C.A. Criminal Law — Murder — Summing up — Evidence — whether summing up failed to exhibit care and accuracy — whether jury misdirected re evidence — Although misdirection proved under Section 14(1) Judicature (Appellate Jurisdiction) Act applied — evidence so overwhelming that no substantial miscarriage of justice — Appeal dismissed

Cases referred to: ① R v Turnbull 63 Cr. App. R 132 ② R v Oliver Whyte (1978) 25 W.I.R. 420 ③ R v Reid (1979) 3 W.L.R. 771

JAMAICA

IN THE COURT OF APPEAL

Classified as non-Capital murder

SUPREME COURT CRIMINAL APPEAL NOS: 67 & 72/91

✓ comp

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

Evidence

Criminal Practice

R. v. EASTON McECKRON
CLINTON GORDON

Lord Gifford, Q.C. & **Delroy Chuck** for McEckron

Dennis Morrison & **Delroy Chuck** for Gordon

February 1, 2, 3, & 22, 1993

FORTE, J.A.

This application for leave to appeal comes to us from the Home Circuit Court, where on the 30th May 1991, the **appellants** were tried and convicted for murder. Having heard the submissions of counsel, over a period of three days, we thereafter reserved our decision in order to consider in depth, the issues which arose in those hearings. We have granted leave to appeal and treated the hearing of the applications as the hearing of the appeals. The following are our conclusions.

The deceased, Samuel Dawkins was shot and killed in the early morning of the 1st April 1990, in the yard of his dwelling place on Hanover Street, Spanish Town in the parish of St. Catherine. When his body was subsequently examined by the pathologist, it was determined that there were externally, three gunshot wounds and that death was caused by those wounds.

Not long before his death, Dawkins who was known as Val, was in the company of two of his friends at a gambling house from where they left together at about 3.24 a.m. and proceeded to his home on Hanover Street. On reaching there, they sat on a stall at the roadside, by his gate, and engaged in friendly chatter. As they

sat there, five men were observed coming along Hanover Street, walking together in their direction.

The description of what allegedly unfolded that morning fell from the lips of one of the friends of the deceased, Troy Welcome, on whose evidence the prosecution totally relied. He testified that as the five men approached, he recognized among them, the two **appellants,** and Gervan Rattray who was tried with the **appellants** but acquitted. On seeing them he was able to discern that the **appellant** McEckron was armed with a "short gun" while another known to him as Arthur Pearson, who was not on trial, had a long gun. He was aided in his observation by street lights which shone on the roadway. The approach of the men caused the deceased and his friends to take their leave of the stall and to seek refuge in the apparent safety of the yard. As they entered the yard, the third man who is called "Bat" - went in his own direction and disappeared, not to be seen again by the witness, until much later that day, and after this incident had come to its finality. Welcome and the deceased, however, remained together, taking shelter behind one of several buildings on the premises, where they hid and peeped long enough for Welcome to see the five men, including the two **appellants** enter the yard. As he saw them enter, he then lay on his belly on the ground, about 2½ feet behind where the deceased stood. While in this position, he observed the **appellant** McEckron, come up to the deceased, "stick him up" with a gun and take him to the front of the building. Shortly after, he heard the voice of the deceased shouting "Please dont shoot me", followed by three gunshot explosions. On hearing the shots, he jumped over the fence and ran back to the "gambling house" where he remained until about 5.00 o'clock that morning. At that time he went out **unto** the roadway, and on receiving information he returned to the premises at

Hanover Street where he observed the dead body of his friend Dawkins in front of the building. The police came there subsequently, and having spoken with them he went with them to the police station. While there speaking with the police, he saw the **appellant** McEckron come to the station, and heard him telling the police that "a man shot after him." He then pointed out McEckron to the police and in the presence and hearing of McEckron said "Is that one kill me friend Val," (i.e. the deceased Dawkins). In response the **appellant** McEckron said "a lie him a tell pon me and if you dont believe, mek me carry you go fi the rest a man them whose name him a call up." It was in furtherance of that offer that Rattray was apprehended. The applicant Gordon whose name had also been called, was subsequently arrested on a warrant.

