JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 31/89

BEFORE: THE HON. MR. JUSTICE CAREY P. (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A
THE HON. MR. JUSTICE GORDON, J.A (AG.)

REGINA V. RUPERT CROSDALE

Miss Fara Brown for Applicant

Miss Diana Harrison for Crown

16th, 17th and 30th April, 1991

GORDON J.A (AG.)

On 22nd February, 1989 after three days of trial before Harrison J, and a jury the applicant was convicted of the murder of John Roberts on the 20th day of June 1988. Through his counsel he now seeks leave to appeal against this conviction.

The incident out of which the charge arose occured in the early morning of the 20th June, 1988 at 23 Smith Lane in the Parish of Kingston. The premises are what is known as a tenement yard -- one occupied by several individual tenants. The Crown's case was that on that day at about 6 o'clock Miss Patricia Cooper was at the common pipe in the open yard washing plates when the applicant who was another tenant in the premises, came up behind her. She then heard him complain that she had splashed water on him. She apologised and observed that he had brought it upon himself by assuming the position he had taken. Further words passed between them and the applicant became abusive and obscene in his expressions. He threatened to chop her up and she ran into her room while he ran to his. He then came by her door armed with a cutlass. He pushed her door and invited her to come outside so that he could chop her up. She remained in her room and proceeded to iron clothes ignoring his entreaties.

He left the door and returned to her window with a stone and continued to utter threats which she ignored. He left calling to his girlfriend "Lorna, gi me the knife. Me ago kill that mawga gal deh this morning ...." At this time Patricia Cooper's boyfriend, the deceased John Roberts, came on the scene. He entered her house with his son's school uniform; he spoke to her and left the room. She then heard the applicant say "Hey! Pussy! a long time me wan kill one a oonu, you know" To this Roberts replied by asking "how you gwan like you bad so?" Then she heard someone shout "John". She ran to the door looked out and saw Roberts running towards the gate clasping his chest while the applicant followed behind with a knife in his hand. The deceased fell on his face and the applicant went over him and stabbed at him. She ran to the rescue of her boyfriend and the applicant turned on her stabbing her. She received injuries on her forearms and when she turned to run away, he followed and stabbed her in her back where the blade of the knife broke. The applicant withdrew the broken blade, discarded it and ran from the premises.

The injured John Roberts rose from where he first fell went through the gate and collapsed and died in the road. Miss Cooper lost consciousness and was hospitalised.

Miss Gloria Laxley, another tenant, was on the premises and witnessed the incident. Her testimony supported the evidence of Miss Cooper. Miss Laxley said she had called the warning "John" when she saw the applicant with the knife and she saw when the applicant stabbed John with the knife in his chest. She assisted Miss Cooper after she was injured.

Karen Hudson, a school girl, aged 13 years and the daughter of a tenant living at the premises was preparing to go to school when the sound of the quarrel attracted her attention. She went and stood by her doorway and looked out. She saw the applicant by the door of Miss Cooper's

room armed with a machete issuing threats to kill her if she came out. She saw what occured from that point until the applicant ran from the premises.

According to Dr. Roystan Clifford, the consultant forensic pathalogist at the Ministry of National Security who performed the postmortem examination, the victim died from one stab wound to the upper right anterior chest wall.

The applicant in his defence gave sworn evidence. He said that he and the tenants in the premises got on quite well save and except that Patricia Cooper did not talk much with him. On the morning in question he heard Patricia Cooper's voice while he was on his way to work. She said "Every b.... c.... in a yah done now: All the dolly house mash up yah so; mek we end everything" When he got to the toilet, he saw Patricia Cooper with her back to him standing infront of and facing the deceased. Patricia Cooper and her boyfriend were "tangling" and he saw the deceased trying to hold her and then he saw her stab him. He ran towards them and said "no", because he saw her about to stab him again. He said she turned on him, and stabbed at him and he jumped back and was stabbed in the right leg. Patricia Cooper started screaming and the other tenants attacked him and he ran from the premises. He said when he first saw Patricia Cooper her blouse was bloody. His evidence was that the deceased was fatally injured by his girlfriend, Patricia Cooper, who also injured him and at that time she herself had already been injured, presumably by the deceased. The applicant said he had injured no one that day.

