NMG

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 193/2002

BEFORE: THE HON MR. JUSTICE FORTE, P.
THE HON MR. JUSTICE WALKER, J.A.
THE HON MR. JUSTICE COOKE, J.A. (AG.)

REGINA V ORAL LAWRENCE

Ravil Golding for appellant

Bryan Sykes, Snr. Deputy Director of Public Prosecutions, for Crown

October 6, and December 19, 2003

COOKE, J.A. (Ag.)

On the 17th January 1998, Errol Carnegie, a special constable, was posted to do guard duty in Earls Court, St Andrew. Along with him were Constables Rupert Harper and Kevin Maine. It is the evidence of Harper that Carnegie was dressed in blue denim attire worn by special constables. Further, he carried a 9 m.m. pistol in a holster which was attached to his waist band. The presence of the firearm in the holster was plainly visible.

Carnegie left the premises minutes after "4:00 o'clock" in the afternoon. At about 5:00 p.m. that same day Donna Davis was a passenger on a bus which plied between Constant Spring and Half-Way-Tree. The bus was proceeding towards Half-Way-Tree. Her evidence was that this bus stopped at a bus stop

just below the traffic lights at the intersection of Grants Pen and Constant Spring Roads. At this bus stop, there were three persons waiting to board the bus. Set out below is the description by Davis of what then transpired. The policeman being referred to is Carnegie:

> "A Some passengers, about three persons were coming on the bus, including ...
>
> Q Including?
>
> A. A policeman in denim uniform.
>
> Q. Now, where this bus came to a stop, was it a stop? In other words, was it a bus stop that the bus had stopped?
>
> A. Yes
>
> Q. You said passengers were coming on the bus?
>
> A. Yes sir.
>
> Q. Did anything happen when the passengers were coming?
>
> A. Yes. As the officer stepped up on the bus step ...
>
> Q. Yes?
>
> A. ... a young man was behind him I thought was a passenger too, but then I saw ...
>
> His Lordship: Just a minute. Yes?
>
> A. Then saw the young man grabbed on the holster at the policeman side where he had a gun. (Indicates)
>
> Q. I see you indicate somewhere on your body. Where is it?

A. The hip of the officer.

Q. When he grabbed this gun, could you tell us what you observed?

A. Pardon?

Q. What next happened?

A. He hold on the officer gun. The officer spin and grab on back on his holster here. (Indicates)

Q. Please speak louder, Miss Davis.

A. Yes.

Q. How, when you say the officer spin, spin in which way, facing which way?

A. Facing the gentlemen that grab on to his gun.

Q. Now when you saw that, what next happened?

A. The gentleman had a gun in his hand.

Q. Which gentleman?

A. The gentleman who was behind the officer. He fired the shot, I don't know where it hit the officer, but the officer fell on the ground in the bus.

Q. Yes?

A. After the officer fell, the passengers on the bus began to get scared and the gentleman run off.

Q. Which gentleman run off?

A. That shot the officer.

Q. Now, when the officer fell on the floor of the bus what next happened?

A. The driver start – they start to tell the driver to drive, and the driver drive straight to the Half-Way-Tree Police Station. Pardon me. When the officer drop on the ground and he hold on to his gun so tightly, two shots fired out of the officer's gun inside the bus after he fell on the ground.

Q. You said the driver drove this bus to Half-Way-Tree Police Station?

A. Yes, sir.

Q. Were you still on the bus at that time?

A. Yes, sir, that is why I am here.

Q. And the police officer who was shot, where was he?

A. Some police came out and take him.

Q. No, was he taken off.

A. Yes, he was taken off the bus at Half-Way-Tree."

Carnegie succumbed to the gunshot injury. The fatal bullet had entered the right upper part of the chest, passed through the thoracic cavity, and in a deformed state, was lodged in the back from where it was recovered.

On January 22, 1998, a warrant was obtained for the arrest of the appellant Oral Lawrence, in connection with the murder of the deceased. He was taken into custody on the 30th March 1998, brought to the Rockfort Police Station, transferred to the Central Police Station and finally held at Constant

Spring Police Station. At this last station he gave a caution statement. The relevant section of that statement is reproduced hereunder:

> "Mi go a the bus stop. A bus did a come from Constant Spring Road, a policeman come down to the bus stop where I was standing. He was dressed in blue, navy blue overall with the same colour cap the bus come to the bus stop and stop. And the police was boarding the bus and mi was going into the bus miself. Before him go into the bus full I was behind him and the police spin around and mi panic because mi believe him suspect me how him turn him have him hand on him side. I took out the gun I had in the front of mi waist and point it at the officer and me hear an explosion. The gun go off and mi frighten and me run off up Shortwood Road. Is only one shot mi fire and me nuh know if the officer get shot. After me run off going round the corner, me hear two explosions. Me don't know who fire the shots".

