JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 55/83

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

R. v. DENROY GORDON

Mr. H.G. Edwards, Q.C., Mr. Noel Edwards, Q.C., & Miss Ola Edwards for the Appellant

Mr. F.A. Smith, Deputy Director of Public Prosecution for the Crown

November 20, 21, 22, 1985 &
January 16, 1986

CARBERRY J.A.

On the 17th May, 1983, in the Manchester Circuit Court before Wolfe J. and a jury, this appellant was convicted for murder after a trial that lasted two days.

The hearing of his application for leave to appeal was treated as the hearing of the appeal, the appeal was dismissed and the conviction and sentence of death affirmed.

We now set out herein the reasons for our decision.

The appellant was tried for the murder of Ernest Millwood on the 3rd of October, 1981. This was a re-trial.

The appellant, Denroy Gordon, was a young police constable attached to the Kendal Police Station in the parish of Manchester. He was described by Corporal Robert Afflick who was in charge of the station as being an efficient officer dedicated to his duty and responsibility.

The deceased Ernest Millwood was a handyman employed at the station to wash vehicles and bush the yard, and his wife Mrs. Cisclyn Millwood was also employed at the station as a cleaner. Both had worked there for many years, while the

appellant was a new comer. It is clear that there was friction between the appellant and the Millwoods, particularly Mrs. Millwood. It was her duty to clean and tidy the barracks where members of the station slept, and it appears that the appellant accused her of having moved his shoes while tidying and failing to put them back where she had found them. It is also clear that she resented a newcomer speaking to her like that, and reported his behaviour to her husband.

This friction apparently existed for some time before the fatal morning of October 3, 1981. On that morning, while the appellant and another constable, Harris, were showering in the bathroom of the station, words passed between the appellant and Mrs. Millwood. According to Mrs. Millwood, after words had passed between them, she heard the appellant say to his colleague Constable Harris, that when he came out of the bathroom he was going to shoot her husband Ernest.

According to Mrs. Millwood she reported this to her husband and also complained about it to Corporal Afflick who was in charge of the station. She said in her evidence that she did not actually mention the threat to Corporal Afflick, because by time she reached that part of her report she was overcome by tears and he told her to come back later when she had composed herself. She went home to do so, and on her way passed her husband who was bushing premises next door to the station. It will be noticed that on this version by Mrs. Millwood no encounter took place between her husband and the appellant, though he had been informed about her encounter with the appellant.

To anticipate, in an unsworn statement made from the dock, the appellant's version was that while bathing that morning he heard Mrs. Millwood abusing him, that he told her to stop it or he would arrest and charge her for it, she replied with more abuse, and that she then called her husband and told him of the

incident, and he in his turn abused the appellant, who then, according to him, told the husband to consider himself under arrest for indecent language and threats.

Corporal Afflick in his evidence confirmed that Mrs. Millwood had reported the appellant to him, but denied that she had mentioned threats or had broken down into tears. It is clear however that as a result of her report he called the appellant and told him that if anything went wrong between himself and Mrs. Millwood he should report the matter to him and he would deal with it. He stated that the appellant was then in plain clothes. He also said that he had heard the deceased using indecent language in the station yard that morning and had sent Constable Harris to speak to him. He had not thought of charging the deceased and had certainly not instructed the appellant to do so.

There are discrepancies between the various versions of what transpired that morning in the station yard, but what is clear is that there was an encounter between the appellant and Mrs. Millwood, and probably Mr. Millwood, and that Mrs. Millwood reported it to the Corporal who seems to have reproved the appellant about it and told the appellant to bring such matters to him, as the person in charge of the station. It is also clear that Mr. Millwood, the deceased, was later on that morning bushing the yard of a Mrs. Simpson who had premises adjoining the station.

What happened next is well covered by the evidence offered by the Crown.

The appellant was despatched on road traffic duty. He put on his uniform and armed himself with a service revolver. Instead of going out on duty he went next door to where the deceased was bushing the yard and accosted him.

This part of the story is recounted by Angella Marks, an unemployed young lady who was sitting on the "gate fence" of the premises that the deceased was engaged in bushing. She describes the deceased as chopping the grass with his machete and muttering to himself that the appellant was out of order to call his wife "dutty girl" and that he did not respect any one.