Grounds four (4) and five (5) of the supplemental grounds of appeal filed were the first argued on behalf of the applicant. It is convenient to deal with both grounds together. They are in the following terms:

> "4. The learned trial Judge erred in his summation to the jury by not specifying that each ground of the submission of no case remaining was a question for them and that they should not be influenced by His Lordship's ruling against the defence at the close of the prosecution case." (p.169)
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> "5. The learned trial Judge erred in Law by refusing an application by the defence that the jury should be excluded from the Court room during the course of the submission of no case to answer." (p.129)

Miss Brown submitted that the learned trial judge was wrong not to have acceded to the defence request that the submission of no-case to answer be heard in the absence of the jury. She relied on the authorities of R.v. Joan Olive Falconer-Atlee (1973) 58 Cr. App. R 348 and R.v William Smith and Henry Doe (1987) 85 Cr. App. R 197. She acknowledged that in this regard the Jamaican Courts differ from the English Courts in that we have not followed Falconer-Atlee (supra) and she submitted that in the development of the law, it was time that there be a new approach to this aspect of the trial. We were referred to dicta of Roskill L.J. in R.v. Falconer-Atlee (supra) at p.354 where he said inter alia "It is most undesirable that that discussion should take place in the presence of the jury". Two bases are given for this approach, he said:

> (1) "inevitably the judge may express a view on a matter of fact, which is within the province of the jury."
>
> (2) "The presence of the jury may hamper freedom of discussion between counsel and Judge."

It is interesting to observe that counsel in that case had consented to the Jury's presence during the course of the no case submission. Nevertheless, the Court felt constrained to articulate the rule of practice extant in the United Kingdom. That practice dictates that the trial judge has no discretion he must hear the no case submission in the absence of the jury.

The practice in Jamaica is fully stated in S.C.C.A 8,9,10,11/82 R.v. Henry, Bunting and McLean (unreported) delivered 21st June, 1985. The cases of R.v. Falconer-Atlee (supra) R.v. Galbraith (1981) 73 Cr. App. R 124 R.v. Barker 1977 (65) Cr. App. R 288 and Haw Tua Tua vs. Public Prosecutor (1982) A.C. 136 all dealing with the practice of no case submissions before a jury were examined and analysed by Kerr J.A in R.v. Henry, Bunting and McLean (supra). In that case, as in the instant case, the learned trial judge refused an application to hear the submission in the absence of the jury. Kerr J.A in delivering the judgment of the court said at p.13:

> "In Jamaica, as the experienced trial judge stated, the long established practice is that no case submissions are made in the presence of the jury."

and again at p.20

> "accordingly and having regard to the practice obtaining here, we do not consider it obligatory on the judge to accede to counsel's request that a no case submission be made in the absence of the jury. We would not wish to fetter a trial judge's discretion in this regard."

That case provides the basis for the Jamaican practice which we take to be

(a) the long established practice; and

(b) the advantage to the defence to advert the jury at an early stage to the questionable areas in the case for the prosecution.

The trial judge here can exercise his discretion and exclude the Jury from hearing the submissions. We, however, wish to emphasize the caution given by Kerr J.A. at p.21

> "Although we have declined to impose any obligation on the trial judge to accede to the request of the defence that no-case submissions be made in the absence of the jury, prudence would usually favour the grant of such a request and so obviate an appeal being made on such grounds as were here argued. We would also advocate that when no-case submissions are being made in the presence of the jury that defence attorney ought to confine his

> arguments to matters directly affecting the credibility of the prosecution evidence, such as unexplained inconsistencies or uncertainties in a witness' evidence, glaring discrepancies in the evidence of the prosecution witnesses, breaks in the chain of circumstantial evidence or that there is no evidence to prove an essential element in the offence charged. He should strive for accuracy in his recitals or summary of the evidence so as not to evoke from the judge corrective comments. A trial judge could not be expected to be silent while erroneous interpretations of the evidence are being made in the presence of the jury. On the other hand, the trial judge should refrain from expressing his views or commenting on the evidence in a manner that could be interpreted as determining an issue of fact or as being prejudicial to a fair consideration of the defence."

