Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 55/87

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

RONALD HIGGINS

R. Carl Rattray, Q.C. and Walter Scott for Appellant

Winston Douglas for Crown

November 30; December 1, 1987; January 29, 1988

ROWE P.:

Ronald Higgins joined the Jamaica Constabulary Force in 1983 and was posted to the St. Elizabeth Division. On January 25, 1986 he was stationed at the Black River Police Station, and at about 9:45 p.m. a firearm was discharged in the barrack-room occupied by the appellant Higgins which resulted in the death of Beverley Lewin. Arising out of this incident Higgins was tried and convicted in the Black River Circuit Court of Manslaughter and sentenced to four years imprisonment at hard labour. We dismissed his appeal on December 1, 1987 and now keep our promise to reduce our reasons into writing.

Sometime on the fatal day, the appellant introduced Ms. Lewin into his room. She was dressed in black trousers and a yellow blouse. A shot rang out in the station premises at about 9:45 p.m. and several policemen rushed towards the sound of the gunshot. First on the scene was Acting Corporal Scott who in ascending the stairs towards his barrack-room met the appellant descending the stairs with both hands on his head and he looked

frightened. There was blood on the shirt and trousers of the appellant. Actg. Corp. Scott enquired from the appellant what had happened. The appellant held on to him and took him to the No. 1 barrack-room, where the appellant took a key and opened the door. Actg. Corp. Scott saw a woman lying on her side beside the bed in a pool of blood. The appellant lay on Actg. Corp. Scott's shoulders and cried. They left the room and again the appellant locked the door. With the assistance of other policemen the wounded woman was taken to the Black River Hospital where she died. Actg. Corp. Scott said that on their return from the Hospital the appellant said he wanted to talk to him and so both men went to Actg. Corp. Scott's room where the appellant told him that he was emptying or unloading his firearm and did not realise that one live round was left in the chamber and he started to click the trigger and he heard an explosion.

At trial Actg. Corp. Scott without resiling from the account given above accepted defence counsel's suggestions that the appellant could have told him a host of other things including the defence's version of the facts as stated in the unsworn statement. But what Actg. Corp. Scott did not do was to say categorically that the appellant did tell him any of the things which he agreed the appellant could have told him.

Inspector Henry heard the explosion and went to investigate. He saw the appellant who said to him: "Inspector, come here mek me tell you something, sah". The appellant was then breathing sharply, as if he was tired and he pulled the Inspector towards a step. They spoke to each other and went upstairs and the appellant opened the door with a key. At this time Actg. Corp. Scott had joined them. The Inspector saw a .38 revolver on the bed and a black female lying on her left side bleeding from the mouth and nostrils. Inspector Henry heard the appellant say: "Me nuh know how it happen, me did in a de bathroom". Inspector Henry asked Higgins for the ammunition. He took six .38 cartridges from one of his pockets and five .38 cartridges from a locker and handed them to Inspector Henry. In the course of cross-examination Inspector Henry denied the suggestions that the appellant

told him that when he returned from the bathroom he saw the deceased with the firearm and that he tried to take it away from her.

Superintendent Lawson accompanied Inspector Henry into the appellant's room and the Superintendent heard the appellant say: "Me was in the bathroom, me nuh know how it happen". The firearm had been allocated to the appellant on January 24 and he had failed to return it to the station guard at the conclusion of his tour of duty on that day.

Asst. Commissioner Wray, a Ballistic Expert, examined the .38 revolver which was found in the appellant's room and compared fragments of the bullet removed from the head of the deceased and concluded that the bullet was fired from the appellant's firearm. He examined the body of the deceased and observed that there were no powder burns around the wound, but he saw evidence of tattooing and blackening around the wound, which led him to conclude that the muzzle of the weapon when fired was held between nine to fifteen inches away from the body of the deceased. He conducted nitrate tests on the hands of the deceased and took swabs of sections of the hands and he conducted tests on the swabs and these tests revealed no evidence of gun-powder residue, which suggested that the deceased might not have fired a firearm. In cross-examination Asst. Commissioner Wray said that if someone else's hand was on the firearm and the deceased's hands were on that person's hand he would not expect to find gun-powder residue on the deceased's hands.

Asst. Commissioner Wray was re-examined and the dialogue is important:

> "Q: To find the residue, firearm residue, as you said - to use your own words - gunshot residue on a person's hand, the finger would have to be on the trigger when it is pulled, gunshot fired (sic) to find gunshot residue on the hand?
>
> A: The residue would have escaped in gases from the area of the cylinder, which would be deposited on the hand holding the firearm.
>
> Q: And actually holding the firearm and pulling the trigger?
>
> A: Yes, sir.

"Q: But if there is a hand on that hand after the shot is fired, could that hand also - could residue on the gun come on that hand that is on top of that person's hand?

A: Yes, sir, depending on where and in what position."

The appellant gave an unsworn statement in his defence. He said he had been issued with the firearm which he retained because his investigations were incomplete. On Saturday the 25th January, 1986, he met Beverley Lewin of Ffyfes Pen, St. Elizabeth and invited her to accompany him to the Black River Police Station. They were alone in his barrack-room and as they talked together he removed his revolver from his waist, took out the cartridges and put the revolver and the cartridges in his cupboard. He said further that both of them continued to talk for about another five minutes when he left her and went to the bathroom. When he returned from the bathroom he saw Beverley with his revolver in her hand. He immediately held on to her. She pulled away. There was a struggle during which he heard an explosion which surprised him as he had unloaded the revolver. He noticed that Beverley was shot in the face and he immediately rushed in search of assistance. He ended by saying he told Actg. Corp. Scott this identical story.