The appellant then entered the yard, passing her at the gate, spoke to her, then went to where Millwood was chopping the grass with his machete and said to him "A you me come for sar". Millwood made no reply but went on chopping. The appellant repeated this challenge, Millwood went on chopping replying "You no see me a do me work" and the appellant then drew his gun from his holster pointing it down towards where Millwood was chopping. Millwood then stood up, (he had apparently been stooping to bush the yard) and started to walk towards the back of the house. The appellant followed him. Millwood started to run, appellant followed him. They passed out of sight behind the house. Two minutes later she heard a shot, and half a minute after that she heard a second shot. She heard a neighbour exclaim, and went out on to the main road which passed behind the house, and there she came upon a tableau: A crowd had gathered. Millwood was on the road dead, and Constable Gordon was standing up beside him.

At that stage appellant was holding a machete. Millwood had been wearing heavy water boots while bushing, and she now saw these down the road, some distance from his body.

What happened when Millwood and appellant disappeared from view round the back of the house was answered in part by the evidence of two eyewitnesses, John DeClou (an agronomist farming pigs on his own account) and Austin Walters, (a scaffolder). They, together with Paul DeClou (who was not called), were going

to a pig farm where John DeClou had a project. They were climbing up a hill on the other side of the main road, across the road was the cottage or house behind which Millwood and appellant had gone. They heard a shot and saw Millwood running out on to the main road from back of the house and saw him start to run up the main road. They saw Constable Gordon, the appellant, giving chase. They saw Millwood discard his water boots which were encumbering him. They saw appellant, gun in hand draw abreast of Millwood. He caught up with Millwood and apparently attempted to hold him. They heard a second shot, and Millwood fell dead. The medical evidence indicated that the deceased had been shot by a bullet that passed through one side of his chest and came out at the other. The path of the wound indicated that the gun had been in front, a little towards the left side; the doctor could not say from what distance it had been fired.

Millwood had been running with his machete still in hand. The witnesses are clear and definite that he made no attempt to use it. As may be reasonably expected there were inconsequential discrepancies as to whether the appellant was to the left or the right of the deceased during the chase, and as to the exact motions that took place when he drew abreast of the deceased.

A part of this chase had also been seen by a third witness Irene Johnson, who saw appellant chasing deceased, gun in hand, but did not see the actual shooting. She saw when Millwood discarded his water boots, before they passed out of sight. She noted that Millwood had his machete in hand. She too went to the scene and saw his body. She reports that appellant was standing over the body. She saw Corporal Afflick arrive on the scene sometime after. "A good somebody went and called him."

Austin Walters, the second eye witness, adds that when he and his colleagues came down from the side road to the piggery to the scene of the shooting, he spoke to the appellant and asked him why he had murdered the man. The appellant replied "if I didn't see the man with machete in his hand." He then said to him "A saw the man running away from you." Appellant replied "Is all right. Is all right. Is all right."

Corporal Afflick then arrived on the scene. He took charge of the fatal gun, a .38 Smith & Wesson revolver. It had two spent shells and four live rounds. He spoke to the appellant and asked him what happened. At this stage in the evidence the Crown objected to the appellant's reply going into evidence, and after some discussion the trial judge upheld the objection. This had furnished one of the principal grounds of complaint urged on behalf of the appellant and is discussed later.

The police headquarters in Mandeville (the parish capital) was notified. Assistant Superintendent Walker responded, conducted an investigation, and some hours later arrested the appellant on a charge of murder.

The appellant in response to this evidence elected to make an unsworn statement from the dock. We have already looked at his version of the initial events that took place that morning. His statement was further to the effect that after he had been despatched on traffic duty, hearing Millwood still using indecent language next door, he went over to where Millwood was chopping. He told Millwood "Is you me come for, sir." Millwood did not respond, so he repeated it. Millwood then replied "You no see me ah do me work?". To quote verbatim."

> "I had the firearm issued to me for traffic duty and I took it from the holster and held it in my hand as I believed that this would make him submit."

He went on:

> "Millwood stopped chopping, stood up, walked away and then ran behind the house. I ran after him. He stopped and faced me. I stopped too. I was then about six feet from him. I told him to drop the machete because I

> "have already told him that I have arrested and charged him for indecent language, and he should drop the machete and come with me to the police station. He would not. I told him to drop the machete, and fired a shot in the air to scare him. He ran off again."