The foregoing synopsis is the basis for the preferment of the indictment against the appellant which charged him with Capital Murder in that he "murdered Errol Carnegie in the course or furtherance of a robbery".

At his trial the appellant made an unsworn statement. In this he said he was threatened with death at the Constant Spring Police Station. He said he gave a statement stating that on the day of the shooting of the deceased he was at Rockfort. He was further given another "paper to sign" which he signed but did not know what was written on that paper. He was forced to sign that "paper". The "paper" was the caution statement which was tendered in evidence by the prosecution. In effect, the essence of his unsworn statement was:

(a) His signature on the caution statement was involuntary and the contents were a fabrication; and

(b) He was in Rockfort at the relevant time – the defence of alibi.

On September 27, 2002, the jury returned a verdict adverse to the appellant and he was sentenced to suffer death in the manner authorized by law. The application for leave to appeal challenged the correctness of the verdict and the constitutionality of the mandatory sentence of death as is provided for by Section 3(1) of the Offences against the Person Act. The original grounds were abandoned and leave was granted to argue eight supplementary grounds and the hearing of the application was treated as the hearing of the appeal.

As ground 6 effectively disposed of this appeal, attention will first be directed to it. This ground was framed thus:

> "6. That the learned trial judge fell into error when he directed the jury that "... there can only be one of two verdicts, either guilty as charged or not guilty" in that:
>
> (a) He failed to leave the verdict of Non-Capital Murder for the jury's consideration and;
>
> (b) He failed to leave the verdict of Manslaughter for the jury's consideration".

Before embarking on an examination as to the merit of this ground, the relevant law should be stated. Guidance is provided in the advice of the Judicial Committee of the Privy Council in **Alexander von Starck v R** (Privy Council Appeal No: 22 of 1999) (unreported) delivered February 28, 2000. In delivering the advice at pp. 6-7 Lord Clyde had this to say:

> "A The function and responsibility of the judge is greater and more onerous than the function and the

responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the may be evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognized in **Xavier v The State** (unreported), 17th December 1998; Appeal No. 56 of 1997, a low one, and, as was also recognized in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge had no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the

> choice to them. In **Xavier** the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that "If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter". In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury". (Emphasis mine)

See also **R v Errol Morgan** (1971) 12 J.L.R. 1033.

In this case, an analysis of the excerpted portion of the appellant's caution statement set out above reveals that he was denying that he was participating in a robbery or in the furtherance of a robbery. This was a challenge to the case advanced by the prosecution that the appellant was involved in robbing the deceased of his firearm and had fatally shot him in the process. Further, the appellant was saying that he had no intention to shoot the deceased. He panicked, took out the firearm he had in his waist and "point it at the officer and me hear an explosion". The learned trial judge failed to put before the jury the contentions of the appellant as were contained in his caution statement. In fact, he emphasized what he considered to be the evidential value of this statement to the prosecution. At p. 260 of the transcript he directed the jury as follows:

> "The essence of the statement as far as the prosecution is concerned is that the accused is saying, I am the man who shot the police officer, Carnegie".

However, he seemed not to have appreciated the "essence" of the statement as far as the defence was concerned. It cannot be said that the assertions by the appellant in his caution statement as to what occurred on the

bus were wholly incredible, "or so tenuous or uncertain" that the learned trial judge was entitled to regard them as without substance and therefore to be ignored.

The interest of justice demanded that the evidence that arose on the caution statement which was relevant to the offence of capital murder as well as to the alternative offence of non-capital murder ought to have been left for the consideration of the jury. It follows therefore that the implicit denial of the appellant that he was participating in a robbery should have been left to the jury. If the jury accepted the appellant's version or were in doubt as to his veracity it would have been open to them to return a verdict of non-capital murder.

Then there was the issue of manslaughter arising on the appellant's caution statement that he pointed what presumably was an illegal firearm at the deceased after which he heard an explosion. Manslaughter should have been left for the consideration of the jury. On this evidence the learned trial judge should have posed the following questions to the jury:

(1) Was the act of pointing the firearm by the appellant at the deceased intentional?

(2) Was that act unlawful?

(3) Was it an act which any reasonable person would realize was bound to subject the deceased to the risk of physical harm albeit not necessarily serious harm?

(4) Was that act the cause of death?

See **Kevin Goodfellow** (1986) 83 Cr. App. R. 23 where the relevant principles are correctly stated.

If the jury answered these questions in the affirmative, then it would have been open to the jury to have returned a verdict of manslaughter. Of course the jury would only have gone to the consideration of manslaughter if they had concluded that the appellant was not guilty of capital or non-capital murder.

