JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 152/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. V. CARL PEART

Paul Ashley for Applicant

Terrence Williams for Crown

November 26, 1991 & March 9, 1992

GORDON, J.A.

The applicant was convicted in the St. Ann Circuit Court holden at St. Ann's Bay on 24th October, 1990 for the murder of Donna McDonald on 9th May, 1987 and sentenced to suffer death in the manner authorised by law. From this conviction and sentence he now seeks leave to appeal.

Evidence for the prosecution was given by four witnesses, three of whom witnessed some of the events leading up to the infliction of the injuries which resulted in the death of the deceased. These are the facts on which the prosecution relied.

The deceased Donna McDonald and the applicant enjoyed a commonlaw relationship which produced two children. At one period they lived in the home of Mr. Leandro McDonald the father of the deceased. The friendship ended in April 1987. On the morning of the 9th May, 1987 Donna Powell and the deceased were walking on the road at Cave Valley when they came upon the applicant who held the deceased in her dress and stabbed at her with an ice pick. This is the testimony of the witness Donna Powell. Miss Powell said she intervened and chucked the

applicant away telling him to desist. The applicant then threatened the deceased in the words of the witness thus "say him gi him the ending a the month fi kill her," which interpreted means he would kill her within the month. After they were parted the witness and the deceased continued their journey towards the witness' home and the applicant followed them caught up with them and again laid his hands on the deceased and stabbed at her. None of the stabs directed at the deceased by the applicant injured her, but her dress was torn. The witness and the deceased then went to the home of the deceased and a report of the incident was made to the deceased's father. Donna Powell, the deceased and Mr. Leandro McDonald then proceeded from that home walking to the Cave Valley Police Station.

When they were within sight of the police station the applicant suddenly appeared on the scene and felled Mr. McDonald unconscious with a stone to the head. He did not then see his assailant. Miss Powell saw the applicant and took to flight. She ran because the applicant said he would stab her. When she was some distance away she looked back and saw the applicant, ice-pick in hand, pursuing the deceased who was running.

Miss Vashtina Parke was on her way to visit her daughter when she heard sounds of someone in distress, she investigated and saw the deceased running on the road with one shoe missing, pursued by the applicant. The deceased called to her and the applicant took up a stone flung same at the deceased which struck her in the back of her neck and she fell. The applicant went up to his fallen victim, took a knife from his pocket and holding down the victim with one hand stabbed her with the knife. The witness moved away raising an alarm by calling to policemen

in the police station which was nearby. She saw the applicant wipe the knife, throw it away and flee from the scene. The deceased, the witness said, was a-wash with blood. Mr. McDonald recovered consciousness to see the applicant bending over his daughter stabbing her. He called to him, went towards him and the applicant ran away. He observed his daughter's body had several stab wounds to the left chest, hand and side.

Miss Junie McDonald who identified the body at the post mortem examination held on 13th May, 1987 said there were 26 stab wounds on the body of her sister.

The applicant in a statement from the dock said that on that morning he saw the deceased, offered her money for the children and "she just drag it from me like a dog." He said he told her he was leaving her and she said he could not as she had given him something to drink already. "That," he said, "is what cause the problem." He attempted to hold her and a friend intervened saying it was foolishness. A little later he met her with Donna Powell and an argument developed. He held her and Donna Powell intervened. He went and tended his animals and on his way back he saw and heard both Donnas and Mr. McDonald making noise and threatening to kill him. At that time they could not see him, but when he came in view Mr. McDonald ran towards him with a machete threatening to kill him. He threw a stone hitting and felling Mr. McDonald. Donna McDonald then attacked him with an ice-pick. She stuck him. He continued:

> "Well, the two a we was rassling (sic) for the icepick so me tek up me knife out a me pocket and she heng on pon the knife and it cut her in a her hand middle. Yeah and she get a next cut right here so, My Lord.
>
> His Lordship: Where? A little cut where?

"Accused: Right here so. She just get a cut right in her stomach. (indicates chest) And between rassling and hold up me knife and she a catch after me hand now and me draw weh me hand and she hold on pon me hand and me carry down me hand fast, the knife catch her in here so. (indicates chest)

His Lordship: Yes?

