Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 169/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.(AG.)

REGINA

vs

JAMES BAILEY

F.M.G. Phipps, Q.C. ; Enoch Blake and Earl DeLisser instructed by Enoch L. Blake & Co. for applicant
Miss C. Richards for Crown

April 15 and June 7, 1991

BINGHAM, J.A.(AG.)

The applicant was charged on an indictment in the St. Catherine Circuit Court for the murder of Dave Davis committed on July 9, 1988 before Pitter, J. and a jury. After a trial which lasted from December 4 to 6, 1990 he was found guilty of the lesser offence of manslaughter and sentenced to a term of imprisonment of three years at hard labour.

An application for leave to appeal against conviction and sentence having been refused by a single judge, this application has now been renewed before us.

The facts surrounding the matter were that on the night of July 9, 1988 the deceased Dave Davis who was also known as 'Dlinky ', and 'Prento' and a number of men were assembled at a shop - grocery and bar-operated by one Dorrel Crossgill on Brunswick Avenue in Spanish Town. Along with

Wayne Crossgill the deceased was at the premises for about two hours drinking. Afterwards, the deceased, Wayne Crossgill, Dorrel Crossgill and about fifteen persons, were standing outside the piazza when the sound of an explosion was heard coming from the direction of the applicant's yard. From the piazza where they were standing, it was possible to see into his yard. The explosion sounded like the discharge of a gunshot. Wayne Crossgill said that he then ran out in the road and stood up. He then saw the applicant drive his van out of his yard and went up Brunswick Avenue and away from him. The van then returned shortly after travelling in the opposite direction and heading towards Spanish Town. On reaching up to where the persons were assembled by the shop, the van then "middled the road and bare explosion he heard coming from the van."

It is common ground that it was during this discharge by the applicant of his firearm, that the deceased who was standing by the piazza with a bottle of beer in his hand was fatally struck by a bullet fired from the applicant's gun.

The deceased was placed in a passing vehicle and taken to the Spanish Town Hospital where he was pronounced dead.

Sergeant Barbara Simpson of the Spanish Town C.I.B., on receiving a report went to the Spanish Town Hospital that same night where she saw the accused. He was bleeding from his left side. She spoke to him and he told her that "some men had pounced on him at his home and had shot him." The applicant was then instructed by the Officer to report to the Police Station after receiving treatment. Acting on a subsequent report she returned to the hospital and told the applicant of receiving a report that "he had shot the deceased" and on her request he handed over his firearm to her.

A visit to the scene of the killing by Sergeant Barbara Simpson revealed the presence of a portion of a broken beer bottle as well as blood stains on the side of the road ...

nearest to Mr. Crossgill's shop. Sergeant Simpson then went to the applicant's home where she saw blood stains on the wall of his verandah and what appeared to be the impression made by a bullet in the wall. Her evidence as to the presence of the broken bottle and the blood stains at the scene of the killing was supported by Inspector Cole the investigating officer in this matter.

The applicant gave evidence on oath in his defence. He said that he was a businessman who operated a pastry shop and a club. He lived with his wife and children at Four Dyce Avenue off Brunswick Avenue. He had locked up his business place around 2:10 the Saturday morning and driven his van on his way home. He had the day's takings with him. He saw four men going towards his gate and recognised one of the men to be deceased. As he was suspicious, he made a deviation travelling further down Brunswick Avenue. He went by the No. 2 Post Office then turned his van before driving to his home slowly. He had to pass Grossgill's business place and he then observed that no one was in the shop. There was, however, light in the shop. On reaching home he opened his gate and called to his wife to open the door but before this was done he heard a gun shot and felt a numbness in his side and realised that he had been shot. He then fired two shots in the direction that these shots were coming from. He made a report to Detective Inspector Cole that "he saw the deceased run from his gate and he heard other footsteps running in different directions. He then got in his van and went to Brunswick Avenue (presumably Crossgill's Bar). He saw the deceased in a group with three others. He fired three shots from his revolver in the direction of the deceased and continued driving to the Spanish Town Hospital. There was no mention in the report made to Detective Inspector Cole that the deceased was armed with any weapon when he was shot. In his evidence at the trial, however, the applicant's account was that on his journey to Spanish Town he observed

someone in the road waving him down. It was common ground as the witness Wayne Crossgill in his evidence had admitted going into the road and waving at the van. The applicant said that he saw the deceased who he referred to as 'Blinky' by the sidewalk pointing a gun at him and that it was in those circumstances that he fired three shots from his revolver at the deceased.

The issue which arose for the jury's determination was whether the applicant's account at the trial amounted to a credible narrative of events at his home, in relation to the presence of the deceased in an active role as one of his attackers. Of equal importance was his account as to the events which took place on Brunswick Avenue at the time the deceased was shot.

