JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 125/89

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

RICHARD GREEN

Dr. Paul Ashley for the applicant

Patrick Cole for the Crown

October 15 and November 4, 1991

WRIGHT, J.A.

When this application for leave to appeal against conviction and sentence of death for murder was called on October 14, Dr. Ashley announced his appearance for the applicant and stated that he was led by Mr. Howard Hamilton, Q.C. who was absent. He explained that the reason why no grounds of appeal were filed was that after consultation with Mr. Hamilton it had been decided that no arguable grounds could be found. It appeared that Mr. Hamilton was not aware of the case being set down for hearing and since he is the leader the court thought it proper to hear from him and so deferred the case to the following day, October 15, to allow Dr. Ashley further time to consult with him. On October 15, Dr. Ashley announced to the Court that he had consulted further with Mr. Hamilton but that they could find nothing in law or on the facts which could constitute a ground of appeal with any merit. When called on by the court for his assistance Mr. Cole agreed that he could find no arguable point in law or on the facts.

We agree with the observations of counsel and consequently the application for leave to appeal is refused. It only remains to set out the facts and to demonstrate the reason for the refusal.

In sharp focus the prosecution case and the defence may be stated thus. On the prosecution case the victim Mitchell Spence died from hypervolemic shock as a result of stab wound injuries to the right lung with a sharp cutting instrument with a moderate degree of force. The injury was 1" long in the right side of the back near the medial border of the scapular situated 60" from the toes and 2.5" from the midline of the body. The wound passed through the sixth intercostal space and upper lobe of the right lung. It was 2½" deep and was directed downwards, forward and medial. Such was the evidence of Dr. Ramesh Bhatt the Pathologist.

In contrast to the prosecution case that the injury was inflicted by the assailant standing behind the victim the defence contended that the injury was inflicted when the applicant in order to forestall a blow with a stool by the deceased grabbed him from in front while holding the knife in his hand. Great emphasis was placed on the medical evidence as the defence sought to canvass support from Dr. Bhatt for their contention.

The deceased Mitchell Spence was employed on a mini-bus called "Top Celebrity" which plies between Kingston and Spanish Town. The background to this tragic event as gathered from a caution statement from the applicant which was admitted into evidence was that on July 13, 1988 there was some fuss between Spence and the applicant arising out of the non-payment of fares by the applicant. This impasse ended at Central Village where the applicant left the bus after an encounter between himself, Spence and three other men from the bus. At sometime on the following day the applicant along with one Cecil, who he said was Spence's friend and who intended to speak to Spence, ran down the bus and mounted it but the applicant said he was confronted by Spence armed with a machete. The Applicant received blows from a man on the bus after which he left.

The evidence of the prosecution witness Ainsley Trout was that while he and Mitchell Spence were seated in Joyce's Hide-out

Lounge, Central Village about 9:45 p.m. on July 14, 1988 engaged in a game at the Joker-poker machine he suddenly heard behind him two sounds, "boof, boof", as if blows had been struck. They both jumped up off the stools on which they were seated. He spun around and waved his hand while Spence held on to his shoulders from behind using the witness as a shield. When he spun around it was to face a man whom he did not know standing some 5-6 yards away (demonstrated to be 10-12 feet). There was no light in that section of the Lounge save what was emitted by the machine. Speaking from behind the witness Spence said to the man:

> "Greenie bwoy, if mi dead police bwoy Mikey wi tek care of yuh, yuh must remember that."

The applicant stated that he is called "Greenie". According to Ainsley Trout he became aware that Spence was hurt because the latter kept pulling him down towards the back door. In the light in that section of the building he observed two red spots in Spence's back - one on the right and the other on the left of Spence's ganzi. He saw Spence leave going towards a bus stop. That was the last time he saw Spence alive.

Mitchell Spence had indeed sustained two stab wounds to his back - the one which proved fatal has already been described. The other wound was described by Dr. Bhatt as:

> "A stab wound measuring 1/8" in length on left side of back near medial border of left scapular situated 60" from toes and 1½" from mid-line. It was ¼" deep."

