JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 38 OF 2006

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

GLENROY McDERMOTT

v

REGINA

Mrs. Valerie Neita-Robertson for the Appellant

Donald Bryan, Deputy Director of Public Prosecutions and Miss Melissa Simms, Crown Counsel (Ag.), for the Crown

November 26, 2007 & March 14, 2008

HARRISON, J.A:

The application for leave to appeal

1. This is an application for leave to appeal by Glenroy McDermott who was convicted of non-capital murder of Michael Dorsett otherwise called "Buba" in the Home Circuit Court before Beswick, J and a jury after a trial between February 6 and February 13, 2006. He was sentenced to life imprisonment with a specification that he would not be eligible for parole before serving twenty years. He now applies to this Court for leave to appeal against that conviction after a single judge had refused him leave to appeal.

We propose to treat this application for leave as the hearing of the appeal in view of the fact that the ground argued before us, was of law.

The evidence adduced by the Crown

2. The conviction in this case depended wholly on the evidence of the sole eyewitness for the Crown, 10 year old Javion Markland. At about 6:00 pm on the 9th November 2000, he was in his yard washing when he heard the sound of a gunshot followed by a "shuffling" sound and the movement of zinc. He turned around and saw Dorsett, who was his cousin, running from a bathroom area next door. Dorsett then jumped over a fence, ran through some bushes and was hotly pursued by the appellant who held a gun in his hand. The deceased who was unarmed ran to the side of the house, went across to the next-door neighbour's yard and jumped a fence. The appellant he said, fired shots at Dorsett. It was later discovered that he was shot in the back.

3. A number of police men came on the scene and the headlights of a police vehicle were used to search the area. Dorsett was not found so they drove away. After the police left the scene Dorsett was placed in a vehicle by relatives and was taken to the University Hospital of the West Indies where he was pronounced dead.

4. Dr. Pawar who conducted the post-mortem examination found a single entry wound on the left mid-posterior chest (the back), 47 centimetres below the top of the head. One bullet was removed from the body and was handed over to the police. No gunpowder marks were found in the area where the deceased was shot and the Doctor said this indicated that the shot which

caught the deceased was fired more than two feet away from his body. The hands of the deceased were swabbed by the police and no gunpowder residue was found on them.

The defence

5. After an unsuccessful submission of no case to answer the appellant presented his defence from the dock and denied the charge. He said he was a Constable with ten (10) years of service at the time of the incident. At about 6:00 p.m. on the 9th November 2000, he was on duty at Bull Bay Police Station when a telephone call was received concerning three armed men who were said to be involved in a robbery in St. Thomas and were travelling in an identified motor vehicle. He was instructed by Cpl. Blake to arm himself with an M16 rifle. Cpl. Blake, Det. Cpl. Walters and himself left the station in a police service vehicle and went in search of this vehicle. It was seen and they gave chase. The vehicle turned into Taylor land in Bull Bay and they eventually lost sight of it.

6. They continued their search and shortly thereafter he saw two men on foot approaching their vehicle. Cpl. Bailey who was driving the service vehicle, shouted, "Buba". Both men drew firearms from their "waistbands" and opened fire in the direction of the police officers. The appellant said he alighted from the vehicle and returned the fire. The men then ran into nearby premises and they all gave chase. He went ahead of the other policemen since he was the one armed with the high powered rifle. On approaching the rear of the premises he saw the same men again and they

opened fire at them. He said he took cover and returned the fire in defence of himself and of his colleagues.

7. "Buba", who was known to him then made his escape over a fence. A search was made of the area but the men were not found. They left Taylor Land and returned to Bull Bay Police Station where a report of the incident was entered in the station diary.

8. The appellant also said that the deceased was known to him as one of East Kingston's most wanted men and that several warrants had been issued for his arrest for offences including rape, robbery, and shooting with intent.