Accused: I never lick her with no stone, My Lord. Yes, My Lord, that finish there so, My Lord."

He then in a long rambling statement told of his relationship with the McDonald family and of a family feud that existed which caused Mr. McDonald to dislike him. He said Miss Vashtina Parke o/c "Miss Lurline" did not know him but there was an incident between her daughter and his sister and "all a them a carry feeling fi mi." He then told of his ministering to Mr. McDonald during his illness. Everyone he said "deh **fight** against me, My Lord, and told lie on me."

Mr. Ashley made submissions on the one ground of appeal filed, viz:

1. The learned trial judge failed to clearly direct the jury as to the manner in which they should approach their duties.

   To wit, the learned trial judge
   (i) issued misdirections on law;
   (ii) gave conflicting and confusing directions on the same issue;
   (iii) misinterpreted the evidence;
   (iv) wavered in his determinations."

He submitted that the total result of the summation was to leave the jury in a state of uncertainty in relation to the law and how they should apply the law. He highlighted selected passages from the summing-up to support his submissions. At pages 76 & 77 of the transcript there are the following passages:

Page 76 - "When you consider all the circumstances of the other one, 'I gave you soomthing to drink,' you have to remember that the accused himself, said his friend said, 'That a foolishness.' You may very well think, Madam Foreman and your

"members, that that friend was right, 'That a foolishness.' It's a matter for you. You have to consider whether those things were such as to cause a reasonable, responsible person to lose his self-control to act as he did, because the allegation is that he acted to the extent that there were twenty-six stabs on a seventeen year old girl, the mother of a child six weeks old one of them. Look at these things, a matter for you. You haven't got to take it from me. Then, the other provocative act you are to look at in self-defence also is the statement of the accused that when he knocked down the father of the deceased she came at him with an icepick. That, Madam Foreman and members of the jury, could be considered as a provocative act, but you have to consider whether that act was provocative and whether the girl who did that provocation and running away entitled a person to chase her down and stab her twenty-six times.

Page 77 - A matter for you. This provocation is a matter for you, but remember that it is the prosecution who must prove to you that the act was not done in provocation. At the end of it all, if you consider that the man was provoked you have to acquit him. If you are in doubt that he was provoked, you can't find him guilty of murder, the highest you can find him guilty of is guilty of manslaughter. So this is how you do it, if you find that he was provoked, manslaughter because provocation reduces murder to manslaughter. Equally, if you are in any doubt as to whether he was acting under provocation, manslaughter, because the prosecution would not have made out the case to your satisfaction.

The word entitled used by the trial judge at page 76, Mr. Ashley submitted, amounted to a misdirection in law. The act would be a provocative act not an entitlement, he said. The word entitled used by the judge in this context is accepted in common parlance to mean cause, and in this context "cause a person to lose his self-control. ..." If there was any doubt about this meaning it was clarified in a passage at page 79 thus:

Page 79 - "But that was his statement. If you believe that story that what he did, the wounds that she received from him were accidental, end of the matter. You have to acquit him. If you believe that he acted in self-defence against Donna McDonald, you have to acquit him also because self-defence is a complete defence. If the self-defence does not avail him and the accident does not avail him, you can look at the case in relation to provocation, if you see that provocation is there and you remember you have to reflect on the 'grabbing away of the money like a dog,' the saying that you can't leave me because of what he has had to eat or drink and then the attack on him again with the icepick, you have to look at that whether that was provocation which would have caused a sudden loss of self-control. If you find on his testimony that he was provoked legally to act, then you have to say guilty of manslaughter. If you are in doubt, it is manslaughter."

Two other passages were challenged as amounting to misdirections in law. They appear on pages 85 and 87 - 88:

Page 85 - "Now, it is the prosecution who must negative self-defence and he says, 'I had nothing with me, I had no machete and my daughter, also, had no machete.' So if you don't have any weapon - that's what the prosecution is telling you to believe - if you don't have any machete, you can't attack any body to demand self-defence or to provoke you."

