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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 94/73

BEFORE: The Hon. Mr. Justice Luckhoo, J.A., Presiding
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.

R. v. VINCENT McFARQUHAR

K. St. Bernard for the Applicant.

Courtney Orr for the Crown.

January 23, 24, 25, 29; March 29, 1974

LUCKHOO, J.A.:

The applicant Vincent McFarquhar was convicted in the St. Catherine Circuit Court on July 4, 1973 before Parnell, J. and a jury on an indictment which charged that on January 12, 1973 he murdered Peter Spencer in the parish of St. Catherine. He was sentenced to death. He now applies for leave to appeal against conviction.

The evidence for the prosecution was to the following effect. On the night of January 12, 1973 a dance was being held by one Olga Willis also known as Lovie, in her yard on Corletts Road, Spanish Town in the parish of St. Catherine when the applicant and his girl friend came into the yard. Apparently Olga Willis was amused because the appellant's girl friend wore shoes and socks and she laughed loudly. This seemed to annoy the applicant for he slapped Willis' face and said that she liked to "trouble people business too much." Willis began to bawl. She left the yard and spoke with the deceased. At this time

the applicant had left the scene. While Willis was speaking with the deceased the applicant's mother, Louisa Hall, came up and spoke with the deceased. According to Willis, the deceased kicked the applicant's mother and they began to wrestle. The applicant's uncle Uriah Hall then came up and kicked the deceased. Hall and the deceased wrestle and the deceased struck Hall in the mouth. Hall returned to his yard. Byron Gordon a schoolboy some 14 years old testified that he was present on the night of January 12, 1973 when the applicant and his girl friend came into Willis' yard where a dance was being held. He said that as a result of Willis laughing the applicant slapped her and she began to cry. She left the yard and went onto the road. Gordon said that he also went onto the road and saw Willis speaking with the deceased when the applicant's mother came up and spoke with the deceased. She pointed her finger in the deceased's face and the deceased told her to take her hand out of his face. She advanced upon the deceased when Uriah Hall came up and held the deceased from behind. The deceased broke away and he and Uriah Hall exchanged blows. The deceased struck Uriah Hall on the mouth. Louisa Hall who had in the meanwhile left the scene returned with a knife. She advanced with the knife upon the deceased who got hold of a piece of board and swung it to and fro. At this stage the applicant came running down the road towards the deceased whereupon the deceased dropped the piece of board and ran up the road chased by the applicant and his mother. The applicant and his mother were each armed with a knife. As they were chasing the deceased up the road Gordon said that he heard the deceased cry out "Lord, Jesus Christ, you cut me." Then the deceased still being chased by the applicant and his mother came back down the road. The deceased ran towards a wire fence which he tried to go over. In so doing his pants were caught in the wire and the applicant stabbed him. The deceased fell. Gordon said he saw a wound under the deceased's arm and another a little one under the neck. Gordon said that at no time was the

deceased armed either with a knife or a bottle. The deceased was placed in a vehicle and taken to the Spanish Town Hospital. He died the same night. Dr. John Williams, senior surgeon at the Spanish Town Hospital performed a post mortem examination on the body of the deceased on January 17, 1973. On external examination he found a one inch incised wound of the left armpit between the third and fourth ribs. Internally there was a one inch long perforated wound of the upper part of the left lung. This wound penetrated the heart sac and the lower end of the aorta. There was about 120 cc of blood within the heart sac. According to Dr. Williams death was due to bleeding into the heart sac resulting from the wound to the aorta. Such a wound could have been inflicted by a knife used with at least a moderate degree of force. Dr. Williams did not observe any wound to the deceased's neck.