The grounds of appeal and submissions

9. Two grounds of appeal were filed but Mrs. Neita-Robertson argued only ground one which reads as follows:

> "The learned trial judge was under an obligation under law to leave to the jury for their consideration the Defence established by section 14(2)(d) of the Constitution in that the appellant, a Police Officer, acting pursuant to his duty to apprehend a felon used force resulting in death. That in failing to leave the said directions adequately or at all, the appellant was denied the opportunity of an acquittal."

Ground 2 which complained about the trial judge's treatment of the appellant's unsworn statement from the dock was abandoned.

10. It is common ground that the deceased was fatally struck when the appellant fired at him.

11. On the Crown's side, the evidence revealed that there was the sound of a gunshot followed by a "shuffling" sound. In cross-examination, Javian Markland said he did not know the circumstances under which the first shot was fired and he could not say who had fired that shot. The deceased who

was unarmed was pursued by the appellant and was shot in the back. The evidence further revealed that there was a single gunshot injury to the back of the deceased and that no gunpowder residue was found on his hands. Without more, this version of events would certainly make him guilty of murder.

12. However, on the defence side, the case presented to the jury was that two men, one of whom was the deceased man, approached the police. Cpl. Blake then called out to the deceased and both men pulled firearms and fired in the direction of the police. The appellant thereupon returned the fire. There was a chase; the deceased fired shots again at the police and the appellant returned the fire in defence of himself and of his colleagues. The appellant said that on each occasion that the men fired at the police officers he retaliated because he was in fear of his life and his colleagues' lives.

13. It is abundantly clear from the transcript that the cardinal line of defence at the trial was one of self defence. The jury had rejected the account given by the appellant and had apparently concluded that at the time the fatal shot was fired the deceased was not armed with any weapon. Some evidence was adduced on behalf of the appellant that the deceased was wanted on warrants for his arrest for serious offences but it did not specifically raise that his conduct in killing the deceased was done by way of apprehending a felon. The issue now raised by the appellant was whether the learned judge was obliged to have left this defence to the jury.

14. In advancing the ground of appeal, Mrs. Neita-Robertson submitted that the appellant, who was a police officer at the time of the incident, was

entitled to use force against the deceased who was in possession of an illegal firearm and had with intent, fired shots at the police. She argued that the appellant was under a duty to pursue and apprehend the deceased man who was a fleeing felon.

15. She also submitted that the learned judge was under a duty to direct the jury on the appellant's defence pursuant to section 14(2)(d) of the Constitution and to explain the law to them in that regard. She submitted that although the appellant did not rely on this defence at trial, this did not relieve the learned judge of her duty to leave that defence to the jury.

16. We get the impression however, that it is section 14(2)(b) which Counsel wishes to rely on and that the insertion of subsection (d) in the written submissions could be a typographical error. She submitted that the section raises a defence which arises by statute and is separate and apart from the common law defence of self defence.

17. Section 14(2)(b) of the Constitution provides as follows:

> "14(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 the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -
> (a) ...
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) ...
> (d) in order lawfully to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war."

18. Section 14(2)(d) really deals with a situation where the officer acts in order to prevent the commission of a criminal offence and is not relevant based on the facts of the instant case.

19. Mrs. Neita-Robertson further submitted that a police officer was obliged to apprehend persons committing offences and/or suspected of committing offences and may use such force as is reasonably necessary in order to prevent the commission of offences. This is certainly in keeping with the provisions of section 13 of the Constabulary Force Act which states:

> "The duties of the Police under this Act shall be to keep watch by day and by night, to apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence."

20. Mrs. Neita-Robertson had another string to her bow. She argued that the appellant was under a duty to apprehend the deceased since the appellant knew of the existence of several un-executed warrants for his arrest. It mattered not, she said, whether the appellant had the warrants in his possession at the time of his apprehension.

21. However, Mr. Bryan, Deputy Director of Public Prosecutions, submitted that the summing up, when taken as a whole covered all the possible issues that arose on the evidence. He argued that the learned judge could have been more elaborate in her directions to the jury on the issue of death occurring where a police officer is lawfully executing his duty but given the totality of the directions on self defence and the circumstances of the shooting, the failure to give a further direction pursuant to section 14(2)(b) of

the Constitution was not fatal. He submitted that a jury properly directed would still have arrived at a verdict of guilty of murder.

