

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 222 & 231/02

**BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MR. JUSTICE WALKER, J.A.
 THE HON. MR. JUSTICE SMITH, J.A.**

**R .v. ASTLEY WALTERS
 PRISCILLA STONEY**

**Applicant Walters not represented
Glen Cruickshank for Appellant Stoney
Tricia Hutchinson for Crown**

December 8, 9, 2003 and December 20, 2004

SMITH, J.A.

Astley Walters and Priscilla Stoney were indicted for the murder of Clement Johnson in the Trelawny Circuit Court before Campbell J and a jury. On November 12, 2002, Walters was convicted of murder and Stoney of manslaughter. The former was sentenced to life imprisonment and ordered to serve a minimum of 15 years before parole, and, the latter to 5 years imprisonment at hard labour.

On September 15, 2003 a judge in Chambers refused the application of Walters for leave to appeal but granted that of Stoney. Before this Court were the application of Walters for leave to appeal and the appeal of Stoney against conviction and sentence.

On the 9th December 2003, we refused the application of Walters and allowed the appeal of Stoney. We then promised to reduce our reasons to writing. This we now do.

The Prosecution's case

The prosecution's main witness was Richard Williams a fisherman and labourer from Coopers Pen District, Trelawny. This witness testified that on the 8th June, 2002, about midday, he was at the appellant Stoney's house in Coopers Pen. He had gone there with the deceased Clement Johnson whom he also knew as "ISIS" to collect money from Stoney for work done on her house.

The applicant Astley Walters o/c Stone who was the 'boyfriend' of Miss Stoney was also there. They were all in Miss Stoney's house talking. Miss Stoney asked the deceased, "Did you bring me the money that you have for me because I want it to go and get some money at Western Union to come and pay oonu?"

The deceased said "I am going to give the money to you." The witness was leaving the room to get a jug of water when he felt "something wet" on his shoulder. He said he looked around and "it also go into my left eye." He saw the appellant Stoney and the applicant Walters holding the deceased. Stoney was behind the deceased holding his shoulder while Walters was in front holding his throat and his right hand. The deceased had sprayed "pepper" into their eyes. They were trying to take the bottle with pepper spray from him. All three fell – Stoney at the bottom, the deceased on her and Walters on top of the deceased. According to the witness when they fell the deceased no longer had

the bottle. Walters got up and grabbed a piece of wood. He hit the deceased several times in the head and all over his body with the wood. At this time Stoney was still holding the deceased who was on top of her. She was trying "to get him off her." Eventually Stoney got up and told Walters "not to hit him anymore." Walters picked up a hatchet. Stoney held him and said "Don't chop him with it."

The witness assisted the deceased to get up and "struggled with him to the next door neighbour." The deceased he said was battered and could not walk. The deceased was a "rastaman" and much of his "locks" was pulled out. He was bleeding from his ears.

On the 24th June, 2002 Dr. Murari Prasad Sarangi, a consultant forensic pathologist, performed the post-mortem examination on the body of the deceased. The body was identified by Mr. Hugh Johnson the brother of the deceased. The doctor testified that he observed seven external injuries. These injuries were to the head, cheek, chest, shoulder, arm and hip. On dissection he observed a curved fissure fracture of the skull bone. In his opinion the injuries to the head were caused by blunt trauma with severe force. All the injuries, he said, were consistent with the use of a blunt instrument such as a piece of wood. Death was due to cranio-cerebral damage consequent upon blunt trauma to the head.

Detective Sergeant Noel Grant told the Court that when he confronted the accused persons with the crime and cautioned them Walters said "Mr. Grant, the boy a tief and mi lick him in him r... and if him dead a so." Stoney

said, "No, is not so, I held him, you hit him in his r... then me hit him too. It was not meant to kill him."

When Stoney was charged with the murder of the deceased by Det. Sgt. Wayne Brown and cautioned she said that the deceased stole money belonging to her father and herself. Walters when charged and cautioned said, "Nutten nuh wrong. Do what you have to do."

The Defence of Walters

Walters made an unsworn statement. Priscilla was his girlfriend. They lived together in Coopers Pen. He knew the deceased, Clement Johnson. On June 8, 2002 the deceased came to his house. Priscilla asked him about money he owed her. A quarrel ensued. The deceased attacked him and Priscilla with pepper spray. They tried to get the bottle of pepper spray from the deceased. Priscilla and the deceased fell, the latter still holding onto the bottle of pepper spray. He picked up a "little piece of board" and with it he hit the deceased about three times. The deceased dropped the bottle. He took it up. He went to the Falmouth Police Station and from there he went to the hospital. Later he and Priscilla went to the Coral Spring River to get a bath. While they were there Sgt. Grant arrested them and took them to the police station.