Shortly after the deceased's death, Detective Acting Corporal of Police Allwood went to the applicant's home at March Pen Road in Spanish Town. The applicant was then in bed and upon being told by Corporal Allwood that he was investigating a case of murder the applicant said "I did not cut him fi kill him sir." Corporal Allwood asked him for the knife. The applicant got up from his bed and took a knife off a table in the room and repeated "I did not cut him fi kill him." Detective Sgt. of Police Levi Wilson was at the police station in Spanish Town when Corporal Allwood brought the applicant there together with certain articles of clothing and a ratchet knife. In the applicant's presence Corporal Allwood told Sgt. Wilson that the knife was the one which the applicant had used to cut the deceased. The applicant then said "Sergeant, is Lovie cause it sir, I didn't cut him to kill him. I will give you a statement telling you how everything go, sir." The applicant was cautioned and thereafter dictated a statement in the presence of his uncle Uriah Hall. The statement was written down by Sgt. Wilson and signed by the applicant. That statement was admitted in evidence and is as follows:-

"I come from up the Town of Spanish Town around 8: o'clock in the evening. I carry my bag up to Mr. Brown's house. I was accompanying my girlfriend Linnett Barko. After we went to Mr. Brown's home I told Linnett that I would like to go to look for my mother. Linnett said yes. Linnette and I went up to my mother's home. I called to her. She say good night. I told her I came for my food now. She said to "her" how you look so fraidish so. Lin say nothing. We began to eat. After finish we went to Mr. George and we were standing up inside. I saw a fat girl by the name of Love. She began to laugh. I asked her what she laughing about and she tell me a big word that hurts me. She started to curse and say we must come out her yard. I did not leave same time as the music was playing. They were having dance. Love say to me you can have that deh girl as a woman. I got vexed. I grabbed her and I punched her. She began to cry and she ran for a bill them used to cut cane. I tell her she can't do me anything with it. Same time my mother came out and same time took me out. I went straight to Mr. Brown yard again after I hear my mother say again if you lick me it not going to go so. Same time I ran out and saw the same Peter standing before my mother with a piece of board me rush down on him. Him flash the board at me 3 times, then him run up the road. I ran at him. He picked up a bottle and flung at me. He ran down at me same time and say "I going kill you, a going to kill you". I then reached my pocket knife and cut at him and it catch him in his side. I left same time. Later the police came to my yard and took me to the station. At station I told Detective Sgt. Wilson I would like to give a statement. He caution me and I gave him this statement. It is truth and do not want to add alter or delete anything. It a true testimony of what I know. Peter has died."

In his defence the applicant elected to make a statement from the dock as follows:

"My mother was living at Corletts Road and I went to look for her and after me go round there I and my girl friend go there, sir, to the yard and I saw my old lady sit on the step. I tell her how-di-do and she looking at Lyn, my girl friend like she frighten and I tell her a come to her and I pass her and go inside and I sit around the table and started to eat and and I don't see when my old lady move away from there, sir. I still inside there and eating and I heard a voice sound like me old lady, sir and I went out at the gate and when I went out the gate I saw Peter Spencer kicking her and boxing her, sir, and I go up and part it, sir. After me part it I walk away sir and he come back with a bottle and a ratchet knife and he fling at me with the bottle, sir.

HIS LORDSHIP: You mean 'he flung the bottle at me?'

At me, sir and he run down at me, sir, with the ratchet knife and me draw my own, sir, and he stab after me and me go underneath his hand and my knife cut him. After my knife cut him me get a lick on my shoulder and a run to the light and I see blood stains on my shirt, sir and after me went to my home and soon after I see police a come a me yard and arrest me and carry me to the jail, After me in Guard Room, them move me and put me in the lock-up, sir, and after rain start to fall and one brown policeman come and take me out and carry me in the Detective Office, sir, and me tell Sergeant Wilson the statement. Yes sir."

In relation to the statement made by the applicant from the dock the learned trial judge left the issues of self defence and provocation for the determination of the jury. Quite clearly by their verdict the jury rejected the applicant's story that he was attacked by the deceased the latter being armed at the material time with a bottle or a knife or both a bottle and a knife. It is not without significance that in his cautioned statement given to the police no mention was made by the applicant of the deceased being armed with a knife. It is also not without significance that there is no evidence of any such object having been found at the scene or on the person of the deceased after the fatal wound had been delivered by the applicant.

A verdict of guilty of manslaughter by reason of provocation was left to the jury on the basis of the applicant's story of seeing his mother being assaulted by the deceased. It is clear that the jury by reason of their verdict rejected the applicant's story that he observed any such assault upon his mother.

Similar issues were also left to the jury in relation to the cautioned statement made by the applicant to the police Exhibit 2 and were also rejected by the jury.

