Supreme Court 57

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 155/80

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. CLINTON GOODEN

H.G. Edwards, Q.C. for Appellant

M.J. Dukharan for Crown

December 4, 1981 February 12, 19, 1982

CAREY J.A.

On February 12, we treated this application for leave to appeal as the hearing of the appeal, which we then dismissed. At that time we intimated that we would put our reasons in writing and this we now do.

The appellant was convicted in the Portland Circuit Court before Morgan J. and a jury on 26th June, 1980 for the murder of Steadman Johnson, and sentenced to death. The evidence adduced on the crown's case was circumstantial and the real complaint of the appellant's counsel (who did not appear below) relates to the learned trial judge's treatment of this evidence.

It is necessary therefore to set out the facts of the case in some little detail. Both the appellant and the victim were police constables stationed in far distant Green Island in Hanover. In the early morning of 19th January, 1980 at about 4.30 a.m. Inspector Martin Richards who is the sub-officer in charge of this station, on his return there, requested Johnson, the officer on station guard duty, to copy an entry from the Inspection Minute Book onto a sheet of foolscap. He also gave a pen to the station guard to ensure that his instructions

were carried out. Before retiring he noticed that Johnson had begun copying the entry. At about 5.35 to 5.40 a.m. he was awakened by a knocking on the cubicle he occupied and the voice of the appellant saying 'Inspector, Inspector, Constable Johnson get shot, sir". Richards had not heard the sound of a gun-shot but another constable, Constable Nickel Daley, also sleeping at the police station was awakened by the explosion. He confirmed that this occured at 5.30 a.m. and that about 4-5 minutes later, he heard the appellant sounding the alarm. These times are approximations because at 5.35 a.m. when the radio operator at Lucea Police Station called up the Green Island station, he heard the voice of the appellant respond to this call. Thereafter, the voice of the deceased Johnson came on to transmit the morning's crime report.

When Inspector Richards, who had been awakened by the appellant reached the guard room, he saw Johnson lying in a pool of blood. He had a gun shot wound in his head. He was dead. The medical evidence showed the injury to be 3" above the right eye-brow. This was an entry wound. The doctor retrieved the bullet just below the skin at the back of the head with its junction with the neck. There was no burning of the skin. There was extensive damage to the brain and the brain stem was destroyed. Death would have been instantaneous. The doctor expressed the view that the firearm at the time it was fired must have been held above and in front of the victim's head at a distance greater than 2 feet. In the right hand of the deceased was still clutched the pen given him by Inspector Richards. The copying of the entry had been partially completed. All the doors and windows in the station were secure, the bunch of keys for the station were still in a pocket of the deceased, (which pocket the jury were not told). The lead wire or electric line connecting the speaker to the radio was under the mid-section of the body on the floor. The service revolvers of the appellant and the deceased were both found on top an ammunition chest nearby in the guard room; 17 live rounds and 1 spent shell from these firearms were on

the same place.

When the appellant was asked how their colleague had been shot, his words were: "Me nuh know, sir. I just hand him the revolver, sir and when I reached in the passage, I heard the explosion, sir. I went back and saw him lying dead, sir." He was next asked how the revolver and the rounds got where they were found. He said he did not know. This was inconsistent with his statement from the dock which we will mention hereafter.

The ballistics expert Superintendent Daniel Wray testified that the bullet which was recovered from the head of the deceased, was fired from the appellant's gun. He also testified that at the time of the post mortem held on 22nd January he made washings from both hands of the deceased to ascertain if he had fired a gun at the material date. The test on the solution was carried out by another member of the Forensic Lab, and he related the result of those tests which he did not carry out. This was plainly hearsay evidence, to which the defence at the trial raised no objection, but which was emphasized by them in cross-examination. The opinion which this officer expressed in examination in chief was that it was not likely that the deceased discharged a firearm that morning. In cross-examination it was emphasized that this result was inconclusive: the gun could have been fired by either the appellant or the deceased. In the absence of powder burns in the area of the entry wound, the opinion was also expressed by Superintendent Wray that it was hardly likely that the deceased could have fired the fatal shot. Superintendent Wray in arriving at this conclusion took into consideration the point of entry and the position from which the bullet was recovered. A demonstration to the jury by this witness showed that if the deceased had held the gun at the maximum of his reach from the site of the injury, the distance between muzzle and site would be about 12 inches. The superintendent (it was not challenged)

was about the same height of the deceased. We would point out that he was present at the time of the post mortem examination, which was when he made the washings of the hands of the deceased.

