JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 131/82

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

R. v. GORDON WRIGHT

F.M.G. Phipps, Q.C., W. Charles and Miss Kathryn Phipps
for Applicant

Howard Cooke for Director of Public Prosecutions

April 17 & 26, 1985

ROWE, P.:

The applicant was convicted in the St. Ann's Bay Circuit Court on October 21, 1982 before Wright J. and a jury for the murder of Joe Constantine and he was sentenced to death. His application for leave to appeal was heard and determined on April 17, 1985, when the application was treated as the hearing of the appeal, the appeal was allowed, the conviction quashed but in the interests of justice a new trial was ordered. We have decided to put our reasons in writing and to confine them to the very narrow but very important point on which the appeal succeeded.

On May 11, 1982, the appellant was employed at the Maroon Club, near Runaway Bay in St. Ann. The deceased, a Canadian, was somewhat loosely connected to the Club, (some witnesses said he worked there, while the owner mentioned that the association was as a patron), and in the early evening of

May 11, the appellant and the deceased were the only two persons in the Club. Neighbours were attracted by sounds of struggle and cries for help coming from the Club. Prosecution witnesses who rushed to investigate testified that they recognized the appellant going from the Club towards the kitchen. The deceased stumbled from the Club bleeding from some five serious wounds. Later the appellant came outside the Club and he had blood on his face and on his clothes. Asked what had happened inside the Club, between him and Joe, the appellant said that it was not "he and Joe." It was a white man and a black man who attacked them both. He repeated this statement in an unsworn statement at trial, adding that in the fracas he was hit in the forehead with a stool which opened a wound from which he bled profusely. The two attackers, said the appellant, ran away chased by dogs. Those Crown witnesses who responded to the cries for help did not see any persons other than the appellant and the deceased in the Club. The police officer described the injury to the appellant's forehead as a bruise which was not likely to bleed, and a bloodstained knife similar to one which the appellant was known to possess was found at the back of the Club.

Ground 1 (b) complained that:

> "The learned trial judge wrongly placed a burden on the defendant to prove his innocence and further directed that such proof should be to the standard of feeling sure. (page 159)
>
> "It is submitted that the effect of the direction was that the jury were told that they could only acquit the applicant if they felt sure about his version. Nowhere did the learned trial judge direct the jury that if they had doubt about what the applicant said they should return a verdict of not guilty for the reason that the crown had not proved a case about which they could feel sure. "

Two passages from the summing-up were examined to determine whether the directions on the burden of proof were accurate and fair and in the end we concluded that one of the possible verdicts which followed from the appellant's unsworn statement, was omitted by the learned trial judge. We were further of the view that the language adopted by the learned trial judge to explain to the jury the effect of the defence was misleading.

In the passage at page 159 of the Record, the learned trial judge said:

> "The gist of what he said is that he didn't do it, it is one or both of two men who came in: a black man and a white man, attacked Joe, he intervened and got a blow himself. Now, if you feel sure about that - not that you are expecting him to prove it, because, he hasn't got to prove anything; but if the mere statement that he has made satisfies you and so you feel sure that that is how it went, then, that would mean that the Crown has failed to make you feel sure that it went the way the Crown says. Because, the burden is on the Crown to present evidence to you to make you feel sure of the guilt of the accused. So, if you are not sure of the guilt of the accused, your verdict must be not guilty. And again, if you feel sure it went the way he said, then the verdict must be not guilty. It is only if you - when you consider everything - you are satisfied and you feel sure the Crown has established the guilt of the accused by the evidence presented to you, that you could return a verdict of guilty against him. " (emphasis supplied)

There is never any duty upon any accused person to satisfy a jury to the extent that they feel sure. Where an evidential burden is cast upon an accused person, the standard of proof is upon a balance of probabilities. Twice in the passage quoted above did the learned trial judge invite the jury "to feel sure" about what the applicant said before they could acquit him on his version of how the incident occurred.

Near the end of the summing-up, the learned trial judge reminded the jury of the appellant's statement from the dock and continued:

> "If you accept that as what happened, then, you can only return a verdict of not guilty. If you have any doubt that that is what happened, then you have to go and consider the Crown's case to see whether the Crown really has made you feel sure about what is it that really happened....."

No exception could be taken to the first sentence if it stood alone, but it was not sufficiently explicit to remove the firmly implanted direction that to accept the applicant's version so that he could be acquitted, the jury must first feel sure about it. The second sentence is misleading. If the appellant's account of what happened left the jury in a state of doubt, that must mean that they are unsure of the case for the prosecution. Put another way, if the jury do not know whether to accept the Crown's case or the case for the defence, the verdict must perforce be one of not guilty. Therefore to tell the jury that when they are left in doubt by the defence account, they should at that stage have a reference back to the prosecution's case, is to deprive the defence of a possibility of a verdict of acquittal.

Lord Chief Justice Goddard in the very well-known case of R. v. Henry Lazarus Lobell [1957] 41 Cr. App. R. 100 at 104 gave very timely guidance as to how to sum up to a jury and to explain the function of doubt in arriving at a verdict. He said:

> "The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be Not Guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence, which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say

> "that, before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found, but none the less the onus remains on the prosecution; what it really amounts to is that, if in the result the jury are left in doubt where the truth lies, the verdict should be Not Guilty, and this is as true of an issue as to self-defence, as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence."

Smith C.J. who had many years of distinguished experience as a trial judge directed the jury in R. v. Edward Vassell S.C.C.A. 88/84 in this impeccable manner, and notwithstanding that the facts were vastly different from those in the instant case, I set out his directions to the jury:

> "If you believe the accused that Marjorie did not come in his room and he did not have anything to do with her, he did not interfere with her, you must acquit. If you are not sure whether to believe him or not, you must acquit because the prosecution must make you feel sure that what he said is not the truth. If you are not sure about it you must acquit him. If you don't believe him you must not convict him because you don't believe him, because there is no burden on him and as counsel have told you he need not have come up here and given evidence at all, he needn't have said anything, the burden is on the prosecution, so they must prove the case against him, So, what you do if you don't believe him, you must take all the evidence into account, Marjorie's evidence, unsworn, Prudence's evidence, the doctor's evidence as well as the evidence of the accused and say what you make of it."

What the Lord Chief Justice said in Lobell's case and what Smith C.J. told the jury in Vassell's case are models worthy of emulation. A trial judge is not required to simply reproduce the language of either of those Chief Justices, but his duty is to make it abundantly clear to the jury that if what the accused says leaves them in a state of doubt then the prosecution would have failed to prove the case to their satisfaction so that they can feel sure. The omission to so direct the jury in the instant case amounted to a misdirection warranting the setting aside of the verdict. And as we said earlier, there is never any duty on an

accused person to satisfy a jury so that they can feel sure. Consequently, such a direction distorted other passages in the summing-up which could be considered to be correct statements on the burden and standard of proof, and thus amounted to a misdirection in law.

Mr. Phipps readily conceded that the proper course for the disposition of the appeal was for the order of a new trial and in our view the interests of justice so require. Such an order was accordingly made.