Miss Brown further urged that the rejection of the no-case submission in the presence of the jury was likely to have been prejudicial to the defence. Prejudice she submitted lies in the fact that they witnessed the rejection of the submission. The warning given by the learned trial judge did not remove the likelihood of prejudice. She argued there is no presumption that a jury is intelligent, relying on R.v. John Canny 1945 30 Cr. App. R 143 at p.146 per Humphreys J.

> "what we do know is that the law of this country is that a prisoner is entitled to take his chance of finding a stupid Jury...."

In his charge to the jury the learned trial judge in the instant case said at p 189:

> "Now, at the close of the case for the prosecution, Counsel for the Defence made a no case submission. That is Counsel was saying to the Court that the evidence so far has not reached the point where the prosecution had proven sufficiently the ingredient that made up the charge and so the Court should not call on the accused to answer the charge. Now, I listened to the submissions and I ruled on it that the accused should answer to the charge. Now, all the Court was saying there is that up to that point, there was sufficient evidence as led by the prosecution for the accused to answer to the charge. That decision by the Court was not saying that he is guilty or otherwise. So, you must not say that he is

> "guilty or otherwise, it was merely a point in the case where the Defence is saying there is not sufficient evidence, the Court was saying, yes, there was enough evidence so far, so the case must go on. So, you don't use the decision that was made there to say, well the Court was saying that there is guilt or otherwise, you use all the evidence from the beginning of the case to the end, to decide whether the accused is guilty of the offence or otherwise."

These directions are clear and should readily be understood by a reasonably intelligent jury. On this point we advert to the dicta of Kerr, J.A. in R. V. Bunting et al (supra) at p. 20 where he said:

> "Further, to say that the making of no-case submission in the presence of the jury will necessarily prejudice the fair trial of an accused would be to deny the jury the presumption of reasonable intelligence. Indeed, it may at times be advantageous to the defence to advert the jury at this early stage to the questionable areas in case for the prosecution. It would be in the nature of a prologue to the final address."

The purpose of the Judge's warning is to dissipate from the jury's mind any likelihood of prejudice. A reasonably intelligent jury is expected to follow and apply the trial judge's directions and no prejudice results in cases where inadmissible evidence has been inadvertently admitted and the jury has been warned. All the evidence the jury heard in the instant case was admissible. The warning given by the learned trial judge was appropriate and the prejudice suggested has not been shown.

However, although we are not persuaded that any prejudice has resulted from the jury being present during the submission of no case to answer in the instant case and despite the fact that the trial judge acted in accordance with a long established practice we were nevertheless concerned to give careful thought to the necessity for the perpetuation of the practice. It cannot be defended on the ground that it is any part of the jury's province from which they ought not to be excluded so that the presence of the jury during this exercise is not a legal necessity. Any

advantage to be gained from their presence can only accrue to the defence. Accordingly, where the defence does not wish to have the jury present no consideration of a long established practice should prevail against such wish. And indeed from the above-quoted judicial utterances on the matter there is discernible support for the view that there may well be good reasons for their exclusion. The trial judge would be released from being largely a silent umpire and counsel can more freely express himself. We recognize, of course, that in the light of R.v. Bunting et al any change in this practice could only be done by the full Court after full arguments.