The learned trial judge declined to leave manslaughter to the jury on the basis that such an issue arose on the evidence relative to the question of an intent on the part of the applicant either to kill or to cause serious bodily injury to the deceased when he inflicted the fatal injury on the deceased. It was submitted on behalf of the applicant before us as indeed it was before the learned trial judge that it was a crucial part of the defence that the applicant in inflicting the fatal injury did so without an intent to kill or cause serious bodily harm to the deceased and that evidence was adduced in this regard when the prosecution as part of its proof that the injury was inflicted on the deceased by the applicant tendered through the mouths of Cpl. Allwood and Sgt. Wilson the oral statements made to them by the applicant "I did not cut him fi. kill him" or "I didn't cut him to kill him."

Although the learned trial judge did not specifically refer to the use the jury ^{might} make of these oral statements adduced during the course of the prosecution's case he did specifically deal with the contents of the cautioned statement Exhibit 2 in the following way:

"Now, as I told you earlier on the mere fact that I admitted the statement does not say that right away you must say everything here is true. I will tell you the reason behind it. If Mr. Reckord did not put this statement of the accused in evidence as part of his case the accused could not put it as part of his defence. In other words, suppose Mr. Reckord did not put it as part of the prosecution's case, he could not put it because I would rule that it would be self serving, that is, making it up himself.

In other words, a man can't hear a person is looking for him, he may be away for a few hours, and go to the police station and give them a nice story, the prosecution does not want to use it, and later he puts it as part of his defence the judge can say no. If, however, the prosecution uses it as part of its case to show this is what the accused has said, the defence is entitled to use it in his favour, but it is still left for you, the jury, like all evidence given in the case to say whether you believe it or not. I hope I have made it clear. The judge rules that what a prisoner says is not evidence unless the prosecutor chooses to make it so by using it as part of his case but if the prisoner's declaration has something in it which supports what he is saying then he can rely on so much of it as part of his case. But on the whole picture it is for you to say what you believe, just like the rest of the evidence in the case. What value is to be given to the statement is all a matter for you just like the other evidence in the case, what weight you are going to give it."

This direction is no doubt based on the direction given by Parke, J. in R. v. Higgins (1829) 3 C and P at p.604 and by the Court of Appeal (Criminal Division) in R. v. Storey (1968) 52 C. App. R. 334. As this Court has observed in the recent case of R. v. Joseph Simpson Cr. App. No. 109/1973 decided on February 22, 1974, the matter is dealt with succinctly by Park, J. in R. v. Steptoe (1830) 4 C & P 397 as follows:

"What a prisoner says is not to be of necessity taken as an exculpation, merely because he says it, and the prosecutor gives it in evidence. You are to take what he says all together. You are not bound to take the exculpating part as true merely because it is given in evidence; but you will say, looking at the whole case, whether you think the prisoner's statement consistent with the other evidence, and whether you believe that is really true."

When the trial judge declined to leave the issue of manslaughter on the basis of the appellant's oral statements 'I did not

cut him fi kill him' being construed to mean that the cutting was done without an intent even to cause serious bodily harm to the deceased, he was not in error for that statement was neither consistent with the applicant's cautioned statement nor ~~from~~ ^{with} his statement from the dock nor was it consistent with the prosecution's case of the circumstances and manner in which the fatal injury was given as narrated by Byron Gordon.

This ground of appeal therefore fails.

It was further submitted though not strenuously urged that "the cumulative effect of (a) the opinions of the learned trial judge which were expressed very strongly and freely during his summing up and (b) his treatment of the question of the credibility of the evidence of Byron Gordon, threw the summing up out of a fair balance and therefore resulted in its being not a fair presentation of the case to the jury, with the consequence that the applicant/appellant had been deprived of the substance of a fair trial." We have carefully examined these complaints and are of the opinion that although it is true to say that the learned trial judge clearly demonstrated to the jury what views he held in respect of certain aspects of the case he was careful to impress upon the jury that they were the sole judges of fact and that they might well find that his views were misconceived and therefore not acceptable to them.

This ground of appeal also fails.

In the result the application for leave to appeal is refused.