Cross-examination of Ainsley Trout sought to extract from him that a struggle ensued between the strange man and Mitchell Spence after Spence had attacked him during the course of which struggle the man drew a knife to ward off Spence who was armed with a stool. But the witness denied that there was any struggle. Admitted in evidence to contradict Trout's evidence that he saw no knife in the man's hand was a portion of his deposition which reads:

> "The deceased was sitting to my left. When I heard the sound I spun round and I saw a man with a knife in his hand. There was not much light in the place."

The witness also denied that the strange man with knife in hand, in order to protect himself against imminent injury by Spence, had to

hold on to Spence.

In cross-examination of Dr. Bhatt support was sought for the contention that the two injuries to Spence's back could have been caused in the manner suggested to, but denied by, Trout:

> "Q: Now doctor, you said injury number three was inflicted with a moderate degree of force?
>
> A: Yes.
>
> Q: Is that consistent with also a struggle as opposed to a direct stab?
>
> A: If the assailant is in the back, because it is more consistent with the assailant being in the back-side of the victim.
>
> Q: But at the same time you don't disagree it is consistent with a struggle?
>
> A: Well I did not see a defence wound except for injury number two which was on the back.
>
> Q: So doctor, I did not hear you clearly. I am having a little difficulty. Injury number two, could that have been consistent with a struggle?
>
> A: Well usually in a struggle we see the defence wounds like cuts on the hand and on the arms.
>
> Q: I just want to know if in a struggle injury number two which you spoke of could have resulted?
>
> A: Some remote possibility."

Thereafter with the assistance of a policeman substituting for Mitchell Spence defence counsel embarked upon a series of demonstrations designed to show how the two stab wounds to Spence's back could have been inflicted while the applicant was holding on to o Spence. But despite the several variations suggested by counsel none was consistent with the injuries found except when the assailant was to the back of the victim. The doctor explained that the direction of the injuries and the force required, particularly with reference to the fatal injury ruled out the grabbing-up position.

Detective Corporal Earl Davey testified that pursuant to information received he went to the Crofts Hill Police Station on November 1, 1988 for the applicant who was in custody there. He was accompanied by District Constable Ellis. On the return journey the applicant asked the corporal how he knew that the applicant was

in Crofts Hill and whether it was true that Spence had died. The corporal said he avoided the first question but replied in the afirmative to the second. He said the applicant began crying and started to tell him about the incident involving Spence and himself in which he said he used a knife to stab Spence. At that stage he stopped the applicant, cautioned him and told him that if he wished to make a statement he could do so at the Central Village Police Station. Accordingly upon arrival there he secured the attendance of Mr. Renford Nivens, a Justice of the Peace, and in his presence the applicant dictated a statement which the corporal recorded. After a voir dire was conducted that statement was admitted into evidence. It reads:

> "...'Wednesday, 13th of July, 1988, about in the evening, Cecil and me was at Spalding Gardens in Central Village...'
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> 'We decided to go check wi friend, Spence at Spanish Town for some money. Cecil and Spence is friend. Spence and me is not friend. We go to Twickenham Park and I saw my step-brother, Raphael Scott and I asked him for a money; he gave me three dollars. Cecil and me went to a bus-stop at Twickenham Park, asked a guy for a quarter million mini-bus name Top Celebrity and he said it gone to Spanish Town.'
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> 'Spence work on Top Celebrity bus, he is the conductor. Cecil and me took another bus to Spanish Town and found Spence at the bus terminus. Cecil ask him for money and Spence said, he don't have 'ne'...'
>
> '...except two dollars. Cecil decided to go to Trial Heights to visit his baby mother. I decided to go with him. His two dollars could not pay the fare for us so I gave him my three dollars. I decided afterwards not to go Trial Heights. Cecil and I took the said Top Celebrity bus. Cecil said he would talk to Spence about our fares and I saw him go to the back where Spence was then returned to me and told me that everything is all right. Cecil got off the bus at McNeil Park in Greendale and I remained. When the bus reach half way to Central Village and Spence came to me to collect my fare, I asked him if Cecil did not talk to him about our fares and he said, "Pay mi man, pay mi because mi nuh like yun".
>
> 'I begged him a ride and he draped me up in my shirt front. Mi box off him hand and a lady passenger paid for me as Spence was now taking up a machete from a corner of the bus...'
>
> 'That was before the lady paid for me. About three men who worked on the bus, rushed me, along with Spence. The bus stopped at Central