The next ground of appeal urged was No. 7, in these terms:

> "7. The learned trial judge erred in his summation to the jury on the law as to corroboration by:-
>
> (a) failing to define corroboration accurately and in accordance with the relevant authorities.
>
> (b) failing to leave it to the jury as to whether or not there was corroboration.
>
> (c) referring to evidence as capable of being corrobative (sic) and in fact being corroboration when upon application of the legal definition such evidence was incapable of being corroborative. (p.170)"

Miss Brown submitted that the directions given by the learned trial judge were incorrect and that he misinterpreted the use of the word "independent" as used in D.P.P v. Kilbourne (1973) A.C. 729. The word she contends should mean free from risk of collusion. Kilbourne was convicted on one count of Buggery and six counts of indecent assualt. The complainants were all young boys, some were related, and they all gave sworn evidence. The House of Lords had to consider whether there could be mutual corroboration between witnesses, each of whom require corroboration. In his speech Lord Reid said at p.750 G and H:

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in. In ordinary life we should be, and in law we are required to be, careful in applying this idea. We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements we should not accept them as corroborative."

The passage Miss Brown criticised is found at p.170 of the transcript and reads:

> "Well, corroboration means just evidence that is independent of the evidence of that child, to show that the evidence is supported in what she is saying. Because she is saying that she saw the accused man Rupert Crosdale, that he had a knife and he is the one who stabbed John Roberts. Well, from the evidence, there is corroboration in this case for the evidence of Karen Hudson and you may well find, in consideration of the evidence that Gloria Laxley and Patricia Cooper do in fact corroborate the evidence of Karen Hudson."

She challenged the statement "from the evidence, there is corroboration in this case" as improper. The instant case differs from Kilbourne (supra) in that here, there were as witnesses two adults and one child. The evidence each witness gave was supportive of the other. There was no suggestion of collusion. The word independent used in this context means "from some other source." In Kilbourne's case the word "independent" in the passage quoted from Lord Reid's speech, means free from the taint of collusion. This was necessarily so because of the nature of that case. There was no need for a warning on corroboration in respect of the evidence of either Patricia Cooper or Gloria Laxley; the warning was given in respect of the evidence of Karen Hudson. The evidence each of these

witnesses gave was mutually supportive and there was no taint of collusion. The clause complained of by counsel for the applicant is but part of a sentence in which the jury was invited to consider whether the evidence of Gloria Laxley and Patricia Cooper corroborated that of Karen Hudson. This was essentially a matter for the jury and it was left for their consideration.

We cannot support the applicant's contention. We hold that there was no misdirection here and this ground of appeal also fails.

The third ground of appeal urged reads:-

> "The learned trial Judge erred in his summation to the jury by alleging that the defence was insincere."

This, Miss Brown submitted amounted to telling the jury "don't believe the defence".

There were clear discrepancies between suggestions put to prosecution witnesses by Miss Brown in cross examination and the evidence of the applicant. The learned trial judge in his summation dealt with them, isolating three such discrepancies. The first discrepancy arose from suggestions made by counsel to Patricia Cooper that there was no love lost betwen the applicant and the other tenants in the premises. Defence counsel suggested that the tenants always taunted the applicant. The applicant, however, in evidence said he got on quite well with the tenants other than Patricia Cooper. In relation to that witness he said "She don't too talk with me." The second discrepancy concerned the incident at the pipe. Defence counsel suggested to Patricia Cooper that this incident did not occur on that date but at some time before. But the applicant never mentioned in evidence any such incident at any time. The third suggestion to Patricia Cooper was that in the course of the quarrel between Patricia Cooper and John Roberts, the latter had taken out the knife and that the stabs and cuts she got were inflicted by

John Roberts. It was in the context of dealing with evidence relating to these suggestions that the impugned word "insincere" was used at p.181 of the transcript thus:

> "Now, the accused never told you that he saw John with any knife that morning. Here again is another suggestion to the witness for the prosecution that John had a knife. Now, there is nothing from the accused to say that John had any knife, so you must ask yourselves the question, why is the Defence so <u>insincere</u>, putting one thing to the prosecution and you don't hear anything about it again in the case? Because if the Defence is suggesting to Patricia Cooper that John had a knife that morning, you would expect that when the accused man told you that he came out there and saw them, according to him, in the yard, and he saw that Patricia had blood on her and he saw Patricia with a knife and he tells you that John was already stabbed, well, if John was already stabbed and Patricia had the knife, how did Patricia get the blood on her? Is the Defence saying to you that Patricia took away the knife from John after he stabbed her, and she used the knife on him? Is that what they are asking you to believe? Because there is no evidence in this case of any other knife that morning. Nobody has mentioned any other knife, even on the Defence's case, no other knife is mentioned. So, you use your common sense as members of the jury and say where you find the truth lies."

Counsel for the applicant who appeared at the trial said her suggestion as to John Roberts' possession of the knife was an inference she drew from the instructions of the applicant. She admitted that the fault lay with her and her sins should not be visited on the applicant. She said the proper course is for the judge to enquire of counsel before he embarks on the summing up what was the basis of her suggestion since it did not accord with the evidence given by the applicant.

It is plain that the learned trial judge focussed his attention on what took place before him. On the evidence, the comments made by the learned trial judge were valid. The suggestions put to the witness were not substantiated and the trial judge was entitled to take note of the conduct of the defence and to comment thereon. He left it to the jury to

decide whether or not the fact of unsupported suggestions amounted to insincerity - thus:

> "now you use those suggestions made to a witness where the accused does not support it, to say whether or not you find there is any sincerity in the case for the defence as it is put to you."

Plainly there is a factual basis for the learned trial judge's comment and we cannot say that on the factual basis he overstepped the boundaries and entered the arena, as submitted. He certainly would be failing in his duty if he did not direct the jury's attention to the inconsistencies. The question for this court is whether the use of the pejorative word "insincere" was fair i.e. warranted on the facts. The learned trial judge had, as was his duty, directed the jury's attention to inconsistencies in the Crown's case and in this exercise, he did likewise in the defence case. It was left to the jury to decide where the truth lies.

The cases of R.v Leggett et al (1958) 53 App R 51 and R.v. Stephenson 12 J.L.R. 1690 relied on by Miss Brown are wholly inapplicable in that they deal with circumstances where the Judge descended into the arena which is certainly not what happened in the instant case.

The final ground argued on behalf of the applicant was that:-

> "The learned trial Judge erred in his summation to the jury when referring to the inconsistency between the evidence of civilian witnesses and the forensic pathologist regarding the injuries to the deceased. (p.172)

This is how the judge dealt with this aspect of the case giving rise to the ground argued p.173:-

> "so the evidence of the doctor must be taken as it is given to you, but the absence of the injuries to the body does not necessarily mean that there was not a stabbing at the back as the witnesses state. It is a matter of the witnesses' credit, because they are not saying that there were cuts to the back, they are not saying that they saw wounds to the

> back there is no evidence from any prosecution witness that there were wounds to the back; what they saw was a stabbing at the deceased while he was lying down there behind the gate."

The only knife injury to the deceased which the doctor said he observed was the stab wound to the chest. Dr. Clifford's evidence confirmed the evidence of the witnesses who said that the deceased was first stabbed in his chest. The conflict arose because the witnesses said that after he fell the injured John Roberts was stabbed several times in the back by the applicant. The medical evidence did not support this. In giving evidence the witnesses demonstrated to Judge and jury the motions of the applicant at the time of the stabbing. It is interesting to note that none of the witnesses who spoke of this stabbing saw any signs of injury to the deceased's back. In these circumstances the learned trial judge, drawing the only inference that could be drawn from the primary facts, described the motions as a stabbing at. In so doing he did not misrepresent what the witnesses had said.

The summing up was fair and the issues were left to the jury for their determination. We do not find that the learned trial judge usurped the functions of the jury. For these reasons we hold the view that there is no merit in the grounds of appeal advanced and the application is accordingly refused.