It was against that background that before us, Mr. Phipps for the applicant argued the following grounds of appeal:-

> "1. That the verdict was unreasonable and unwarranted and cannot be supported having regard to the evidence in that:
>
> a) the applicant was shot by persons who ambushed him at his gate, one of whom was the deceased and as such was legally entitled to repel that attack.
>
> b) even if the applicant was mistaken in his belief that the deceased was involved the presence of the deceased in the area as well as the applicant's subjective belief that the deceased was one of his attackers justified the killing of the deceased.
>
> 2. The primary defence of the appellant at his trial was never put to the jury. This non-direction amounted to a misdirection. The appellant in his sworn testimony had stated that after he was shot he drove his motor vehicle in pursuit of the felons when they eluded him he was

> "returning on his way to the hospital he saw one of the felons who pointed a gun at him. It was in these circumstances that he shot the person he believed to have been one of the felons. It is submitted that the defence of apprehension of a felon arose on the evidence for the jury's consideration in addition to self defence."
>
> 3. That in all circumstances the sentence is excessive and harsh.

In advancing these grounds, he submitted that the accused was entitled to use force against the deceased if he was one of the assailants. Whether he was so or not was a matter for the jury to determine and not for the trial judge. While agreeing that the judge's directions on the law were proper, he contended that it did not go far enough as to justifying the use of force in relation to someone in order to prevent him from repeating the crime. He sought to develop this proposition by adverting to the general situation existing in this country at present in relation to gun crimes and the fact that the deceased was someone the applicant believed was a gunman and who had shot him recently. He submitted that on that basis the applicant was not merely obliged to report the matter to the police but was entitled to apprehend the deceased by the use of force in order to prevent the repetition of the earlier crime. In support he cited The Attorney General's Reference (1976) 2 All E.R. 937.

On an examination of the facts, it is our view that no assistance can be derived from this case. The facts there related to a situation in which the deceased was running away in disobedience to the soldier's command to halt before he was shot. It was this conduct by the deceased which was relevant to the officer's state of mind and provided honest and reasonable grounds for suspicion on his part that the deceased was an I.R.A. terrorist and the justifiable basis for his act.

On the premise that this applicant believed the deceased to have been a felon who had earlier committed a crime, there is no evidence even remotely suggesting that the deceased was attempting to leave the scene when he was shot.

Learned Counsel for the Crown submitted that the summing-up of the learned trial judge was adequate and fair. The defence not having raised the applicant's conduct in killing the deceased as done by way of apprehending a felon, the learned judge was not obliged to leave this defence to the jury. The summing-up, therefore, when taken as a whole covered all the possible issues that arose on the evidence.

With these submissions we are in agreement as on the evidence presented, the summing-up, and the verdict at which the jury arrived, it is clear that they rejected the account given by the applicant that at the time the fatal shot was fired the deceased was armed with any weapon or that the applicant believed he was so armed. Given the admitted shooting of the applicant, it was clear that this act gave rise to a provocative incident, and that the shooting of the deceased was the result of conduct on the part of the applicant brought about by the harm done to him, in which he entertained the belief that some of the persons assembled by the shop had responsibility for the injury which he suffered at his home.

On the evidence presented, two issues called for a determination namely:

1. Self-defence
2. Provocation

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 his directions relating to the burden of proof in determining these issues. His directions on self-defence were along similar

lines as approved by the Privy Council in Solomon Beckford v R. (1987) 3 All E.R. 425.

In applying the law to the facts the learned trial judge then said: (p.7):

> "Now the evidence is that, coming from the accused man, is that he was shot and that the man who shot him was the deceased and that when he later saw the deceased, the deceased was armed with a gun pointing at him. Now if you accept that, then he is entitled to use his gun to prevent an attack on him, more-so bearing in mind that he is injured by a gun. So he hasn't got to wait until the deceased fire again. He can shoot to prevent this attack on him providing he honestly believes that his life is in danger, and I repeat that the burden of proving self-defence is not on the accused. The burden of proving that he was not acting inself defence rests upon the prosecution and that burden never shifts."
>
> (emphasis supplied)

The learned trial judge, not content, did not stop there, but gave a further direction based upon a situation where there existed an honest but mistaken belief on the applicant's part that:-

1. The deceased was among his asailants in the attack launched upon him at his home.

2. The deceased when seen by him later on at Brunswick Avenue was armed with a gun which was pointing at him.

In returning to self-defence later on in his summing-up in dealing with these two situations at pages 22-23 he then said:

> "Now I must tell you Mr. Foreman and Members of the jury, that he had a right to defend his home, defend his person and defend all

> "those who are there and he tells you that his wife and children are there, and if somebody invades his house particularly at that hour of night and is shooting at him and he is in fact injured, he has every right to fire. This is what he tells you he did; he fires back and he fired two shots.....then he says when he was returning he saw the deceased with something in his hand; that he pointed it at him and somebody was stopping him.
>
> Now did the deceased have anything in his hand? The witness for the Crown says the deceased had a beer bottle. The accused man says that the deceased had what appeared to be a gun. Now what if you find that the deceased never had a gun; but in fact had this beer bottle? was he pointing it at the accused? If he is mistaken as to the fact, but what operated in his mind at the time was that what he saw in the deceased's hand was a gun, this is what operated in his mind and he took action then he wouldn't be guilty of any offence, even though its a mistake."