The error of the learned trial judge was that he did not "place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions:" (See **Alexander von Starck v R** (supra). Mr. Sykes, counsel for the Crown with his accustomed candour, conceded that the learned trial judge ought to have left the alternative verdicts of non-capital murder and manslaughter for the consideration of the jury. Mr. Golding for the appellant realized that at best the most his client could hope for was the quashing of the conviction of capital murder and the substitution of a verdict of manslaughter. That was the decision of the Court. A sentence of thirty (30) years imprisonment at hard labour was imposed. This long sentence was warranted because of the most reprehensible conduct of the appellant and this Court cannot be oblivious to the regrettably high and unacceptable incidence of crime in this country especially that being perpetrated through the medium of illegal firearms.

Before moving on to a discussion of the other grounds argued, it is necessary to comment that in recent times there has been a number of cases before this Court where trial judges have abdicated their judicial responsibility to analyse caution statements of accused persons and to give appropriate directions within the context of the respective cases. It is hoped that this comment will not go unheeded.

Grounds 1, 2, 3 and 4, can be conveniently dealt with together. The complaints were that the learned trial judge left for the jury's consideration an offence for which the appellant was not charged:

> " i.e. murdering a police (sic) in the lawful execution of his duties"

Further, that to compound this error there was:

> "absolutely no evidence that the deceased was acting in his duties as a police officer and indeed there was evidence to the contrary".

The adverse consequence of these errors it was argued "was so fundamentally prejudicial as to deny the appellant a fair trial". This would be so as it would be impossible to say whether or not the jury returned their verdict on the basis of a murder in the course or furtherance of a robbery or a murder of a "police (sic) in the lawful execution of his duties".

Section 2(1) of the Offences against the Person Act lists the circumstances in which a murder is classified as capital murder. Section 2(1)(a)(iv) and 2(1)(d) prescribe as capital murder:

"(d) any murder committed by a person in the course or furtherance of -

(i) robbery;

(ii) ...

(iii) ...

(iv) ..."

Section 2(1)(a)(i) makes it capital murder if the murder is of -

"a member of the security forces acting in the execution of his duties or of a person assisting a member so acting".

Section 2(5) designates:

"member of the security forces" as -

(a) ...

(b) ...

(c) the Island Special Constabulary Force;

(d) ..."

The deceased was a member of the Island Special Constabulary Force.

As already stated the particulars in the indictment which grounded the charge of capital murder were that the murder was committed in the course or furtherance of a robbery. A perusal of the transcript indicates that the contest was not concerned with whether or not the deceased was at the relevant time acting in the execution of his duties. The prosecution, by way of the particulars of the offence, stated clearly what they intended to prove. By these particulars the defence knew the case it had to meet and no doubt would have prepared itself to meet the legal proposition of the prosecution. This was that the murder of the deceased was in the course or furtherance of robbery. Despite the

particulars of the offence as stated in the indictment, the learned trial judge took it upon himself to direct the jury in the following manner. At pp. 251-2 of the transcript there are these directions:

> "And I must tell you that the charge of capital murder in this case arises out of the fact that the prosecution is saying that it was in the course of robbing the policeman of his gun that the accused man shot the police. And if you find that this is what happened, then your verdict must be guilty as charged.
>
> If however, you have a reasonable doubt, then your verdict must be not guilty. Because in this case, well, perhaps I ought to mention that in this case, there is uncontradicted evidence that the man who was shot that day was a policeman in the lawful execution of his duties, dressed like a policeman. So that, the policeman called in this case would see that he is a policeman, and anybody who shoots a policeman in those circumstances would also be guilty of murder".

At pages 263-64 of the transcript there is this:

> "What is significant about this, you know, is that he was dressed so like a policeman, that anybody seeing him would immediately say that he is a policeman. As Donna Davis, who did not know him before, said when she saw him, she spoke of the policeman, police coming in the bus. And as I said before, killing a policeman while he is in the lawful execution of his duty, is in fact capital murder, even if no robbery took place".

These portions of the summing-up illustrate the force of the appellant's complaint. The learned trial judge left to the jury a basis for the conviction of the appellant for capital murder which resided solely within his contemplation. Accordingly, there is merit in this aspect of the complaint of the appellant. As to

whether or not the deceased was acting in the execution of his duties did not fall for determination in this case. That was not a relevant consideration.

Ground 5 was couched in these terms:

> "The learned trial judge failed to adequately assist the jury on the law in relation to alibi".

This ground was deficient in that it did not specify the alleged failings of the learned trial judge in this regard. In any event it was without merit.

Grounds 7 and 8 pertained to the constitutionality of mandatory death sentences for persons convicted of capital murder. In view of the decision of the Court in this case these grounds do not call for consideration. Further there is a decision of this Court in **Lambert Watson v R** S.C.C.A. 117/1999, delivered December 16, 2002, on this issue which is now the subject of an appeal to the Judicial Committee of the Privy Council.

In conclusion, to reiterate the conviction for capital murder was quashed and sentence set aside and a verdict of manslaughter substituted. A term of imprisonment of thirty (30) years at hard labour was imposed, to commence on December 27, 2002.