A Criminal Law – Non-Capital murder – Evidence – Self-defence, provocation – whether judge's direction served to confuse the jury – whether error in summing up – whether jury misdirected No case referred to

APPLICATION refused

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 108/93

COR: THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE GORDON J A
THE HON MR JUSTICE WOLFE J A

R v PAUL EAST

Cecil J Mitchell for applicant

Ralston Williams for Crown

October 31 & November 21,1994

FORTE J A

This is an application to appeal the conviction of the applicant in the Home Circuit Court on the 9th November 1993 for the non-capital murder of Carlton Smith on the 21st September, 1991. As is mandated by law he was sentenced to be imprisoned for life, the learned trial judge recommending that he should not be released on parole, until he has served a period of twelve years imprisonment. The application having been refused on hearing submissions of counsel on the 31st October, 1994, we now reduce our reasons into writing.

The conviction arose out of the following facts.

The Crown relied on the evidence of three witnesses - the first a Ms. Althea Pollack, testified that she was in the Coronation Market in Kingston at about 9.00 a.m. on the 21st September 1991. Also there were the deceased and the mother of the deceased Marlene O'Sullivan. Several other persons were also present in the market at the time. Ms. Pollack saw the applicant passing when she heard the deceased Carlton Smith say to his mother, at the same time pointing to the applicant:

> "See the security boy there what him and his friend run me down."

The applicant then stopped, and both men had an argument during which the deceased pointed a knife at the applicant. His mother then said "Carlton gwaan over, is jail you want to go?" The deceased, then placed the knife into his pocket and in response the applicant said:

> "Is not jail him waan go is dead him waan dead."

Then he turned and walked away as if he was leaving, but instead, pulled his shirt, turned around, took a knife (looking like a dagger) and stabbed the deceased and thereafter ran back into the market. At the time the deceased was stabbed, he was unarmed and talking to his mother Marlene O'Sullivan. The mother of the deceased also testified. Absent from her evidence was the account of Pollack, that the deceased had first pointed a knife at the applicant. She however, spoke of the deceased pointing out the applicant to her, as someone who with a friend had run him down on a previous occasion. In her account she stated that the deceased asked her to warn the applicant and as a result she said to the applicant:

> "What yuh see me children and yuh a run them down for? Through him come from the ghetto is not the same thing."

As the applicant did not answer she asked him "You a go lock him up?" whereupon the applicant said:

> "You think a lock me a go lock him up?"

and then opened his shirt, took out a knife, touched the deceased on his shoulder and said:

> "P.... a long time you fi dead."

He then stabbed the deceased and ran.

District Constable Taylor, was on duty at the office in the market, when the applicant came to him holding a dagger in his hand. Blood stains were on the dagger. The applicant then told him that he (the applicant) and a man had a dispute and he had cut the man.

The applicant in his defence gave sworn testimony in which he maintained that he acted in defence of his own life. He is a security guard and was at the market on the relevant day for the purpose of collecting money to pay some "country people". The market was conjested with hand-carts which made it difficult to move around. He had just settled a dispute among some persons in the market when he saw the deceased standing on a hand-cart at the entrance to the market. The deceased placed a knife at his neck and said "Security bwoy yuh and yuh police friend love run man down" and then asked him if he can defend himself without a baton. He eased the knife from his neck and stepped away. The deceased stabbed at him and said:

"Whe you a dress back for?"

at the same time continuing to stab at him and advancing on him using threatening words. He tried to retreat, but because of the congestion of hand-carts he could not do so. He took out a knife which he had concealed in his waist. The mother of the deceased then said "Whe you a run down me son fah" - he saw her also coming towards him with a knife. The deceased "jooked" at him and he "jooked" back and realized thereafter that there was blood on his (the applicant's) hand. He got frightened and ran to the head office at Redemption Market. He admitted that he in the company of policemen had chased the deceased on a previous occasion when the deceased was with two other men, all three men having just committed a robbery.

On those facts two issues arose for the consideration of the jury i.e. self-defence and provocation.

Before us Mr. Mitchell for the applicant argued the following ground of appeal:

> "That the learned trial judge fell in error when he directed the Jury as follows:
>
> 'It is only if you feel sure that he was acting in self-defence that you may convict him and to convict him of murder you must feel sure that he was not acting in self-defence, that he was not provoked, that he intended to kill.
> So, then, will you please consider your verdict, and I must ask you to come with a verdict on which you all are agreed. All twelve of you must feel sure of the accused man's guilt either of murder or manslaughter before you may return a verdict.'
>
> That the cumulative effect of the aforementioned direction, coming as it did at the end of the summing up served to confuse the Jury and to erode the otherwise proper direction which the learned trial judge had given earlier."

In our view this contention is without merit. In the first place, the passage alluded to by the applicant must be taken in the context of the thorough direction which in our view the learned trial judge gave to the jury. The sentence upon which Mr. Mitchell sought to rely in order to establish an error on the part of the learned trial judge appears to be the result of a typographical error. It reads:

> "It is only if you feel sure that he was acting in self-defence that you may convict him."

Before dealing in detail with the complaint, it is appropriate to refer to the dicta of Fox J A speaking for this Court in the case of **R v. Herman Spence** [1971] 12 JLR 556. He stated:

> "If it is obvious that there is a mistake or error in the transcript so that the court is able to feel entirely satisfied that the printed record does not represent what had transpired at the trial, or what has been said, the court is not bound by the note as transcribed."

An examination of the passage complained of shows that there was in fact an error in the transcript.

A placement of the word "not" between the words "was" and "acting would result in a correct direction and would be consistent with the rest of the paragraph. To understand this the whole paragraph is set out hereunder:

> "If you believe his story or that he was acting in self-defence, being attacked by this young man, and bear in mind that the law says when you are attacked like that you don't have to dress back. If a man draws a knife on you to cut your throat or belly or wherever, the law says you dont have to dress back, you can draw your knife and stab the attacker. But if you believe that this man was attacked then you acquit him. If you are in doubt as to whether he was attacked you must also acquit him. It is only if you feel sure that he was acting in self-defence that you may convict him. And to convict him of murder you must feel sure that he was not acting in self-defence, that he was not provoked, that he intended to kill."

In our view the word "not" must have been omitted, otherwise the sentence complained of would be out of context with the rest of the paragraph. In any event, even if that were not so, it would have been clear to the jury, given the total content of the paragraph and other directions which preceded it in the summing-up, that they could not convict the applicant unless they were sure that he was not acting in self-defence.

In advancing his arguments Mr. Mitchell also contended that in the last sentence of his summing-up i.e.

> "All twelve of you must feel sure of the accused's guilt either of murder or manslaughter before you may return a verdict."

the learned trial judge omitted to direct the jury that if they were not sure they could acquit the applicant. A direction to convict only if you are sure must necessarily imply a direction not to convict if you are not sure, and so this submission is really without any merit whatsoever.

Nevertheless, we have already pointed out that the learned trial judge did in the case of self-defence direct the jury accordingly. He said:

> "If you are in doubt as to whether he was attacked, you must also acquit him."

In respect to provocation he directed the jury on this aspect as follows:

> "If you feel sure that he was not acting in self-defence but you think he was provoked or you are in doubt he was provoked, then you cannot convict him for murder, but you may convict him for manslaughter."

At the end of what can be described as a thorough and helpful summing-up, the jury must have been aware of all the issues which called for their consideration, the law that related to those issues, and most importantly, in the context of this appeal, the burden and standard of proof which was required of the prosecution. There is indeed no merit in this application, and for the reasons hereinbefore stated, the application for leave was refused.