Case for McEckron

In his defence, McEckron admitted to being on the road that morning, and seeing two men enter the yard, one of whom he identified as the deceased. He also admitted to entering the yard, where he saw the deceased, who on his request, invited him to approach him to speak with him (the deceased). While speaking with the deceased, he heard a gunshot and when he looked in the direction from which it came, he saw "Bat", pointing the gun at him. As a result he ran, and while running he heard other explosions. He escaped and went to the police station later that morning to make a report. At the station, he saw the witness **Welcome,** who made the report concerning himself and the others. He denied having had a gun that morning and that he shot the deceased. He maintained that he was the only one of his party who entered the yard that morning, and denied specifically that his co-accused Rattray was present on the scene. His defence therefore made several admissions which coincided with the testimony of the witness for the prosecution, and clearly indicated the issues that existed in the two cases. The case therefore

rested on whether in fact he was armed with a gun, and being so armed, "stuck-up" the deceased and in that manner took him away to the front of the building where thereafter, the deceased was heard pleading not to be shot; or whether he was speaking peacefully with the deceased, when he himself was the subject of an attack by "Bat".

Emphasizing that issue, Lord Gifford for the **appellant** McEckron, raised two major contentions on his behalf. Those are contained in the following grounds, summarized for relevance:

> (i) ... the justice of the case required a careful and accurate summing-up of the evidence, with particular attention being paid to the said areas of difference and the possibility of Welcome being mistaken as to what he saw. It is submitted that the learned trial judge's summing-up did not exhibit the care and accuracy which was required and
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> (ii) He (the learned trial judge) suggested that the deceased was killed by a bullet from a short gun when there was no evidence adduced as to the type of gun which could have fired the bullet found in the deceased's body.

1. In developing his arguments on this ground, Lord Gifford, while conceding that the classical directions called for in the cases of **R. v. Turnbull** 63 Cr. App. R. 132 **R. v. Oliver Whylie** [1978] 25 W.I.R. 420, and **R. v. Reid** [1989] 3 W.L.R. 771 were not necessary in circumstances such as these, nevertheless contended that having regard to the conditions that morning, and the opportunity for observation which was available to the witness, and given the fact that the **appellant** McEckron, had stated that he had a bottle of stout in his hand while walking on the road, the learned trial judge ought to have brought to the attention of the jury that accuracy of observation as well as honesty is a matter for their consideration and consequently the possibility of mistake should have been addressed. Instead, he contended, the learned trial judge, spent much time on assessing the evidence of the witness,

on the basis of whether he was a truthful witness, and none on the question of whether, though truthful, he was making a mistake as to whether the **appellant** was armed with a gun.

In testing the strength of this argument, it is necessary to determine the line of demarcation that existed between the two cases. The case for the prosecution if believed did not admit an acceptance of a peaceful conversation between the **appellant** and the deceased. It portrayed hostility on the part of the **appellant** who stuck up the deceased with a gun, and impliedly forced him to surrender his position and follow him to the front of the building. In the parlance of Jamaicans, which the jurors would have understood, to "stick-up" means the aiming of a gun at the person thereby threatening violence to the person with the gun. It is coupled with a command to place his hands above his head, thereby making the person more vulnerable to any attack or treatment his assailant wishes to mete out to him. Where, however there is no expressed command, the purpose of the aim of the gun towards the person is nevertheless understood. The witness in those words as the jurors would have understood them, was describing a set of circumstances which was in effect very different from the account of the **appellant** who testified that he had seen the deceased enter the yard and when he got to the gate, he saw him in the yard, called him, and told him that he wanted to talk to him. The deceased, he said, asked who it was, and when told that it was him (the **appellant**) told him to come, and it was in those circumstances he entered the yard. He explained it as follows:

> "A. Well, I call Val and say to Val say, listen Val, me want to talk to you nuh.
>
> Q. Did you enter 28?
>
> A. When I call Val, he said who is that, I said John.
>
> Q. Well, did you do anything?
>
> A. I tell him that I want to talk to him, he said I must come, and I go inside the yard.

"Q. Now, did you speak to Val?