The appellant made a statement from the dock. He told Morgan J. and the jury that he returned to the station at about 5.30 a.m. and handed over to the deceased his service revolver with the ammunition. He confirmed that he took the call from Lucea. He observed that as he was tired he had not checked to see if any rounds were left in the chamber of his revolver. This is a curious statement, seeing that he was not too tired to take a radio call which did not concern him. As he made his way to his sleeping quarters along a passage in the station, he heard an explosion. He returned to find Constable Johnson with the "two revolvers, spent shell and ammunition beside him." This too was odd because the spent shell is not automatically ejected upon firing. Be that as it may, he picked up all these articles and placed them on the ammunition chest. He also explained that on the previous day he had received an urgent call to Negril. This last statement was to explain the reason why he still had the firearm in his possession, there being evidence that he should have returned the firearm to proper custody on the 18th.

Three sets of supplemental grounds of appeal were filed. The court granted leave to argue them all. We mean no disrespect to these grounds but they amounted first to a complaint that the learned trial judge wrongly allowed evidence, based on a test carried out by another person viz. "the washings from the hands of the deceased," to be given by the ballistics expert, and thus admitted, evidence which was not only inadmissible but highly prejudicial to the appellant and secondly did not warn the jury of the inherent weakness of circumstantial evidence, and emphasized circumstances which linked the appellant with the crime and under-stressed weaknesses in the crown's case.

As we have seen some technical evidence was adduced at the

trial by the Crown in an endeavour to demonstrate that the deceased had not fired a gun that morning, and as part of it Superintendent Wray stated in his evidence that he had made washings of the deceased hand using a solution of mitric acid. This solution was handed over to a Dr. Taylor for analysis. He examined the result of the tests carried out by his colleague.

His examination then continued:

> Ques: Now from your examination of the results of the test, did you come to any conclusion as to whether or not there was any gun powder on the hands of the deceased?
>
> Ans: Yes, sir. The results were that there was no trace of gun powder on the hands of the deceased.
>
> Ques: And to you, Superintendent, when you, to your mind, Superintendent when you saw no trace of gun powder in this test, what does it mean to you?
>
> Ans: That it was not likely that the deceased did fire or discharge the revolver.

In cross-examination, learned counsel for the accused, a person of vast experience at the criminal bar, was not troubled by the nature of that evidence. This is how he saw the importance of that evidence.

> "Ques: Now it is observed that in giving your opinion you used the phrase 'it is not likely' - correct?
>
> Ans: Yes, sir.
>
> Ques: Whereas when you are talking about your findings in relation to which gun fired the bullet you say, 'it is conclusive'?
>
> Ans: Yes, sir. "

So that there could be not be the slighest doubt, he persisted.

> Ques: Am I correct, Superintendent, in saying that in your opinion as to the hands of the deceased, Johnson, your findings are not conclusive?
>
> Ans: That is correct, sir

Ques: And that is why you used the phrase, 'not likely' as opposed to 'conclusive'

Ans: Yes, sir "

And later he sums up the matter by this question:

"Ques: Let us understand this evidence that you have been giving from 10.00 o'clock this morning. You cannot say positively that the deceased didn't do it and am I correct in saying that you cannot say the accused did it?

Ans: No, sir."