Appellant then described his pursuit of the deceased, and said:

> "I gained on him and eventually passed him. As I passed him I told him to drop the machete. He would not. I drew the revolver from the holster and told him that he is under arrest and he should drop the machete. I stretched out my left hand to hold him and he chopped at me and I fired a shot on his shoulder. He fell to the ground. I took up the machete. A crowd came down. Corporal Afflick came on the scene and asked me what had happened. I told him that I went to arrest Mr. Millwood and he chopped at me and I fired a shot high on his left shoulder to disarm him. I then handed over the revolver to him."

This then was the evidence put before the jury. It is clear that the appellant had resolved to arrest the deceased, and though the deceased worked at the police station and was readily available, the appellant had determined to march him at gun point to the station, and pursued him with this in mind. There is old authority in the case of Edward Foster's case (1825) 1 Low C.C. 187; 168 E.R. 1007 that a police officer is not entitled to kill for an escape where the party is in custody for a misdemeanour; but may be able to set up self defence, if he had reasonable ground for believing his life was in danger, or that he was in danger of serious bodily harm.

In this case it is clear that the deceased when confronted by the appellant ran away; and that on the appellant's own story this happened even when both were out of sight behind the house. The defence set up was that when the appellant caught up with the deceased, the latter attempted to chop at

the appellant, who then shot him. This was to set up self-defence, and as Foster's case seems to indicate, at that stage the normal rules as to self-defence apply: the fact that the deceased was to be arrested or had been arrested on a misdemeanor and was escaping is irrelevant. The issue is self-defence, or alternatively, vide Semini (1948) 33 Cr. App. R. 51 possibly manslaughter. The Crown's evidence negatived both things, and the jury having had both versions put to them clearly rejected the appellant's story and his defence, and brought in a verdict of murder.

Three points were in substance argued before us in this appeal. The first was to the effect that the trial judge had wrongly excluded the evidence that Corporal Afflick proposed to give as to what had been said to him by the appellant when he came to the scene of the incident and commenced investigation. Mr. Horace Edwards on behalf of the appellant relied on three cases in support of his attack on the judge's ruling. In Storey & Anwar (1968) 52 Cr. App. R. 334 the appellant Storey in whose apartment the police found cannabis volunteered to the police when they searched her flat that the cannabis belonged not to her but to Anwar, the co-accused who was then in the toilet of the flat and who had just brought it there, she said against her wishes. Like the accused in this case, at trial she elected not to give evidence on oath but made an unsworn statement from the dock. On a submission that the judge should have accepted her statement to the police and ruled that there was no case to answer, the Court of Appeal (Criminal Division) rejected the argument. In doing so Widgery L.J. remarked:

> ".....a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then, as a matter of shorthand one says that the admission is proof of guilt, and indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial."

Widgery L.J. went on to observe that the finding of cannabis in the appellants flat was some evidence of possession to go to the jury. Her unsworn explanation might, if true, have provided an answer but did not cancel out or nullify the evidence provided by the presence of the cannabis, and it was ultimately a question for the jury to decide if that explanation was or might be true, not for the judge to accept it at the stage of a no-case submission. The court went on to observe that the Judge's remarks on the failure of the appellant to go into the witness box and give evidence were unexceptionable, and ended by stating:

> "the evidence against this accused was sufficient to justify her conviction if she was not prepared to give on oath the kind of explanation which she had given to the police."

R. v. Roberts (1943) 28 Cr. App. R. 102 was also referred to. One of the points canvassed was the admissibility of a statement made by the accused to his father shortly after his arrest. In that case the accused was charged with shooting his girlfriend who had broken off relations with him. He had

visited her armed with a rifle; there had been no eye witnesses but a shot was heard and she was found dead and the appellant with the rifle in his hand. He proposed to offer a defence of accident, and the father was to be called to show that the accused had said so to him. In a long and careful judgment Humphreys J. giving the judgment of the court, remarked

> "The father was called as a witness by the defence. In the opinion of the Court the Judge was right in refusing to admit that evidence, which was in law inadmissible. It might have been, and perhaps by some judges would have been, admitted on the ground that it was harmless and that there was no strenuous opposition by the prosecution. The judge was, however, absolutely entitled to take the view that that evidence was inadmissible in law. The law on the matter is well settled. The rule is sometimes expressed as being that a party is not permitted to make evidence for himself. ..... So in a criminal case an accused is not permitted to call evidence to show that, after he had been charged with an offence, he told a number of persons what his defence was going to be. The reason for the rule appears to the Court to be that the evidential value of such testimony is nil ..... of course, it would have been a totally different matter if the statement had been made to the father just at the time of the shooting, because any statement accompanying an act has always been admissible so that it may explain the act. It was on that ground that the Court allowed the two witnesses Jeffrey to give evidence, because their evidence was something said by the appellant contemporaneously or within a minute of the shooting, namely how the shooting had come about, and so explaining the act. A statement to the father a little time afterwards was quite a different matter."