The Defence of Stoney

She also made an unsworn statement in which she gave the following narrative. On June 8, the deceased and Richard Williams came to her house in Coopers Pen. She asked the deceased if he brought the money and he said yes. She opened the door and let them in. She asked the deceased where the money was and the deceased took a bottle out of his pocket and sprayed

yellow liquid in her face. She and Walters held onto the deceased in an effort to disarm him. The three of them fell. Walters got up, picked up a piece of stick and hit the deceased who released his hold on the bottle. She pushed the deceased off and got up. Williams and the deceased left the premises.

Grounds of Appeal

The applicant Walters

The Criminal Form 1 discloses two grounds:

1. Unfair trial
2. Insufficient evidence to warrant a conviction and sentence

The applicant's defence was self defence. According to the witness Richard Williams the applicant took away the pepper spray and rained several blows upon the deceased. The learned trial judge left self defence and provocation for the consideration of the jury. The directions on these issues were fair and adequate. There was sufficient evidence to support the verdict of the jury. Accordingly we refused leave to appeal.

The appellant Stoney

Counsel for the appellant Stoney otherwise called Jenny, was permitted to argue the following supplemental grounds:

1. The learned trial judge erred when he failed to uphold the no case submission as the live issue of self defence in relation to the appellant was not negated by the prosecution.
2. By failing to put into context the evidence of Richard Williams, that the appellant was on the ground with the deceased on top of her, the learned judge misdirected the jury when he told them that she

participated in the beating, by holding the deceased while the co-accused beat him.

3. The learned trial judge left the issue of provocation to the jury in general terms. The jury received no guidance how it ought to be treated in relation to the appellant.

Counsel argued grounds 1 and 2 together. The learned judge after defining self defence directed the jury as follows:

"Were the accused defending themselves? The evidence from Mr. Williams on that issue is that when he turned around, he saw what he called the Rasta Man holding the deceased by his throat and the other hand was wrestling with the arm with the bottle and that Jenny was holding the deceased from behind. The second thing that he related of subsequence (sic) is that they fell, all three, Jenny on the bottom, the accused on his back, his back resting on Jenny, he was on top of Jenny and the male accused on top of the deceased. They wrestled on the ground for possession of the bottle containing the orange coloured liquid. And one got the impression whilst that struggling was going on it was being sprayed around, it was being sprayed.

According to the evidence of Mr. Williams, Astley Walters got up, when he got up he had the pepper spray in his hands. He had the pepper spray in his hands, do you believe this. Do you believe that when he got up he had that in his hands or this is something that the witness has just said. The evidence of Mr. Williams was that the deceased received blows after the pepper spray had been taken from him.

Several times he denied that the only blow that the deceased received was whilst he was holding the pepper spray. Could they have been defending themselves? If the pepper spray was no longer with that man who was on the ground when they were being hit, what would they have been defending themselves from. That is a matter for you, Mr. Foreman and your members."

Mr. Cruickshank contended that the learned trial judge erred in not ~~wiretapping~~ the jury that the appellant Stoney's conduct in holding the deceased was purely defensive at the outset and might have continued to be so at the time the injuries were inflicted.

Miss Hutchinson for the Crown submitted that there was evidence from the witness Williams that the blows which resulted in the death of the deceased were dealt at a time when he had already been relieved of the pepper spray.

We are of the view that in so far as the appellant Stoney is concerned the learned trial judge's directions were inadequate. There is no evidence that Stoney encouraged or assisted Walters in hitting the deceased with the wood. The evidence of Mr. Williams is that when they fell the appellant Stoney who was at the bottom of the pile was "trying to get him (the deceased) off her". As soon as she got up she told Walters "don't hit him anymore". We agree with Mr. Cruickshank that in these circumstances there was a clear duty on the trial judge to direct the jury to carefully consider whether or not her conduct which was indubitably defensive at the outset had changed to being offensive at the time when Walters pummelled him.

Such a failure, we think, is fatal to her conviction.

Conclusion

1. For the reasons given we refused Walters' application for leave to appeal. His conviction and sentence were affirmed. We ordered that his sentence should commence as of February 12, 2003.

2. We concluded that Stoney's conviction could not stand. Accordingly her appeal was allowed; her conviction was quashed and the sentence set aside. A verdict of acquittal was entered.