Pages 87-88 "The next witness was Junie McDonald who identified the body and that was the case for the prosecution. I had put the two cases to you before. I told you that if you believe the accused's unsworn statement that it was an accident, you have to acquit him. If you are in any doubt as to whether it was an accident, also you have to acquit him. If you believe him that he was acting in self-defence, he was defending himself against an attack by Donna, who

> "he said attacked him with an icepick, you have to acquit him and if you are in any reasonable doubt that he was acting in self-defence, you have to acquit him too.
> If you don't believe any of those, you look at the matter - if you don't believe any of those Madam Foreman and members of the jury, you look at the matter, now, in relation to the provocation that I told you, to see if there is anything which reduces it to manslaughter. If you disbelieve him completely, if you don't believe his story at all, remember what I tell you that you cannot say he is guilty without looking at the Crown's case in its totality to see if it satisfies you. That's how you deal with it. You have to look if the crown negative provocation. If you find that the crown has negatived provocation, you are in no doubt that what he did was not under provocation, only then you can find him - the verdict adverse to him."

The impugned passages are those underlined. I have given them in context because to isolate them, could mislead. It is clear from the context that the passages were appropriate. The reference to a machete (at page 85 supra) was against the claim by the applicant that he was attacked by a machete-wielding Leonard McDonald. This allegation the Crown denied and the learned trial judge here adverted to the posture of the prosecution in relation to the defences of self-defence and/or provocation as it arose from self-defence. If there was no attack with a machete there was no question of self-defence against such an alleged attack and consequently the defence of provocation arising from a defence of self-defence which is rejected could not be considered as it would be inappropriate. The words "demand self-defence etc" did not detract from what the learned trial judge intended to convey i.e. that if they found that Mr. McDonald did not have a machete and did not attack the applicant the question of self-defence and provocation arising from self-defence in that context cannot be entertained as the prosecution would have negatived those defences.

Clearly the passage on page 88 cannot be read in isolation. It is but part of the complete passage which began on page 87 in the paragraph above and to which reference is made in these words:

> "... If you don't believe any of those Madam Foreman and members of the jury, you look at the matter, now, in relation to the provocation that I told you, to see if there is anything which reduces it to manslaughter. ..."

The passage contains directions in law which are appropriate.

Mr. Ashley next contended that the learned trial judge failed to give the jury the legal definition of accident and this failure amounted to a misdirection in law. The reference to accident in the passage on page 77 (supra) he submitted was inadequate:

> Page 77 - "The other little area I want to tell you about is accident. You remember the statement contained something to say, 'she get a cut here and she get some more cut,' and all that is suggesting is that it was an accident. if you feel that whatever wounds that the deceased suffered was accident you have to acquit, you know. Equally, if you are in any doubt you have to acquit also, because the prosecution would not have negatived this accident, it would not have been a deliberate act, but all these are matters for your deliberation in the whole circumstances." (emphasis added)

Mr. Williams for the Crown contended that it was unnecessary for the trial judge to have given the legal definition of accident because he told the jury that if they found the injuries were not deliberately inflicted they were to acquit.

The submissions of counsel overlooked the clear directions given by the trial judge at pages 73 - 74:

"You must consider now the third element. He is saying that it was, has to be the prosecution who must prove to you that the acts which caused the death, the stabbing, were deliberate acts and that is where you would have to examine carefully, in the light of the suggestion coming from the accused man in his unsworn statement that it was an accident, because <u>if something is done in an accidental way it is not deliberate, it is an accident.</u> It doesn't give rise to criminal charges. So, you will have to look when we consider the - when I review the evidence to you and I make the comments, you have to look at all that to see in the circumstances to see where there was this, whether this thing could have been an accident. The next element, you look at is how I tell you, is the element of intention and if you find that an ordinary, reasonable person stabbed so many times - you remember how I tell you - you ask yourself what could have been the intention. Then, the prosecution has to prove to you so that you feel sure that whatever was done, if you think that anything was done, was not done in self-defence. Self-defence, Madam Foreman and members of the jury, is a complete defence, a complete defence and it operates in this way:
If a person is attacked or if he honestly apprehends an attack and he honestly believes that his life or his body is in danger therefrom, he may use such force as is reasonable to repel or prevent the attack and even if he kills in the use of such force it is not a crime. It is a commonsense - it is commonsense and good law that a person who is attacked should defend himself; but whether or not he has been attacked or honestly apprehends danger is a question of fact for you. Considering all the circumstances and hearing and deliberating on all the evidence, it is a matter for you."