At the end of the day although it is true that the evidence of the result of the mitric test to the hands of the deceased was hearsay and properly no opinion could be expressed on it, the opinion which was in fact given to the jury would not have strengthened the Crown's case. It did not prove what the crown thought it would. The learned trial judge did not rule on the question of its admissibility, doubtless because no objection to it was taken. We do not however wish it to be thought that this relieved the learned trial judge of her clear duty to indicate to counsel for the crown as soon as the question was put, that the answer was inadmissible hearsay. We note that she made no comment on this evidence given by the Superintendent, but left the matter to the jury, as the evidence was given.

At pages 207 - 208 of the transcript she said this:

"He says he did the test on the hands to try to find out if the deceased fired the gun. The washings were submitted to Dr. Taylor at the forensic laboratory and it is on Dr. Taylor's findings that he gives his opinion. He admits that he says it is not likely and he admits that he says the findings on the gun were conclusive. But in respect of the opinion which he gives in relation to the hands of the deceased, Johnson, his findings are not conclusive. Then he goes on to say. 'yes although I have, I am saying it is not likely that the deceased fired, I am not in a position to say he did. I am more of the opinion that he did not.' So, he sticks to his opinion in spite of the fact that it is not conclusive, but he is saying, taking everything together he is of the

> "opinion that he did not. 'My investigation,' he says, 'is apparently the deceased or the accused fired it. No tests were done by me to the accused's hands so I cannot say positively that the deceased did it or the accused.' "

Learned counsel contended before us that this evidence was of crucial importance to the crown's case since the defence was that the gun which killed Constable Johnson was not fired by the appellant. In our view if the opinion was not as stated, it would have provided cogent evidence that the deceased had not killed himself. Since it was inconclusive, it provided no basis from which any inference whatever could be drawn; its prejudicial effect was nil. There existed other evidence in the case from which the jury could have concluded that the gun had been fired by the appellant rather than the deceased, and this evidence we will examine when we come to consider the other ground. We think therefore that this ground is without merit.

The next contention related to the nature of circumstantial evidence. The appellant's counsel argued that this type of evidence was inferior to direct evidence and referred us to the views of some text-book writers on this subject. We do not consider it necessary to engage in the controversy suggested by these writers. It is enough to say that learned counsel conceded that so far as the judge's directions on circumstantial evidence went, those could not be faulted. The learned trial judge directed the jury in terms of the rule in Hodge's case (1838) 2 Lewin CC 227; 168 E.R. 1136 and R. v. Cecil Bailey (1975) 23 W.I.R. 363; 13 J.L.R. 46. We would not disagree with defence counsel's concession, nor do we feel it necessary to rehearse those directions in this judgment.

The learned trial judge, it was said however, in her comments on the evidence was unduly favourable to the crown's case at the expense of the defence. The circumstances which went to prove the crown's case were these: the appellant had the opportunity to fire that fatal shot; the gun which killed the deceased was the appellant's; he told two

different stories regarding the presence of the firearms and ammunition on the chest; (first that he did not know how they got there and secondly in his statement from the dock said that he had taken them all up from the floor); the absence of powder burnes from the site of the wound; the fact that the radio transmission to Lucea by the deceased ended abruptly; there was no unauthorised entry into the building by any other person, as all doors and windows were intact and the keys for the doors were on the person of the deceased. The demonstration by the ballistics expert tended to show the impossibility of the injury being self-inflicted for had it been self inflicted the distance between muzzle and site of injury would have been round about 12", in which event, there would have been the strong likelihood of powder burns. The evidence that the deceased who is right-handed still had the pen in his right hand in what was described as a "writing position", that he would have to press the transmitting button to speak to Lucea and the unlikely event of him holding pen and gun in his right hand and transmitting at the same time. When the appellant left his comrade, the station guard he was reporting on the radio to Lucea and his, the appellant's revolver had been handed over, the ammunition having been extracted.