Humphreys J. went on to add that such statements sometimes became admissible if it had been suggested to the appellant in cross-examination that he had recently concocted this story, in which event he would be entitled to show that this was not so because he had told it on the very day the incident occurred.

We were also referred to an unreported judgment of this Court, delivered by Watkins J.A. in the case of R. v. Fernando Marks S.C. Criminal Appeal 138/75, handed down on the 30th July, 1976.

There the complaint was that the trial judge had excluded the 'caution' statement made by the appellant after his arrest. The judgment referred to both R. v. Roberts (supra) and to R. v. Storey & Anwar (supra) and stated:

> "The law is well settled that a party is not permitted to make evidence for himself and so a statement by an accused party which is merely exculpatory is, without more, inadmissible. Such a statement may however be admissible in evidence (1) if it forms part of the res gestae or is tendered to rebut a suggestion that a defence was a concoction (E.G. Roberts' case) or (11) as showing the reaction of the accused when first taxed with incriminating facts (R. v. Storey)

Watkins J.A. ruled out the applicability of (1) but considered (11) at some length and expressed the view that the statement ought to have been admitted on the authority of Storey & Anwar's case so that it might form part of the general picture to be considered by the jury at the trial.

However, the learned judge went on to observe that the accused in his unsworn statement from the dock had in fact said everything that was contained in the excluded statement, and that the exclusion did not in the opinion of the Court

> "operate to deprive the jury of the opportunity of forming an adequate general picture of the case, nor did the applicant thereby suffer any injustice in fact."

He added:

> "This is not a case in which consideration of the use of the proviso arises, but if it did we would not hesitate to invoke it having regard to the weight of the evidence as a whole."

These latter comments by Watkins J.A. we would apply to the instant case.

In the instant case the reply made by the appellant to the witness Walters, to the effect that the deceased had had a machete, was clearly admissible and was admitted.

The reply given to Corporal Afflick was however clearly made some time after the incident. It was not admissible as part of the res gestae; it was not admissible to answer a suggestion that the appellant had recently concocted the defence: no such suggestion was made, and indeed he did not give evidence; it might perhaps have been admissible to show the accused's reaction on the scene, but he was not then being taxed with his crime for the first time, and in any event it would not have been admissible as truth of what he said.

It is true that the trial judge in discussing its admissibility with defence counsel at the trial did make remarks to the effect that a party was not permitted to make evidence for himself, reflecting perhaps the reasoning set out by Humphreys J. in the passage cited from Robert's case. On the other hand counsel did not here canvass below the suggestion in Storey & Anwar that it was admissible to show the reaction of the accused as forming part of the general picture.

The highest that the matter can be put perhaps is that some judges might have admitted it, and that it was a matter within the discretion of the trial judge.

In the event it should be noted that the appellant in his unsworn statement in fact set out what it was that he told Corporal Afflick. We do not accept the view urged by counsel for the defence that the appellant's case was materially affected by the exclusion of this evidence which in any event would not have been evidence of the truth of what was said, and so far as credibility of the appellant is concerned it must be remembered that he did not choose to go into the witness box and give sworn evidence but contented himself by making an unsworn statement from the dock. The trial judge in his summation dealt very kindly with that statement, and in effect invited the jury to regard it as being evidence.

The second complaint made in respect of the summing-up was that the trial judge withdrew provocation as an issue from the jury. Counsel before us was hard put to find what provocation there could be on these facts. It was suggested that the deceased's unwillingness to submit to arrest, his walking away and then running away constituted provocation. There was clearly no merit in these suggestions. So far as the suggested right of arrest goes no authority was ever cited that supported the right of a policeman to chase down a person who had been using bad language (a misdemeanour) and shoot him to effect an arrest. In fact, as already mentioned, such authority as does exist negatives any such right: see Edward Foster's case (supra)

Finally it was argued that the directions as to self defence were inadequate. In that connection counsel cited the case of Gladstone Williams (1984) 78 Cr. App. R. 276: The argument put forward, as we understood it, was that if the

appellant honestly believed that the deceased was going to attack him with the machete, then this should have been left to the jury on the issue of self defence, and that the Judge was wrong to have told the jury that the appellant must have held that belief on reasonable grounds.

