JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 73/93

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. BARRINGTON GRAHAM

Dennis Daly Q C for Applicant

Hugh Wildman for Crown

16th May & 20th June, 1994

FORTE, J.A.

The applicant was tried and convicted on the 21st April 1993 in the Home Circuit Court for the offence of manslaughter and sentenced to pay a fine of $50,000 or 12 months hard labour. On the 16th May 1994, we heard and considered the arguments of Mr. Daly Q C for the applicant, and thereafter refused the application for leave to appeal. In keeping with our promise to give our reasons in writing at a later date, we now do so.

The facts which led to the death of Cachita Gray at the University Campus at Carnival time and to the conviction of the applicant are as is necessary, set out hereunder.

The deceased, along with one Simone, and the main witness for the prosecution Ms Lurline Gray, went on the 3rd March 1990, to the University Campus in Mona, St. Andrew to attend the Carnival celebrations on the campus. They arrived at the gate at about 10.15 p.m. and found a number of persons, about 15 - 20, outside the gate, attempting to get inside. Some persons attempted to climb over the fence - some unsuccessfully as they were prevented from doing so by security guards - others however were successful and in the latter group was her friend Simone. The deceased, and Ms. Gray, had remained outside, and were

there when a man, later proved to be the applicant, came to the fence and ordered the people there to remove. In their disobedience to his order he pulled a gun from his waist and pointed it at the crowd. As a result everyone ran, including the witness and the deceased. While running, Ms. Gray heard "a shot fire" from behind her and then she heard the deceased "bawl out" and thereafter saw her fall to the ground. She was in blood. The deceased, succumbed to the injuries she received. At a postmortem examination done 63 hours after her death, the pathologist found on her body one gun shot wound i.e. a **circular** entrance wound to the posterior aspect of the right arm - 3/8" in diameter. The path of the wound travelled through the skin, through the soft tissues obliquely upwards through both chest cavities, right to left, perforating both lungs and the ascending aorta and exited on the left chest just above the left breast. The exit wound was also 3/8" in diameter. Significantly, the doctor was of the opinion that the projectile came from behind the victim somewhere to the right, and the back, so that it entered in the back of her right arm and came forward to the left chest at an angle obliquely upwards. Death of course was caused by the injuries described.

Det. Sgt. Austin, having received a report of the incident on the very night, went to the Casualty Department of the University Hospital where he saw the body of the deceased. He thereafter went to the Police Post on the Campus where he saw the applicant who told him that he (the applicant) was on duty on the Mona Compound while Carnival was in session, when he saw a number of persons "scaling" the fence. He alerted the security guards, and as they moved towards the crowd, there was a stampede during which he was bounced to the ground. His firearm was falling from his waist, he grabbed at it, and a round went off.

He later heard that someone was shot. The applicant's firearm was handed over and was later taken to the Ballistic Expert for examination. The firearm, the Ballistic Expert testified, would have required a pull on the trigger of 8 lbs to fire it. It was fitted with a safety-catch, which had a lever which can be pushed "on" and "off". He testified that to have it in readiness, it would be kept "cocked" with the safety-catch engaged. It would be "risky" to have it "cocked" with the safety-catch disengaged. The opinion of the Ballistic Expert, assumed significant importance having regard to the defence of the applicant which was contained in an unsworn statement, which was consistent with the report to the investigating officer but in more detail. The statement, inter alia, as summarised by the learned trial judge in so far as is relevant to the point in issue in this application reads as follows:

> "He says there was a crowd of people on the other side of the turnstile pushing and shoving each other and trying to get over the other side. A few managed to do so and on seeing this he stood still but was bounced. He said that, 'My gun on full cock fell from my waist to the ground. I quickly grabbed it up from the ground and heard an explosion and felt a jerk on my right hand in which I had the gun. After the **stampede** was over I got up on my feet and went to where the crowd was and went to where two (2) security guards were. Then he tells you that he was trying to get some assistance and that he heard someone saying, 'See how the guard shoot ...' and he went and made investigations and saw this lady on the ground and he advised somebody to take her up.
> He went for assistance to take her to the hospital but by the time he returned she had gone so he stayed at the station. He was told to stay at the station for a while and so he remained."