> Village stop, and I came off, took up stones, rushed them and they ran back to the bus, and I went home. From the time Spence passed me sitting at the road side at Spaulding Gardens, and said, "I don't like certain pussy hole, you know, 'cause certain pussy hole ah go on like dem a bad man." Thursday, 14th of July, 1988, Cecil and me went to Spanish Town to a bank. Cecil decided to talk to Spence about his behavior. We reach ah rice mill, and saw "top Celebrity", and we ran it down. I catch it, and Spence swing a machete at me. The bus stopped, Spence came to me with a machete and I took up a bottle from a stall and fling at him. The bus drove off then, and Spence went in it. The made a circle and came back; it stopped beside me then, and a man in a brown suit came out grabbed me in my shirt front, pulled me into the bus and started hitting me over my body. After this, he let me go, and I went away. At about 8:00 p.m., I went to Joyce's Bar at Central Village looking for Cecil, I did not see Cecil, I saw Spence. He looked at me and said, "Yuh check seh me couldn't hold yuh nuh." He left the juke box, grabbed me at the front of mi shirt and started thumping me in my mouth and body. I took out my ratchet knife, from my right rear pocket, opened it, and Spence let me go, and turned towards a stool in the bar. At that time, I rushed down on him and stabbed him two times in the region of his shoulders, from behind. Spence took up the stool and I ran out of the bar. There was a man and I ran out of the bar. There was a man and a boy in the bar when I stabbed Spence. The man said to me, "Wha' mek you stab the youth." Before I went to Spaulding Gardens, and on Friday 15th July, I hear that Spence was dead. I ran away to Kingston and then to my mother in Crofts Hill, Clarendon. The police caught me and I told them how it go. Mr. Davey come for me and me tell him how the killing go."

Counsel for the applicant at the trial disputed certain sections of this statement but conceded that the applicant did tell the police the greater part of the contents of the statement. In the cross-examination of Detective Corporal Davey counsel suggested to him that what he had recorded was his understanding of what the applicant was telling him but he rebuffed the suggestion. Detective Corporal Davey denied any impropriety in the taking of the statement and in this he was supported by the Justice of the Peace who testified that the applicant made no complaints whatsoever to him.

After the over-ruling of the submission of no-case to answer the applicant gave an unsworn statement in which he said that he had given the cautioned statement only after threats and beating by Detective Corporal Davey yet the details are remarkably similar

to the cautioned statement though in certain areas he condescended to more details.

As regards the stabbing, he said he had gone to the bar to look for Cecil but did not see him and when he was about to leave the deceased barred him:

> "...I turned around and was coming out of the bar after I was coming out, I feel when a hand come across this way and grab me in my shirt; the front of my shirt. When I turn around, I see Spence. After I see Spence, Spence look on me and said, "Yuh check seh I couldn't ketch yuh nuh.' Him give me a box in mi face and I look on him and say, 'Let mi goh nuh man, let me goh nuh man'. And I try to push off his hand. After I try to push off him hand, him thump me in my mouth; him bus right here of my gum; I could feel the blood inside of my mouth. He used his knee to hit me in my belly several times. I remember that I was having a knife in a jeans pants that I have on; I use this hand to tek it out, and I goh like soh and it open, (Witness indicates) I open it like this .. After I took out the knife, same time him let goh of me, and I see when him rush go 'cross goh fi a stool what him was sitting on.
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> After him rush go fi the stool, I see when time him come out; grab up the stool, and coming around and I rush go and suck on to him and me and him start to wrastle; I did have the knife in mi hand; same time when mi suck on pon him. Me and him was there wrastling till the stool drop out of him hand, and same time I push him back and him dress backso, towards the Joker Poker machine.
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> After I see him dress back and rock back, I run out of the bar.
>
> I run out of the bar and goh on Spaulding Gardens Scheme. Don't have anything more."

