JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 90/87

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. LESTON McKENZIE

Mr. Delroy Chuck & Mr. Robin Smith for Appellant

Miss Vinette Grant & Miss Antoinette McKain for the Crown

15th February & 14th March, 1988

FORTE, J.A.:

The appellant was convicted for the murder of Courtney Johnson in the Westmoreland Circuit Court on the 27th May, 1987, after a trial which lasted two days.

Before us Mr. Chuck for the appellant argued two grounds of appeal, after which we treated the application for leave to appeal as the hearing of the appeal, but nevertheless dismissed the appeal and affirmed the conviction and sentence of death. As promised, we now put in writing our reasons.

The appellant, and the deceased both lived in separate buildings on the Frome compound in Westmoreland. At about 10 a.m., on 21st June, 1986, "Pinky", the common-law wife of the deceased Courtney Johnson, was at the pipe on the compound, washing her clothes. At that time, the appellant was at the pipe with a wash pan apparently waiting to get water. It was alleged by the prosecution that the appellant was complaining that Pinky would not allow him to get water and that he threatened them to kill her. He subsequently attempted to hit her, but was stopped by his

brother. After the brother left, the quarrel continued, during which Pinky threatened to throw urine on the appellant if he came to her yard. She then left, went into her house and as she came back out, the appellant ran at her and she ran back into her house. The appellant then issued the following invitation to her, "See me come yah now, come out yah now mek mi pop up yuh r ..... c ....." They continued the quarrel and Pinky then came out and threw some liquid from a basin on the appellant - liquid which it is believed was urine. She then closed the door. The appellant then tried to get into that door and in failing so to do, went to the door at the front of the house broke it down, entered the house and commenced beating Pinky who then "bawled for murder." In her cry for help she sought the assistance of her common-law husband, the deceased, who was called "One Son." She called, "One Son come help me."

The deceased in answer to her call ran into the house, held the appellant and pushed him on to the verandah. They then dropped on the floor and wrestled until they rolled outside. During this, "a little knife" fell from the pocket of the deceased, and it was alleged that the appellant picked it up and cut the deceased on his hand. The deceased then ran behind a lady named Kathleen Whyte, the appellant chasing him. The three of them fell, Miss Whyte appearing to be seriously hurt. It appears that she had fainted. The appellant then left, went to his house and returned with a piece of steel and a knife which was described as a "buck" knife. When he returned the deceased was standing on his verandah. The appellant threw the piece of steel at the deceased but missed him. The deceased then jumped off the verandah followed by the appellant who held him by his shoulder and with the knife stabbed him in his side. In the words of the witness McKay he "wringed the knife and him tek it out and him made around five stab after that." After the deceased was injured he was taken to the police station. In the meantime, the appellant washed the knife and threw it under the house, from where it was subsequently recovered and handed over to the police.

The pathologist performed a post-mortem examination on the body of the deceased and in spite of the advanced stage of decomposition of the body, found the following:

> "With regard to injuries there is one stab wound on the body as follows:
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> There is a 1½ inch long incised stab wound on the lateral aspect of the left chest. For the benefit of the jury that would be just about here. (Indicated) The wound is almost vertical or straight up and the wound penetrates the skin, the underlying tissues, enters the left chest cavity and lacerate the left lung as well as the left ventricle of the heart. This injury is associated with massive haemorrhage in the left thoral (sic) cavity. No very significant external findings. Internally, all significant internal injuries have been previously described on the external injuries and all organs show autolysis or decomposition changes.
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> In my opin on the cause of death is due to a stab wound of the left chest."

In an unsworn statement, the appellant while admitting an earlier altercation with Pinky, during which she threw urine on him stated thus:

> "I have to pass his doorway to go to my yard, and she came out with a yellow chimmey and throw 'peepi' on me. Mi rush at her but mi never catch her and mi rush in the house and she fling a bottle and hit me in mi chest. And, One Son run out and grab mi neck and start choke mi and the two of us start wrestle and fall and mi find myself on top of him and Pinky run out the house with a knife and jook mi on mi bottom. I kick mi right feet and mi feet ketch her pon his feet and the knife drop out of his hand and I grab up the knife and mi hold on the knife and him hand. And when wi wrestling, the knife jook him here so (indicating) and him drop the knife and get up. The two a wi let go the knife and wi run to the station and two police came and seh him gwine detain mi for mi stab the man, and them bring mi to the Frome Cell."

Two complaints were made in the Grounds of Appeal:

1. That the Learned trial Judge failed to direct and/or inadequately directed the jury on the alternative verdict of involuntary manslaughter viz., the applicant may not have intended to cause death or grevious bodily harm.

2. That the learned trial judge's direction on self-defence was wrong in the light of the Privy Council's case of Solomon Beckford v. R.

The learned trial judge in dealing with the question of intention had this to say at page 68 of the record:

> "Now in relation to the offence of murder, one of the ingredients is that the prosecution has to satisfy you that the accused person intended either to kill or to cause serious bodily injury. Now there is no witness available who can come to you and tell you what was in the mind of a person at the time that he did anything, if you find that he did the act in question, but what the prosecution does is pu. before you facts and invites you to infer. For instance, anybody who takes a knife and plunges it into the side of another human being it would be a reasonable inference for you to come to that person intended either to kill or to cause serious bodily harm to this victim. So inspite of the absence of an eye-witness you have this privilege in law .... inferences. And the same way that you draw inferences to complete the case for the prosecution, as it were, you are privileged to draw inferences to show that the defence which is being put forward can apply in the circumstances."