The learned trial judge gleaned from the unsworn statement of the applicant a suggestion that the injuries were inflicted accidentally and he proceeded to deal with it as a defence arising on the evidence. In so doing the judge was over-generous to the applicant affording him an additional chance of acquittal. In his statement the applicant said that under attack he took his knife from his pocket. Thus arming himself was a deliberate act on his

part and done in self-defence. Any injury the knife inflicted on the alleged assailant could therefore not have been accidental. They would have been inflicted in self-defence and if the jury accepted this the applicant would have had the verdict of the jury. "In the popular and ordinary sense, accident denotes an unlooked for mishap or an untoward event which is not expected or designed." **Fenton vs. Thorley** [1903] A.C. 443 at 448 & 451. The jury in this case could have in no wise misunderstood the meaning of the term accident.

Mr. Ashley next focussed his submission on directions which he said were conflicting, confusing and incorrect in law amounting to material non-direction. The first passage appears at page 77 (supra) thus:

> "At the end of it all, if you consider that the man was provoked, you have to acquit him."

This was incorrect in law and if allowed to stand would have redounded to the benefit of the applicant. But in the sentences that follow immediately the trial judge directed in clear terms that a finding of provocation would have the effect of **reducing** a charge of murder to one of manslaughter. He said "if you find that he was provoked, manslaughter, because provocation reduces murder to manslaughter." It is obvious that what the judge meant was that in the circumstances of this case a finding of provocation meant an acquittal of murder and a conviction of manslaughter.

The other passage which Mr. Ashley said offended was that appearing at page 86:

> "He said these people didn't see him. Maas Leo didn't see him and he saw Maas Leo with this Bose Machete chawing (sic) fire, that he going kill him and instead of he cut away he come up and face Maas Leo with the machete. It's a matter for you. It's a matter for you because commonsense would dictate, Madam Foreman and members of the jury, if

> "you hear a man down somewhere distant from you with a machete saying he is going to kill you, you go the other way; but he went up. It's a matter for you. Then the other witness was Miss Vashtina Park. She is a domestic and she lives on the Long Bay ... On the other hand, if a man say he is going to kill you perhaps you could also ask, in all honesty, that you haven't got to run away. You haven't got to run away but you must ask yourself whether it allows you to pick up a stone and lick him down in the circumstances. It is a matter for you."

In this passage the judge sought to relate the law to the statement of the applicant made in his defence from the dock with particular reference to this segment:

> "Yeah, after me leave there now, My Lord, and go look after the cow and come back. When me coming back me see Maas Leo, the two Donna a come. Through me have to come up a little grade, dem never see me because me have fe come up a little grade and me hear dem pon one noise say dem must kill me today. Yeah, after me go up little now, My Lord, and the two a we face to face, as him see me him start to step down faster with the Bose cutlas in a him hand and say him must kill me today. Yeah, from me hear him say that, My Lord, me just tek up a stone same time and fling it and me no know which part it catch him. Me know it catch him. Me no know which part it catch Mr. McDonald. Me know it catch him. At the same time Donna Powell ran off and say Tambu kill Maas Leo.
>
> His Lordship: Donna Powell run off and said?
>
> Tambu kill Maas Leo. By the time Maas Leo fell, that is Donna, My Lord, attack me with a long icepick, with a wire icepick."

The learned trial judge had given the jury directions in law generally and on self-defence and provocation in particular which were correct and in the passage which Mr. Ashley found objectionable he was offering comments as he was entitled to do. It was the prosecution's case that the applicant felled Mr. McDonald by stealth; the applicant in his statement admitted that

Mr. McDonald and his party were observed by him but they were unaware of his presence. The comments of the judge were intended to direct the jury's attention to the fact that the applicant said he had an advantage over the McDonalds in that he heard them speak and knew from what they said that they intended to do him violence. They were then unaware of the applicant's presence and this advantage the applicant could have used to remain out of sight until all danger to him had passed but he chose not to do so and confronted them. This conduct of the applicant showed he wanted a fight. The essence of self-defence is that 'a man defending himself does not want to fight and defends himself solely to avoid fighting' **R. v. Knock** 14 Cox R 1. However it may be viewed, this aspect of the summing-up related to the incident in which the applicant disabled Mr. McDonald **before** the fatal injuries were inflicted on his daughter.