Continuing in the same vein he then said at p. 23:

> "Now if he was still labouring under that mistake, if when he saw persons shooting at him in his yard, and he thought that one of those persons was there and wnen he saw that person ran across the open land and he thought that that person was Dave and later saw that person, saw Dave himself, and he was still labouring under the belief that Dave had this gun and he fired in defence of his own self, then equally he is not guilty."

The above passages have been referred to in order to demonstrate that the learned trial judge was not lacking in his duty and at pains to ensure that the defences raised by the applicantwere fairly and adequately left for the jury's consideration. The gravamen of Mr. Phipps' complaint is, however, that these directions did not go far enough. The effect of the arguments in support of grouns 2 no doubt had in mind the

the direction at page 23 where the learned judge said:-

> "the prosecution will have to satisfy you that he was not acting under any mistake, he never acted under any mistake; knew well it was Dave there and he had no gun there that time but he was just firing or even if in fact, what the prosecution are saying, even if Dave was one of the persons who shot him on his premises and is now standing in the roadside not doing anything, he can't just go up to him and shoot him. This is not the law, because his duty then would be to go and report it to the police."

In so far as this represented a correct statement of the law, these directions in our view cannot be faulted. In this regard, the proposition advanced by Mr. Phipps in support of this ground has no factual basis to support it. Even, if following the incident at the home, the applicant had set out in pursuit of his attackers it was never his case that at the time that the deceased was shot he was other than acting in self-defence whether his conduct was based upon an honest belief or he was labouring under a mistake of fact that the deceased man had a gun. The defence as put was one which from the beginning to the end of the case was one of self-defence.

The issue now raised by the applicant, therefore, never arose either on the evidence for the defence or the case for the Crown. In the circumstances had the learned trial judge resorted to the course adumbrated by Counsel for the applicant he would have provided a valid ground for complaint, as he would in our viewerode the applicant's defence, or at the least have confused the minds of the jury. In this regard the warning ofViscount Simon L.C. in Mancini vs D.P.P. (1941) All E.R. 272 (1942) A.C.1. and applied by Lord Devlin in Lee Chun Chuen vs R

(1963) 1 All E.R. 73 at 80(e) is of relevance:-

> ".....it is not the duty of the judge to invite the jury to speculate as to (provocative incidents of which there is no evidence. The duty of the jury is to give the accused the benefit of the doubt is a duty they should discharge <u>having regard to the material before them, for it is upon the evidence, and the evidence alone that the prisoner is being tried and it would only lead to confusion and possible injustice if either judge or jury went outside of it."</u>
>
> (emphasis supplied)

The underlined words, though addressing the question of provocation would in our view have equal weight in the circumstances of this case, and confirms our conclusion that the learned trial judge would have fallen into error had he directed the jury in the manner advocated for by the applicant. What does not however justify may well excuse and, therefore, the directions on provocation could only arise, if self-defence was rejected by the jury, and in this regard the learned trial judge quite correctly left provocation for their consideration as it arose on the evidence. The summing-up as structured placed the directions on that footing and no reasonable jury could have failed to have fully appreciated them. These directions seemed to have had in mind that enunciated by Delvin J. in <u>Duffy vs R.</u> (1949) 1 All E.R. 932 and of Smith J. (as he then was) in <u>Phillips vs R.</u> 53 Cr. App. R. 132, approved by The Privy Council per Lord Diplock. As they followed the above dicta, this could hardly be the subject for any complaint.

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 as a result of being shot and injured at his home, and an acceptance of the Crown's case that the deceased was at all material times within the vicinity of Crossgill's business premises on Brunswick Avenue.

When the record is examined, therefore, in the light of the above reasons, it is our view that there exists no valid basis for disturbing the verdict arrived at.

On the question of sentence, far from being seen as harsh and excessive the approach adopted by the learned judge can be viewed in the light of the possible need to redress the balance between the offender and the public interest. As the conduct of the applicant, given the verdict of the jury, demonstrated that he acted deliberately, there is no reasonable ground for disturbing the period of incarceration as the learned judge in passing sentence took into consideration the previous unblemished record of the applicant in imposing the sentence of three years at hard labour.

It is for the above reasons that involving as it did questions of law, we treated the application for leave to appeal as the hearing of the appeal, and dismissed the appeal against conviction and sentence. We however order that the sentence should commence on the 6th day of March, 1991.