seemed to us that the sentence imposed did not reflect the factual implications of the verdict so that although we agreed with the learned trial judge that a custodial sentence was warranted we

were of the opinion that a sentence of 15 years was excessive and that 10 years imprisonment was more appropriate in all the circumstances.

[32] For the foregoing reasons we allowed the appeal against sentence and made the order as set out in paragraph [2] above.