Before us, Mr. Daly Q C for the applicant complained in the grounds of appeal that the learned trial judge misdirected the jury in the following two passages of his summing-up:

(i) In dealing with the applicant's defence he said:

> "Because if you were of the opinion that such an act was negligent, then of course he could not be liable to the defence of accident, if you find that that is how it happened. So these are matters that you have to consider, because as I told you accident can only arise if the act is done without negligence."

and (ii)

> "So one of the aspects you would have to consider is whether it was reasonable, whether it was safe in those circumstances to have a firearm on cock, having regard to the evidence of Assistant Superintendent Wray."

Mr. Daly Q C maintained that in the context of those directions, the learned trial judge failed to distinguish the difference between simple negligence and "gross" negligence and to direct the jury that they could only convict of manslaughter if they found that the accused had been grossly negligent.

In his arguments, Mr. Daly Q C conceded that the following directions of the learned trial judge were correct:

> "Now, a gross negligent act must be a very dangerous act such as to involve a high degree of risk or the likelihood of injury to others. So what you have to consider is the use of a firearm, loaded firearm in those circumstances that night. Did he point it? Was he the person who pointed it at the crowd as Miss Gray said? Or, did it go off, whether by his shot, directly firing, but in such circumstances that there was a high degree of risk or the likelihood of injury to others."

However, it is a continuation of this passage which formed the substance in the complaint at (ii) above. The passage continues:

> "The accused man, himself, tells you that his firearm was cocked that night."

and then:

> "So one of the aspects you would have to consider is whether it was reasonable, whether it was safe in those circumstances to have a firearm on cock, having regard to the evidence of Assistant Superintendent Wray."

In our view, the learned trial judge had so directed the jury that it must have been clearly understood that the applicant could not be convicted unless the prosecution had established that he was guilty of "gross negligence", that is to say "a very dangerous act such as to involve a high degree of risk or the likelihood of injury to others." (supra) It is certainly in that context that he invited the jury to say whether, having regard to the evidence of Assistant Superintendent Wray, it was safe to have the firearm cocked, in the circumstances described by the applicant in his **unsworn** statement.

The complaint in respect of the passage set out in (i) given the context in which it was used is also without merit. In order to place it in proper context the entire passage is set out hereunder:

> "Now, he tells us in his own words that he had his pistol on his waist on full cock. Now, one thing you will have to decide, Mr. Foreman and members of the jury, was it reasonable to have a pistol on full cock? He was going to carnival. This was not a question of going downtown to one of these dangerous areas of the corporate area where guns are coming at you from all sides. The only violence you had was people 'scaling' the fence. This is the only thing that happened. People were 'scaling' the fence. So in those circumstances, an officer of ten (10)

"years service, would it not be dangerous to have this firearm on full cock in his waist on a crowd at Carnival where everybody is jumping up and happy? Is there any risk that somebody might bounce on him and that firearm might go off? That is a matter for your consideration. Because if you were of the opinion that such an act was negligent, then of course he could not be liable to the defence of accident, if you find that that is how it happened. So these are matters that you have to consider, because as I told you accident can only arise if the act is done without negligence..
On the other hand, you have the case for the Prosecution, you must say what you make of it. Was there any necessity to remove the revolver from his waist and point it at the crowd? There is no evidence that there was any boisterousness. No bottles or stones being thrown. Nothing to warrant the use of a pistol that night. So if he did take it from his waist or point it at the crowd and by some means or the other it was discharged and caused the death of Miss Gray, you still have to ask yourself, was there a careless act, grossly careless, the reckless disregard for life and limb, and the safety of the other people?
Those are things you must decide. It is entirely for you so you will have to decide which version you are going to accept and whatever version you accept, was the accused man guilty of this high degree of negligence? Those are matters for your consideration, members of the jury."

Mr. Daly Q C strongly contended that in the passage at (i) there was no distinction by the learned trial judge in relation to the defence of negligence that was required to prove the offence of manslaughter and the standard of negligence necessary for example in a civil action. The words complained of, were used after the learned trial judge had told the jury of the standard of

negligence necessary to establish the offence (supra). The jury must therefore have understood that the word "negligent" was being used in that context. However, even if that were not so the learned trial judge made it clear just before he concluded his charge by reminding the jury that "whatever version they accepted," they would have to decide whether the applicant was "guilty of this high degree of negligence."

For these reasons we concluded that the complaints were void of merit, and consequently the application for leave to appeal was refused.