22. He further argued that since no gunpowder residue was found on the hands of the deceased it was for the jury to draw the necessary inferences. In the circumstances, he submitted that this case would be a proper one for the proviso to be applied.

Analysis of the submissions

23. The issue which this Court is called upon to determine is whether the summing up by the learned judge, when taken as a whole had covered all possible issues that arose on the evidence.

24. It is clear from the transcript that the defence did not specifically raise that the killing had occurred whilst the appellant was in the process of apprehending a fleeing felon. The authorities have established however, that it is the duty of a trial judge to deal with and to direct the jury on any defence warranted by the evidence adduced at the trial even though it was not relied on by an accused person. See ***Palmer v R*** (1971) 16 WIR 499 where Lord Morris of Borth-y-Guest speaking for the Privy Council said (at page 502):

> "It is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them."

25. In so far as self-defence arose there is no complaint as to the directions to the jury as given by the learned trial judge. Nor is there any complaint for that matter, as to her directions relating to the burden of proof in determining this issue.

26. The gravamen of Mrs. Neita-Robertson's complaint is, that the learned trial judge's directions to the jury did not go far enough. The effect of the arguments in support of the sole ground no doubt had in mind the direction at page 388 of the transcript where the learned judge said:

> "... the Crown is asking you to accept that, Mr. McDermott, being in Tailor Land, killed Michael Dorset and that at that moment when he pulled the trigger, he Mr. McDermott, was not acting in lawful self—defence.
>
> If you believe Mr. McDermott was on duty doing his job when he killed Mr. Dorset, that does not mean that he cannot commit murder, he can still be guilty of murder.
>
> He is to do his job as a policeman and at the same time, obey the laws of the land. It is against the law to commit murder ..."

27. Mrs. Neita-Robertson submitted that the directions at paragraphs 2 and 3 (supra) were inadequate and could only have served to confuse the jury as to what the appellant could do in order to apprehend persons who had committed offences in his presence.

28. We are of the view that there is merit in Mrs. Neita-Robertson's submissions. Support for this view is contained at paragraph 2527 of Archbold Criminal Pleading & Practice, 35th Edition, where the learned authors state inter alia:

> "... Where an officer of justice is resisted in the legal execution of his duty he may repel force by force; and if in doing so, he kills the party resisting him, it is justifiable homicide; and this is in civil as well as in criminal cases. ... And this is not merely on the principle of self-defence (for the officer or private person is not bound to retreat, as in the case of homicide....) but upon that principle, and the necessity of executing the duty the law imposed upon him, jointly: see *R v Forster*, 1 Lew. 187 (a). Still there must be an apparent necessity for the killing; for if the officer were to kill

> after the resistance had ceased ... or if there were no reasonable necessity for the violence used upon the part of the officer (...), the killing would be manslaughter at least..."

29. We are further of the view that in order to assist the jury in discharging its responsibility, the trial judge is required to explain the relevant law along the lines set out above, review the facts and accurately and fairly apply the law to those facts. The jury will then be left to resolve conflicts and to draw inferences from the facts which they find proved. See ***Sophia Spencer v Regina*** (1985) 22 JLR 238.

The outcome of the appeal

30. Counsel for the appellant has impressed upon the Court that in the interest of justice a new trial should be ordered. The learned Deputy Director of Public Prosecutions argued on the other hand, that even if there was misdirection where the law was concerned, this was a fit and proper case for the proviso to be applied.

31. We are quite mindful of the decision of ***Regina v Reid*** (1978) 27 WIR 254 and the circumstances that guide us in deciding whether a new trial is to be held. Bearing in mind the facts referred to earlier, we are satisfied that the interests of justice dictate that there be a new trial, and this we order to take place as soon as possible.