On the material before the Court, the learned trial judge, after a patient and careful summing-up lasting for two hours and forty-five minutes in which the defences of self-defence and provocation were dealt with, accidental infliction having been clearly ruled out on the demonstrations, sent the jury out to consider their verdict. But after a retirement of 31 minutes they returned for further directions on those self-same issues and received further directions lasting for 20 minutes. Then after retiring for a further 26 minutes they returned a unanimous verdict of guiltyof murder.

Having ourselves perused the record of the trial, we were quite unable to find any point to which counsel's attention could properly be directed and accordingly we agreed with counsel's view of the case. In this regard our decision was informed by pronouncements of the English Court of Criminal Appeal: R.v. Frederick Williams Reynolds [1948] 48 Cr. App. R. 39 and R. v. B. R. v. H. [1966] 3 All E.R. 496.

In the Reynolds case the Lord Chief Justice had this to say at p. 39 - 40:

> "...I fully appreciate the difficulties with which counsel who are instructed for murderers who put in a notice of appeal are often faced, and I do not want to say one word which would be thought to reflect in any way on Mr. Clark, who has put forward the only points which could be put. I desire, however, to repeat what I have said before, that there is no duty of counsel merely because he is asked to represent an appellant against a conviction of murder to attack a summing-up which is quite impeccable and which has put the case fairly and properly to the jury. There is no obligation on counsel in such a case to endeavour to find some minute points which could have no bearing on the case. The Court has always read the transcript of the case, and when it is perfectly clear that there is no ground for appeal, there is no duty on counsel other than to tell the Court that he represents the appellant, and that if the Court has discovered anything in the case on which they wish to hear him, he is prepared to do his best to assist the Court.
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> In this case, Atkinson, J., who tried the case with meticulous care, delivered a full, ample and fair summing-up in which the law is stated to the jury as accurately as any learned Judge could state it and the evidence is put before them as fairly as any Judge could put it. The summing-up was almost more than fair to the prisoner, and in a long summing-up, as this was, there can nearly always be found some phrase or other in which the Judge may have used some verbal inaccuracy which by no conceivable possibility could have any effect on the case at all. In an appeal of this kind, because it is an appeal against a conviction of murder, counsel very often thinks that he is bound to try to attack the summing-up where there is no real attack to be made and where nothing has been said to the jury which could possibly mislead them. Where there is nothing in the summing-up which in any way mis-states the law, there is no duty on counsel to go through the summing-up with what I may call a magnifying glass to see if some verbal inaccuracy can be found or if

> some point which has been mentioned in the course of the case has not been mentioned to the jury.
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> In this particular case, from first to last, there was not a shadow of a defence. It was as deliberate and wicked a murder as can well be conceived, and the appeal is dismissed."

In R. v. B. & R. v. H. Lord Parker, C.J., re-emphasised the inadvisability of counsel advancing unmeritorious grounds. This is how he expressed himself after dismissing the applications:

> "The court would like to comment on the fact that the grounds of appeal are drafted in legal language and indeed were, so we are told, drafted by leading and junior counsel who represented the applicants at the trial and, therefore, presumably were present when the learned judge summed up. It would indeed be unfortunate if counsel put pen to paper to draft grounds without being certain in their own minds that they were arguable grounds. It is very difficult to believe that the counsel concerned in this case, if they did draft the grounds, ever considered whether these were grounds which they, if they were called on to argue the case, could properly put before this court bearing in mind the duty which counsel owe to the court. Speaking for myself, at any rate, as presiding in this court, I very much hope that when counsel are asked to draft grounds for an applicant, they will not do so merely because they are asked to do so, but will only draft grounds which they feel that they are in a position to come before the court and seek to uphold."

In the light of such respected opinions, we are satisfied that counsel adopted the correct course in not placing unmeritorious grounds before the Court which he could not argue.