On the statement of the applicant the deceased attacked him with an ice-pick after her father had been disabled and the trial judge not unmindful of that gave adequate directions on provocation arising in those circumstances in the passage extracted from page 79 (supra).

In support of submissions that the trial judge misinterpreted the evidence Mr. Ashley referred to two passages one already given from page 85 and the other from page 82. In the passage at page 82 the evidence of the witness Donna Powell was being reviewed when the learned trial judge said:

> "... she was emphatic when she told you that he stabbed at her the three times again, and she says now she was still trying to get away from him. That is why maybe she didn't get stabbed. Remember, Madam Foreman and members of the jury, when the witness is asked if Donna didn't do anything, maybe the witness thinks if Donna had hit him or something like that. Can you really imagine somebody hit you in your chest, stab at you with an icepick and you not trying to get away, you are not

> "going as a lamb to the slaughter. So you mustn't think that when she said Donna wasn't doing anything, she just stand up there passive, she must have been trying to escape." (emphasis added.)

Mr. Ashley in support of his contention isolated the last sentence completely overlooking the beginning of the passage and the general context in which the comment was made. There was evidence from Donna Powell that the deceased tried to escape.

We are unable to find any virtue in this submission.

At page 79 of the transcript the judge told the jury:

> "... you remember he went on to a long story about his kindness to Maas Leo and all that. I am not going to repeat that, Madam Foreman and members of the jury, because it has no bearing on the case here. But, then, again perhaps you can consider it because he is saying that he has been so kind to Maas Leo, having been so kind to him in his illness, he wouldn't do anything untoward to him. That is the highest I can put it but that's a matter for you."

This Mr. Ashley submitted as supportive of his contention that the learned trial judge "wavered in his determination". This wavering he submitted added to the confusion and confirmed his submission that the jury were not clearly directed. They were therefore left in a state of confusion as to how they should approach their duty.

A trial judge's duty in summing-up a case to a jury is to communicate with the jury explaining the law applicable to the issues raised on the evidence and review the evidence in language that the jury understands. The jurors in this case were from the rural parish of St. Ann and as ordinary folk they spoke the language of the people. The trial judge had to assess the level of intelligence of the jury and ensure that what he said was understood by them. The language the judge used at times was infelicitous or unjudicial awkward and inelegant, but it is the language the jurors understood. Words like 'chawing fire' are readily understood by the average Jamaican in the rural areas.

Counsel is able to communicate in standard English and at times in the language of the ordinary man. The ordinary man is able to understand standard English simply put and clearly stated but is comfortable with the expressions in use in his locality and among his people. A judge in summing-up must not indulge in a legalistic exposition of punctilious English but in an explanation of the issues involved and the legal principles to be applied by the jury in clear elegant language that the jury understand. I find particularly apposite this extract from the judgement of Lord Chief Justice Goddard in **R. v. Reynolds** [1947] 32 Cr. App. R. 39 at page 40:

> "... in a long summing-up, as this was, there can nearly always be found some phrase or other in which the Judge may have used some verbal inaccuracy which by no conceivable possibility could have any effect on the case at all. In an appeal of this kind, because it is an appeal against a conviction of murder, counsel very often thinks that he is bound to try to attack the summing-up where there is no real attack to be made and where nothing has been said to the jury which could possibly mislead them."

Mr. Ashley readily conceded that the other parts of the summing-up were impeccable.

This was an uncomplicated case. On the prosecution's evidence there was an unprovoked attack on the deceased, after her father had been felled, and some twenty-six stab injuries inflicted on her. On the defence statement there was an attack on the applicant which he resisted and in repelling the attack the deceased sustained the injuries. The summing-up was full, and fair and the jury by their verdict rejected accident, self-defence and provocation. They accepted the prosecution's case.

We are of the view that there was nothing in the summing-up upon which we could conclude that the jury were confused. There was no miscarriage of justice. The issues were simple and the jury resolved them in 20 minutes.

Application for leave to appeal is therefore refused.