A. Yes, sir?"

The **appellant** was clearly denying an act on his part which indicated any form of violence or threat of violence towards the deceased. He also denied that he was armed with a firearm at any-time that morning, and in particular when he was speaking with the deceased. The effect of his evidence, also suggests that when he went to speak with the deceased, neither of them moved from their positions, until he heard the explosions and thereafter ran away. The two accounts were therefore almost totally different, and it fell for the jury to determine which was fact. That there was sufficient light shining into the yard from the "searchlight" on the external wall of the Church across the street, was conceded by the applicant when he testified that that was the light by which he saw the deceased in the yard.

In our view there was really no room, given the evidence, for any assessment of whether the witness made a mistake as to whether the **appellant** had a gun. His description of the events was not confined to the mere possession by the **appellant** of the gun, but extended to an assertion of the use of that gun upon the deceased which he described in his own way and in a manner in which the jury would have understood. There was never any allegation by the **appellant** that he still had the bottle of stout in his hand when he approached the deceased, and consequently it never arose for determination whether the witness could have mistaken a bottle for the "short gun". The real issue on which the jury had to deliberate, was, in the end, did the **appellant** forcibly remove the deceased from where he stood, and thereafter carried out his implied threat by shooting him; or was he peacefully speaking with the deceased, while he (the **appellant**) was shot at, causing the deceased to be killed in the attack upon him (the **appellant**). That the learned trial judge recognized this is disclosed in several passages of his summing-up, two of which are set out hereunder:

(a) "... if you were to find that McEckron was there but he was not armed with a gun, then, Madam Foreman and members of the jury, I unhesitatingly tell you that you must acquit all these three men, because the credibility of Welcome would have been destroyed. Let me repeat that, if you were to find that McEckron was there, because McEckron says, 'yes, I was there but I had no gun.' If you were to reject Welcome's testimony that he had a gun, then I unhesitatingly direct you to acquit all three men, because the credit of Welcome would have been severely destroyed. You couldn't believe him about anything else because you can't say, 'we believe him but we don't find that the man had a gun.' Then why would he be putting a gun in the man's hand. A man like that you couldn't act upon his evidence in relation to any of the accused men."

and

(b) "At the end of the day, the question which will have to exercise your mind is, was Troy Welcome at 28 Hanover Street and did he witness what he said he witnessed."

In our view, in the circumstacnes of this case the learned trial judge was correct in putting the case to the jury on the basis of the credibility of the witness, because the two accounts offered to the jury could not have stood together even if in fact the witness made a mistake as to the possession by the **appellant** of a gun. If "mistake" were to be relevant, then the jury would also have to find that the witness also made a mistake in recounting the actions and conduct of the **appellant** in taking away the deceased from where he had sought refuge. We conclude therefore that the circumstances of the case did not require any directions from the learned trial judge in respect of "honest mistake" as to whether the **appellant** had a gun, and that the issue that was raised by the defence was adequately dealt with by the learned trial judge in his directions. In the event this ground must fail.

(11) The basis of this complaint apparently had its genesis in the evidence of the pathologist who testified that a high calibre bullet was removed from the body of the deceased. There was no attempt by the prosecution to tender this bullet into evidence nor was any ballistic evidence given in relation to it.

Nevertheless the learned trial judge directed the jury thus:

> "... Bearing in mind that one man had a long gun, and the evidence is not that is a long gun that kill the man, the evidence is that is a short gun, so what is the reasonable inference? Because the evidence is that is McEckron who had the short gun, so what would be the reasonable inference in those circumstances?"

And again in the two following passages, though he represents it as the contention of the prosecution he leaves the suggested inferences as correct inferences that could be drawn from the evidence:

> "Now, I have told you that no one saw who actually fired the shot. The Crown is asking you to infer from the evidence of Welcome that the shot was fired by McEckron. Why? Because the man, Welcome says, 'I saw him with a short gun and the doctor recovered a high calibre bullet from the body of the deceased. The other man had a long gun, and everybody know that long gun don't use - if you follow what the doctor is saying - don't use that type of bullet. So, they are asking you to infer that it was McEckron who fired the gun."

and

> "So what the Crown is asking you to say is if you believe Troy Welcome, you feel sure about his evidence that McEckron came to the back and took away Val to the front, armed with a gun, if you believe the doctor about this bullet which was recovered from the body, then they are saying that those circumstances - because you didn't hear of anybody else there with a short gun - so what the Crown is saying, Welcome didn't tell of anybody

> "else there who had a gun, other than the man with the long gun, the Crown is saying that all those circumstances should point to one conclusion and one conclusion only, namely that it was the accused man, McEckron, who shot and killed the deceased man. That's what the Crown is asking."