This was a case in which there were contrasting accounts given by the prosecution and the defence. The unsworn statement given by the appellant at its highest, sought to establish that the fatal injury was caused by an accident which arose out of the appellant defending himself against an attack by the deceased and his common-law wife Pinky. The defence, as stated, left no room for the position for which Mr. Chuck argued i.e., that the necessary intent may have been absent, thereby necessitating the directions on manslaughter. On the case for the defence, the only possibly verdict which was open to the jury, if it was accepted, was that of an acquittal. The learned trial judge correctly directed the jury in this

respect. At page 69 of the record dealing with the defence of accident he directed the jury as follows:

> "Now you will readily understand Madam Foreman and members of the jury, depending of course on your interpretation of the evidence and in particular of the unsworn statement made by this accused man, that one limb of his defence is that in the course of a struggle the deceased got stabbed in his side. You might wish to consider that that could mean that it was an accidental killing. He is saying that the knife was in the hand of the deceased at the time and there was a struggle and that he had - or he is asking you to infer that he had no intention to kill or to inflict serious bodily injury. So an accidental killing is one limb of the defence which you will have to consider, pending (sic) as I said on how seriously you construe this unsworn statement."

And again:

> "You have ..ccident, in which of course if you accept that it was an accident - no offence."

The learned trial judge repeated these directions at pp 84 - 85 of the record:

> "If you believe that the killing was accidental then there is no offence at all."

The prosecution's case, also left no room for a direction on manslaughter based on the lack of intent of the appellant. The accounts given by the eye-witnesses, if accepted by the jury, could only have resulted in one inference as to the intent of the appellant and that is that he intended to cause death or grievous bodily harm. The evidence of the witness Kathleen Whyte speaks vividly as to the intention of the appellant:

> "I see Leston coming down on One Son, down on the ground holding him over his neck back in his shirt. After him holding him over his neck back in his shirt he had this hand with the knife in his side pushing it pushing it in One Son's side."

As also that of Adassa McKoy:

> "Leston held One Son by his shoulder with the knife in his hand and stab him in his side. Him reach the knife and him took it out and after that him mussey no know if that one ketch him. He wringed the knife and him tek it out and him made around five stab after that."

In so far as it affects the complaint in Ground one of the appeal, the learned trial judge did direct the jury to acquit if they found that the appellant acted in self-defence, but as the directions on self-defence form the substance of complaint in ground two, we now deal with the latter ground.

The complaint that the learned trial judge wrongly directed the jury in light of the decision in the case of Solomon Beckford v. The Queen Privy Council No. 9 of 1986 is well founded. The learned trial judge directed the jury as follows at page 72 of the Record:

> "What is in law, 'self defence' is a simple principle, is that any 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 that on reasonable grounds he believes is necessary to prevent and 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. So in deciding that particular case whether it was reasonably necessary to have used force, regard must be had to all the circumstances of the case, and in particular you as judges of facts have to decide whether the deceased wife, Pinky, did in fact attack this accused man. Because if there is no attack, then self defence cannot apply. But in raising the issue of self defence, an accused person does not in law assume the obligation to prove it. It is the duty of the prosecution to show that self defence cannot apply, and if on your interpretation of the evidence you come to a conclusion of fact that there was no attack either by the deceased or by Pinky, then the issue of self defence would have been removed from the case and it could not apply as any lawful defence being put forward by the accused."

This direction is indeed in conflict with the decision in the Beckford case where it is stated that it is the honest belief of the accused and not a reasonable belief which is the basis for determining whether he acted in self defence. Mr. Chuck in developing this complaint submitted that "In the circumstances of this case where the appellant was in a state of anxiety and conflict he could have been mistaken as to whether he was being attacked, and even though the Crown's case may be that there was no evidence on which he could reasonably believe, the state of conflict he was in, could have caused him to respond to a mistaken attack."

We found no merit in this argument. This was a case in which there was never any allegation by the defence that the appellant had a mistaken belief whether reasonable or not, that he was being attacked. The appellant in his unsworn statement gave a detailed account of the circumstances in which the deceased came to suffer the fatal injury. In that account he maintained that he was in fact being attacked by the deceased and his common-law wife Pinky, and that Pinky in fact had a knife with which she stabbed him in his buttocks, a knife with which the deceased subsequently armed himself and continued his attack upon the appellant. In those circumstances, the issues were clearly drawn between the prosecution's case and that of the defence and the jury was correctly left to determine on the totality of the evidence and on the rules governing the burden and standard of proof, which of the two contrasting stories contained the truth. The following passage taken from the judgment of Rowe, P., in delivering the judgment of this Court in R. v. Roy Thomas S.C.C.A. No. 105/86 (unreported) delivered on January 29, 1988 is of relevance:

> "It would be putting an impossible strain upon a trial judge to require him in all circumstances of self defence to say: 'well although the accused has described the attack made upon him in graphic detail, if you reject that account, you must nevertheless consider whether he honestly believe that those circumstances he has so graphically described existed, even if he was mistaken. This appellant has not relied upon mistaken belief and we do not think that the facts warranted any direction on the subject of honest belief."

In the instant case, the appellant has not relied upon mistaken belief and, as in the Thomas case, we are of the view that on the facts there was no necessity for any direction on the subject of honest belief. Consequently, we concluded that the direction complained of in ground 2 in the circumstances of this case can only be of academic interest, and could have had no effect on the verdict.

We are supported in this view by the following dicta of Lord Griffiths delivering the judgment of the Judicial Committee of the Privy Council in the Solomon Beckford case:

> "If on the facts as they appear from the summing-up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest."

For those reasons, we found no merit in either ground of appeal.