JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 146/89

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. DAVE ROBINSON

A.J. Nicholson for Appellant

Lancelot Clarke for Crown

19th March & 29th April, 1991

CAREY, P (AG.)

On 19th March we treated the hearing of this application for leave to appeal a conviction for manslaughter as the hearing of the appeal which we allowed. The conviction was quashed, the sentence was set aside and a verdict and judgment of acquittal entered. We intimated we would give our reasons in writing and this we now do.

On 4th October, 1989 at the Home Circuit Court before Theobalds J. and a jury the appellant was convicted on the lesser count of unlawfully killing Paul Reid on an indictment which charged murder. The jury accepted that the appellant had acted under provocation, which the trial judge properly left to them.

Having regard to the ground argued, it will only be necessary to outline the facts. On 8th October, 1985 at about 3:30 p.m. a Manning Cup Football fixture was scheduled

to be played at Sabina Park in Kingston between Tivoli Comprehensive High School and St. George's College. The appellant was a Security Guard employed by the authorities to maintain order among the entrants to this game. He was armed with a baton and a firearm which was hidden in his waist. The victim Paul Reid who had come as a spectator, joined a queue but eventually broke out of it. He was to use the vernacular "boring." The appellant used his baton to swing at the victim causing "friction" between them. At this point, this unruly spectator stabbed the appellant with a sharp instrument which the appellant said, was a letter opener. There was no direct evidence of this act on the Crown's case, but the investigating officer did testify to observing a small puncture wound in the appellant's chest as also a small tear in his shirt.

Reid then leapt over a barrier, chased by the appellant who fired at him. When Reid's path was blocked, he stopped with his arms raised. According to the solitary eye-witness Desmond Robinson, Reid was saying: "Don't shoot," but, nevertheless, he was summarily shot by the appellant. The medical evidence confirmed he was shot under his left arm-pit, the bullet lodging in the lower lobe of the right lung.

The appellant gave sworn evidence. He said that the slain man having stabbed him, ran away. He went after him to apprehend him. The appellant however raised the letter opener to stab him and he shot to disarm him. He fired a second shot to dissuade the crowd which had gathered menacingly.

Mr. Nicholson sought and obtained leave to argue an amended supplementary ground which we think it is right to set out in full:

"1. That the comments of the learned trial judge on the evidence in the Case had the effect of reversing the burden of proof and eroding the defence of your Applicant in the following instances:

(a) At Page 39 (Second paragraph) 'And while there is absolutely no Burden on him to prove his innocence, would you not expect in the circumstances, that a security guard, a security officer might get the name of the doctor who treated him? The hospital records are there .... but I make this comment by way of bringing to your attention what I think is questionable in relation to that part of the defence'.

(b) At Page 38 (At top of Page) 'And in answer to me he (the accused) said that the reason he did that (chased him) was that he was out to apprehend the deceased. Now you might wish to consider: why this obsession with apprehending a man who is running away'?

(c) At Page 33 (Second Paragraph): In reply to questions asked by me, the investigating officer said that he didn't see anything on the letter opener which he received. By 'anything' I would expect that you would naturally expect that if that instrument was used to stab, then sign of blood would have been on it ..... He also described ..... a small puncture wound on the accused man's chest.

(d) At Page 28 One of the issues in the case was: In what circumstances did the accused discharge the two bullets? His Lordship summed up as follows: 'The first shot might have been the reason why the deceased stopped and turned and raised his hands. There is no other logical explanation but it's for you to say whether you consider it. There is evidence of course that there was no where else for Reid to run....."

It is trite that a trial judge, as part of his duties to ensure a fair trial and to assist the jury on the facts of the case, is perfectly entitled to comment on the facts. Counsel for the Crown, as well as counsel for the defence, are equally entitled to do so. But the judge is neither counsel for the prosecution nor for the defence: he represents neither side: he represents the interests of justice. His comments must therefore always be fair and just: they must be warranted on the facts and issues which fall to be determined. His comments may be strong but he must not fail to warn the jury that they are entitled to reject his comments in favour of their own judgment if they consider his views erroneous or fanciful or misconceived or for any good reason unacceptable to them because they are the judges of the facts. The verdict that is sought is theirs. Where therefore the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have over-stepped the lines of proper judicial comment. He would be failing most seriously to ensure the fair trial that the Constitution guarantees and would lead to a substantial miscarriage of justice. This list is not intended to be exhaustive. In **R. v. George Burke** (unreported) S.C.C.A. 112/87 dated 18th April, 1988 where comments by the trial judge were challenged on the basis that they were confusing, misleading or highly prejudicial to the appellant's case and deprived him of a fair trial, this Court allowing the appeal, held that his comments amounted to an "unsatisfactory facet of the summing up." In that case, comments were made by the judge in the following circumstances. There was evidence that the appellant had left the Hampstead area after the stabbing incident and

when apprehended by the police officer explained that he had not come forward as he did not know of the death of the deceased. The trial judge commented that there was Biblical authority for the statement that "the wicked fleeth where no man pursueth."