The directions in these passages are predicated on the basis that there was evidence that the deceased was shot and killed by a bullet which was fired from a "short gun". There was in fact no such evidence, and the directions perhaps were based on the learned trial judge's personal knowledge of ballistics, which caused him to fall into error by representing to the jurors that they could draw an inference from a particular circumstance which did not exist in the evidence. This in our view was a misdirection. Was it however fatal? Does it affect the conviction of the applicant? The implication from the appellant's testimony was that the deceased was killed by "Bat" who was firing shots at him (the applicant). There was no evidence however, as to what type of firearm Bat had - whether it was short or long. The question as to whether it was Bat or the appellant who killed the deceased, did not call for any determination based on the particular type of firearm each had at the time. The determination was left to be made, on the basis of whom the jury believed. Their verdict indicates that they rejected the testimony of the appellant and that the case was decided on the basis of whether they were satisfied on the prosecution's case. They would have believed therefore, that the appellant did "stick-up" the deceased with a gun and take him to the front, and that after his pleas were heard, he was shot. The inference that it was the appellant and his companions who had entered the yard with him, who were responsible for the death of the deceased, would be obviously reasonable given the evidence. In those circumstances, particularly having regard to the appellant McEckron, it would not have mattered whether the deceased was shot by him, or one of the

others, because his active participation in the killing would have been clearly established. In the result, whether it was a long gun or a short gun he would be equally guilty of murder. The case for the prosecution did not depend on whether he fired the fatal shot because whether or not he did, it was he who forcibly took the deceased at the point of a gun to the execution block. Once the jury believed that he did that act, as obviously they did, having regard to the issue already dealt with in (ground 1) the verdict was inevitable. Consequently, even if the misdirection may have affected the determination of the jury, it is our view, that the evidence was so overwhelming that no substantial miscarriage of justice would have occurred. We therefore apply the proviso under section 14 (1) of the Judicature (Appellant Jurisdiction) Act. Lord Gifford also argued that the learned trial judge misdirected the jury in other minor areas, but did so without any strength of conviction, which was understandable as we found no merit in those complaints.

Case for Gordon

In his defence this appellant, admitted to being in the company of McEckron, and others on that morning and to walking with them on Hanover Street.

He denied that he entered the yard where the deceased was killed. Instead, he had walked past, and, had gone to his home nearby on Hanover Street to fetch a "cassette" which he had promised to hand over to McEckron. While in his room he heard the gunshots. He came back out, saw no one, and thereafter went to his bed. He maintained that no-one in the group was armed while walking down Hanover Street and while he was in their company.

Mr. Chuck for this appellant conceded that visual identification of the appellant was the real issue in the case, and the learned trial judge having dealt with that issue adequately, he could make no complaint in that regard. Indeed, Lord Gifford

described the learned trial judge's directions in this regard, as graphic and thorough. We agree with the stand taken by Mr. Chuck and commend him for it.

Mr. Chuck, however, rested the success of the appeal of Gordon, on the submissions made by Lord Gifford in respct of the appellant McEckron. He was correct in his submission, that had this Court given favour to the contentions of the appellant McEckron, then the case of Gordon would inevitably be affected, and his conviction also could not stand. The reverse also applies and as a result of our conclusions in respect of the complaints of McEckron, the appeal in respect of Gordon must also fail.

In the result, both appeals are dismissed.

Having regard to the new legislation that is to say the Offences against the Person (Amendment) Act, it falls upon us to determine whether having regard to the circumstances of the offence, it should be classified as capital or non-capital murder. As there are no factors which bring the offence in this case within any of the circumstances from which it could be classified as capital murder, we classify the offence in respect of both appellants as non-capital murder. Both are consequently sentenced to life imprisonment.