The jury were entitled to come to the conclusion that the appellant had also extracted the rounds from the deceased's revolver, as it would be difficult to believe that a station guard on duty would have rendered himself powerless by disarming himself. Further he must also have extracted the spent round from the chamber: it had to be done manually. These facts having been adduced before the jury, the learned trial judge left them to the jury with her comments. So far from understressing the defence, she said this about the defence at pages 216 - 218 of the record:

"The defence relies on various counts. They rely on the fact that he was out of the room when the deceased got shot. That is one thing, and it has been brought out that he has consistently repeated that he does not know how the deceased got shot and that he has never varied from this position. It's a matter for you. They rely on the fact that the gun was not examined for finger prints to satisfy you that three-O, from which the fatal shot was fired, whether or not it was handled by the deceased; there is no evidence that he did not handle it. Of course, the detective said it was not necessary, but it's a matter for you to look at. They rely on the fact there was no malice between himself and the accused, there was only friendship and there was no reason for him to kill him; and I have already dealt with that. They rely on the fact that if he had killed him he could have taken various other options of escape which no one would know: he could have gone to bed without waking anyone at all; or he could have said it was an accident and nobody would know. Therefore, the fact that it happened the way it did indicate that. They rely on the fact that if he wanted to kill him he would not choose inside the station to do so. That, of course, is a matter for you, but I would think much depends on the availability of a revolver in your hand and the opportunity at the particular time. They rely on the probability of a self-inflicted injury, and he has put forward three theories for your consideration to indicate that he could possibly have been shot by himself accidentally in any one of those instances. I would just make an observation in respect of the second theory. Now, you remember the theory with the gentleman holding his hand up like that? The evidence is that he walked five yards and of that five yards two and a half yards was inside the guard room and one and a half yards, outside; so you would have to say no matter how slow he walked that was a split second and to say that at least I would say that in that split second the man assumed this very awkward position - because he doesn't tell us that he left him that way - and shot himself. That is what you are asked to consider - that he is there looking in the muzzle of the gun. If that were so, should not the accused man have seen him when he left either commencing to put his hand up or something like that? It is all a matter for you whether he could have assumed that position in so short a time. In respect of that also I find myself forced to comment on what I would call the

> "unfortunate, or rare coincidences that happened to the deceased man based on the theories and the evidence. (1) He has a firearm ..30, which is supposed to be empty but unknown to him a bullet is in the chamber; the second thing is that he holds the firearm to his face and the firearm goes off; the next thing is that it kills him and what unfortunately happened it kills him. The firearm falls and the barrel opens as a result and then the cartridge case which Mr. Wray has told you that it is hardly likely but not impossible, it drops out of the barrel and what is the other rare thing that happens is all the ammunition and spent shell, everything, fall down on the ground; the two firearms, his gun ..52 that falls and it not only falls but when that falls that one opens too. I don't know. If that is not so then it seems to be that he must have been on the ground playing with all of them or - is it that he had the firearm up there at his head plus his own firearm, the seventeen rounds of ammunition plus the pen? He didn't have one and when he fall everything fall down. This is what he says; he saw them on the ground. Everything scatters. Only the pen is left clutched in his hand - what do you think of it? You see, it is a matter entirely for you, not me, so you are to consider all that."

We note that the learned trial judge left to the jury for their consideration various theories as to how the deceased could have fired the gun which we are of opinion, was unduly favourable to the appellant. Theories founded on no factual basis really are without any weight, the effect of which is likely to cause a jury to focus on issues that do not fairly arise from the facts for their considerations. In the instant case, the defence was a denial. The onus was on the crown to show that murder had been committed: they had to negative accident or suicide for that matter. The latter we feel is plainly ruled out, from the fact that the deceased was actually shot when the transmission was in progress. So far as the physical demonstrations went, i.e. the non verbal evidence which forms no part of the transcript, the jury would have observed / and then drawn their own conclusions. One of these more grapic demonstrations in court using a gun shewed the impossibility of one of the theories advanced by learned counsel.

Was this an accident, i.e. did the deceased accidentally kill himself, or was it murder? These issues were clearly adequately and fairly left to the jury. The verdict of the jury shows they rejected the theories of accident and accepted the evidence of murder. We can see no reason, having given the matter our most careful consideration, to impugn that verdict.