The Judge's directions on self-defence are set out at pages 152-154 of the Transcript: It reads as follows:

> "Now, once self-defence is raised it is not the accused who must show that he was acting in self-defence, it is for the prosecution to show that the accused was not acting in self-defence. The prosecution must satisfy you, on the evidence, that the story told by the accused is untruth. The onus remains throughout on the prosecution. If therefore, on a consideration of all the evidence you are left in doubt whether the killing may not have been in self-defence the proper verdict would be not guilty.
>
> A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily injury may use such force as on reasonable grounds he believes is necessary to prevent amd resist the attack. And if in using such force he kills his assailant he is not guilty of any crime, even if the killing is intentional. In deciding in a particular case whether it was reasonably necessary to have used as much force as was in fact, used, regard must be had to all the circumstances including the possibility of retreating without danger or yielding anything that a man is entitled to protect.
>
> I tell you as a matter of law that in the circumstances of this case, if you accept what the accused man told you, there would be no duty on him to retreat. If a police officer seeks to apprehend a man for an offence committed by that man, and in the course of so doing that man raises a vicious attack upon him with a machete, then, there would be no duty on the officer to retreat; he may stand his ground and meet force with force, and if in so doing he kills his assailant he commits no offence.

> "Self-defence is made out when it is established to your satisfaction or you are not sure about it that the accused believed that he was in imminent danger of death or serious bodily injury and that he held that belief on reasonable grounds. Grounds for that belief may exist though they are founded on a genuine mistake of fact. So, you have to ask yourself, 'Was the act done by the prisoner to protect himself from death or serious bodily injury intended towards him by the deceased or was it done to protect him from the reasonable apprehension of danger induced by the words and conduct of the deceased though the latter may not have intended death or serious injury?
>
> What this means, Mr. Foreman and members of the jury, is that for self-defence to be made out, you must be satisfied that there was an attack upon the accused. If you were to say as a matter of fact, that he was not being attacked at the time when he shot, then, self-defence could not avail him. If you were to say that at the time when he shot he did not reasonably apprehend danger to himself resulting from the words and conduct of the deceased, then, self-defence could not avail him. You must be satisfied that as a result of the attack upon the accused man, the accused believed, on reasonable grounds, that he was in imminent danger of death or serious bodily injury, Then, you must be satisfied that the force which the accused man used was used to protect himself either from death or serious bodily injury intended towards him by the deceased or, from the reasonable apprehension of him induced by the word and conduct of the deceased, though the latter may not in fact, have intended death or serious bodily injury."

In response to this argument as to self-defence Mr. Smith, Deputy Director of Public Prosecutions replied by relying on two decisions of this court R. v. Arthur Carney (S.C. Criminal Appeal 135/84; delivered by White J.A. on the 31st May, 1985) and R. v. Arthur Barrett (S.C. Criminal Appeal 133/84; delivered by Rowe P, also on the 31st May, 1985). The latter case reviews fully the recent authorities on the matter, and both reaffirm that self-defence requires that an accused should reasonably believe his life to be in danger or that he

is in danger of serious bodily harm. In those decisions this court preferred to follow the traditional view to which we are accustomed, rather than that set out in Gladstone Williams (supra).

In any event we are of the view that that particular controversy has no application to the facts of this case. The defence was not that the appellant honestly believed that he was going to be attacked by the deceased: the defence was that he was in fact so attacked. Honest belief, reasonable or unreasonable does not enter into the matter at all. It was a straight issue of fact, was the appellant attacked as he said in his statement? Or did he, as the prosecution suggested, pursue and shoot the deceased to effect his purported arrest?

The judge clearly told the jury that if they accepted the former then they should acquit. They clearly rejected it, when they brought in their verdict of guilty.

We could find no ground on which to interfere with the verdict in this case, and accordingly, having treated the application for leave to appeal as the hearing of the appeal, we dismissed the appeal and affirmed the conviction and sentence.