All told, the appellant gave three separate accounts as to how the deceased came to be injured. His earliest account is that he had unloaded his firearm and was clicking the trigger when to his surprise it went off and shot Beverley Lewin. If he had taken all six cartridges from the revolver no amount of pulling of the trigger could cause it to fire. The bullet entered the forehead of the woman and travelled slightly upward indicating that the muzzle of the firearm was almost at 90 degree angle to the forehead at the time of its discharge. If this earlier account of the appellant that he was clicking the trigger when the firearm went off was true, then he was holding a firearm some nine to fifteen inches from the woman's face and either knew that there was a bullet in the chamber or was unsure whether or not there was one. Defence counsel quite rightly conceded

that that action on the part of the appellant could amount to an unlawful and dangerous act.

A second verson was given by the appellant to his two senior officers. He said he was in the bathroom and had no knowledge of what had happened in the room. If that account was correct then he could not have been guilty of any offence whatever. Now came the third version which he offered in his unsworn statement. When analysed this would mean that the deceased took up the revolver from the cupboard, loaded one cartridge into it, and had the revolver in her hand when the appellant returned from the bathroom. There was no suggestion from the appellant that he managed to get hold of the revolver before the explosion, consequently the only reasonable inference was that on that version the deceased still had her hand on the revolver. If that were so, Asst. Commissioner Wray would have expected to have found gun-powder residue on her hand. He found none. In those circumstances a jury would be fully entitled to reject the unsworn statement of the appellant.

Mr. Rattray and Mr. Scott submitted that the judge's directions on circumstantial evidence and on the law relating to manslaughter were confusing and inadequate. As to circumstantial evidence, Mr. Rattray submitted that nothing that the appellant said implicated him in a criminal offence and there was therefore no factual basis from which inferences of guilt could be drawn. He relied upon the pungent dictum of Carey J.A. in R. v. Johns and McIntosh, S.C.C.A. 102 and 103/83 (unreported) that:

> "The trial judge should have told them (the jury) that before they can test the circumstantial evidence to see if it had the inferential and logical compulsion of a mathematical formula, they should be satisfied about the truth of each of the links that go to make a chain of circumstantial evidence."

The appellant and the deceased were the only persons in that room and he alone could say for sure what had transpired. The jury were entitled to draw inferences adverse to the appellant if they found that he was deliberately prevaricating as to where he was when the shot was fired.

To return to Mr. Rattray's main complaint in relation to circumstantial evidence, he submitted that portions of the trial judge's summing-up were misleading. At page 7 of the Record, the jury were directed quite correctly that circumstantial evidence could be likened to the strands of a rope, then the judge concluded:

> "Where anything is missing which would allow you to say guilt or innocence and it is not there, you can infer it or supply it by the use of circumstantial evidence."

We think that the trial judge meant and the jury understood him to mean that when there is no direct evidence, circumstantial evidence, if there is any, can be relied upon to fill out the gaps in the direct evidence. From the tenor of the summing-up as a whole this passage could not fairly be said to have the meaning that in the absence of any evidence, direct or circumstantial, the jury could nevertheless draw an inference of guilt.

A failure by the trial judge to give clear and precise directions on circumstantial evidence will not necessarily result in the quashing of a conviction. In R. v. Cecil Bailey (1976) 13 J.L.R. 46, at pp. 49-50 Edun J.A. said:

> "It cannot be disputed that in Jamaica the rule in Hodge's case has become settled that such a special direction as to the way in which purely circumstantial evidence is to be viewed should be given to the jury. But whether the failure of a trial judge to assist the jury in giving such direction as to purely circumstantial evidence would of necessity result in the conviction being quashed is not free from doubt. What, if in the case of R. v. Elliott the judge had failed to give the proper direction according to the rule but there was sufficient evidence on which an impartial jury, despite lack of assistance, could reasonably have arrived at a verdict of guilty? In such circumstances we are of the view that though the point raised in the appeal might be decided in favour of the appellant, no miscarriage of justice would occur in dismissing the appeal. We are also of the view that the rule in Hodge's case has, in Jamaica, become a settled rule of practice and it is incumbent upon a trial judge to assist the jury in their proper line of approach having regard to the facts and circumstances of the particular case. But a judge's failure to do so may not necessarily in every case result in the quashing of a conviction."

Of the three versions of the incident which came from the mouth of the appellant, two were plainly false for the reasons already adverted to herein. The only other credible version was that he was pulling the trigger of the gun in circumstances which were manifestly dangerous. To have held the firearm within inches of the deceased's face at a time when he either knew that one bullet was in the chamber or was uncertain whether or not a bullet was therein, and then to pull the trigger was both unlawful and dangerous or grossly negligent and on those facts any verdict other than one of guilty of manslaughter would be obviously perverse.

On the assumption, however, that the passage quoted herein on circumstantial evidence was capable of being understood as an invitation to the jury to speculate, out of an abundance of caution, we applied the proviso to Section 14 of the Judicature (Appellate Jurisdiction) Act and dismissed the appeal and confirmed the conviction and sentence as in our view no substantial miscarriage of justice had occurred.