Another example appears at pp 9 - 10 of the judgment:

> "Another comment at page 84 of the Record was directed to the whole defence. The learned trial judge said:
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> 'So honesty is the key when it comes to deciding whether this man killed in self-defence or not. In other words when he implies or ask you to infer that he killed the deceased because he himself was in fear of his own life, whether when he said that he is speaking the truth because that is the test. Is it an honest belief or is he just making it up to save his neck because he is now on trial for murder ....' [Emphasis mine]
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> This particularly poignant comment coming from the trial judge could be interpreted as an invitation to the jury to reject the account given by the appellant because it was a recent invention. That comment was made in the teeth of the evidence from one prosecution witness who had always been saying that the deceased was the aggressor and that the deceased drew an old file from his pocket and held it in a threatening position. In our view, this comment from the trial judge, based on a mis-interpretation of the evidence, was highly prejudicial to the interests of the appellant."

In **R. v. Anthony Sterling** (unreported) S.C.C.A. 78/86 delivered 25th March 1988 this Court gave an example of the effect of judicial comments in which it would interfere viz, "such comments as would inordinately affect the independent assessment by the jury of the evidence which they had heard." (per White J.A. at page 5).

We propose then to consider the comments set out in the grounds of appeal against the law as we apprehend it to be. In his comment at page 39, which is already set out the trial judge while in one breath correctly telling the jury that there was no burden on the appellant to prove his innocence, in the same breath was telling them that in his view, he should not be believed because he, as a security officer should have obtained the name of the doctor who treated him. This comment in our view was unfair. If there is no burden, then the appellant was not under any obligation to obtain the doctor's name. In point of fact, the appellant was not a security officer: he was a security guard who is a lesser being than a security officer who is a member either of the Jamaica Defence Force or the Jamaica Constabulary or its off-shoots. The appellant's evidence that he was injured had support on the Crown's case as we have previously indicated. The doctor's name could not have added one iota to the fact of an injury being received. In our view this comment was not warranted on the facts.

With regard to the second comment (b) at page 38 of the Record which was challenged by Mr. Nicholson, the trial judge used the term "obsession with apprehending a man who is running away." The evidence was that the appellant had chased his victim to apprehend him. The appellant in our view, had every justification to apprehend Reid who had run away having committed a felony. To describe the right of arrest as an obsession is to misrepresent the situation. Its effect was to seriously prejudice the appellant's defence. In our view, the impugned comment - must have had that effect. It was not the case that the evidence was all one way, viz, that the appellant had chased a man who apart from hooliganism had committed no criminal offence. There were no other attempts

to chase him. In the circumstances, there was no unchallenged factual base for the use of the word "obsession."

At (c) at page 33 of the Record as appears earlier herein the suggestion in the trial judge's comment was that the absence of blood from the letter-opener which the appellant had used to inflict the injury, raised a question mark about the appellant's case. The facts were that the letter-opener had been handed over to the investigating officer sometime after the incident. The injury inflicted was a small puncture wound to the chest. There was no evidence of any massive bleeding. It is not, we think, inevitable that a small puncture wound would stain the weapon with blood. Unless the factual situation was such as to show that by reason of the nature of the injury or where it was inflicted, the weapon must show blood-stains, it could not be fair to comment on its absence.

Finally in his last comment dealing with the first shot fired by the appellant and the fact that the victim had stopped, said - "there is no other logical explanation." Mr. Nicholson argued that here the trial judge usurped the jury's function.

It is of course no part of the judge's function to direct the jury what facts they should find. If he does so, he has crossed the "line of proper judicial comments;" to use the words of White J.A. in **R. v. Anthony Sterling** (supra). It seems to us entirely pointless for the judge then to add - "but it is entirely a matter for you." We think that the comment that there was no other logical explanation, would inordinately affect the independent assessment by the jury of the evidence which they had heard. It is one thing to make strong comments but it is a different thing to make findings of fact for the jury. The one is permissible, provided the jury is reminded that the matter is for their consideration and that the defence

have suggested an alternative. The other is improper.

Counsel for the Crown agreed that some of the comments were unfair and asked the Court either to apply the proviso or to order a new trial.

We were not persuaded that this was a case in which the proviso could be applied. These comments made by the trial judge, we hold, had the effect, as Mr. Nicholson argued, in one instance the first, of reversing the burden of proof and eroding the defence of the appellant. All were unjustified and therefore unfair. The appellant was, in our judgment, denied a fair chance of a clear acquittal.

We were not minded to order a new trial on the charge of manslaughter. Apart from any other consideration, a deal of time has elapsed since the incident which gave rise to this charge, and this inclined us to the order which we in fact made, and which appears at the beginning of this judgment.