JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 97/96

COR: THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE BINGHAM JA
THE HON MR JUSTICE WALKER JA (AG)

REGINA VS BRYAN DAVIS

Ian Ramsay & Deborah Martin for the appellant

Hugh Wildman Deputy Director of Public Prosecutions
& Sandra Kerr for the Crown

7th 8th 9th April and 12th May 1997

DOWNER JA

The appellant Bryan Davis was tried in the Home Circuit Court during July 1996 before Reckord J and a jury, on the indictment for murder. On the 31st July 1996 a verdict of manslaughter was returned. He was sentenced for this offence to 10 years imprisonment at hard labour and he is now an applicant for leave to appeal that conviction and sentence. Furthermore he has been treated as an appellant because of the issues of law raised in this application.

It is necessary to outline the facts so as to appreciate the relevance of the grounds of appeal. Davis is a soldier and goes by the nick name "Killer". On the night of 25th August he was present at a party where on the evidence of the sole eyewitness for the Crown, Marlon McFarlane, he used a long blade knife to plunge into the abdomen of Gary Evans. Davis' account was markedly different. His version was that the deceased Gary Evans was involved in a fight with another person and he was a peacemaker who tried to part the fight. He denied that he had a knife that night and said he was injured while attempting to

separate the combatants. This outline is sufficient to appreciate the grounds of appeal and analyse the issues raised therein.

Grounds of Appeal

The first and third grounds:

The initial ground argued by Mr. Ramsay was that the improper and prejudicial use of the nickname "Killer" during the course of the trial was such that it amounted to a fundamental irregularity which was incurable. All in all he said the appellant was denied a fair trial.

There was no need for this impropriety since the name of the accused was known. In those circumstances, the first time the name "Killer" was used there should have been an intervention by the judge to prohibit its use. That was a part of the learned judge's duty to ensure a fair hearing. Instead the alias "Killer" was used forty (40) times during the evidence of Marlon McFarlane and the learned judge himself participated by calling the accused "Killer" during the course of the trial.

Even more important was the repetition in the summing-up. The learned judge realized the prejudice caused during the trial and attempted to eliminate it at the very commencement of his summing-up thus:

> " As I said, he is charged under the name of Brian Davis. You heard from himself and from the witness for the prosecution that he is called by the name of 'Killa'. Well, let me warn you from the very outset do not use this name 'Killa' to draw any inference, adverse inference against the accused man. We don't know how he got the name. Perhaps all of us here had nicknames or still have nicknames from our school-days, some for false reasons, some for good reasons and sometimes for no reason at all you get a name. So do not allow the name 'Killa' as it is attached to the accused man to

> cause you to draw any adverse inference against him. The prosecution has brought him here and it is the prosecution to call witnesses to prove to you so that you feel sure of his guilt."

Regrettably, the learned judge used the name "Killer" when referring to the accused nineteen (19) times during his summing-up. Two examples will suffice to demonstrate this:

> " He said that he was seeing 'Killer's' face and 'Killer' was actually from the witness box to where the Court Reporter is, which is six yards. He said that he saw his face for about a minute. He never had anything covering his face, that's the accused man, and he has known the accused man for a period of time. He passed by his yard nearly everyday. He said that 'Killer' was the first man who made the attack, followed by 'Jucky Shines' and the other man. Then afterwards, after 'Killer' had stabbed Orville, he ran out through the gate and went outside. He does not know what happened to the knife that 'Killer' had. He said that 'Jucky Shines' and the other man also ran out with 'Killer'. He said that as a result of the injury that Orville got, he fell on the ground."

Then on the following page this passage occurs:

> " He recalled that there were shouts for security and he saw people start running about the place like in a panic. He says he never saw the deceased and another man engaged in any altercation. He said that 'Killer' is the Security Guard who killed Orville. 'Killer' and him was in a fight. He said that he never saw Orville with anybody else. He said that he never saw this accused man with any cut on his hand. He said that 'Killer' came and attacked the deceased with a knife and his friend attacked him with icepick and said that is what he called a fight. He said that he gave evidence at the preliminary enquiry in a case at Half Way Tree and he knew one Michael Walker and that he was a witness at Half Way Tree too."

In **Mears v The Queen** [1993] 1 WLR 818 at pp. 822-823 Lord Lane said:

> "... Here their Lordships have to take the summing up as a whole, as Mr. Andrade submitted, and then ask themselves in the words of Lord Summer in *Ibrahim v. The King* [1914] A.C. 599, 615, whether there was:
>
> > 'something which ... deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.' "

This statement of principle is appropriate to the circumstances of this case.

There was a less serious complaint in the third ground about the following passage in the summing-up:

> " In this case we heard that one of the witnesses is dead. Perhaps if the matter had been heard expeditiously you would have heard the gentleman before his demise. Anyhow, so it is."

The complaint was that no explanation was given for the lapse of time. One explanation certainly was that Marlon McFarlane took so long to make a report to the police. On this aspect of the summing-up, the jury might have gained the impression that the accused had something to do with the demise of the witness. By itself, this passage would not vitiate the summing up. However, taken with the citation of the name "Killer" in the summing up the cumulative effect was serious.

On these grounds, therefore, the appeal ought to be allowed.

The second ground:

This was a recognition case as it was not disputed that Marlon McFarlane knew the accused. The important issue which required the most careful direction to the jury was whether the conditions that night were favourable to a good identification of Bryan Davis when on the Crown's case he was plunging the knife into Gary Evans. The evidence disclosed that ordinarily the street light would have enabled Marlon to identify Bryan Davis. However it was usually covered over at those parties on the evidence of the defence. Yet Marlon McFarlane said that on that night it was not so covered. That conflict in the evidence required a careful direction. Further, although the evidence suggests McFarlane was a tall man, the dance hall was packed and there was a distance between him and the combatants of about six yards. Could McFarlane have seen Davis plunging the knife into the mid-section of the deceased's body? These were weaknesses in the identification evidence and they ought to have been brought to the attention of the jury.

The learned judge recognised that the issue of identification was a live one even though it was a recognition case. The following passages are proof that the importance of the issue was recognised. Directions were lacking on the particular weakness in a situation where there was a crowd in an enclosed hall. Also there was a dispute about the lighting, and that could have made the plunging of the knife into the deceased a situation where the judge could have ruled that identification was made under difficult circumstances.

Here are the passages in the summing-up which merit scrutiny.

> " You have to consider also was there any light. Mr. McFarlane said yes, the place was lit by streetlight up there. The accused man said

> 'No. Light up there yes, but it was covered over; inside dark.' You have to consider that.
>
> Was his observation obstructed in any way? You remember he said yes, the place was jammed - the place was packed; but you saw how tall he is. He is a tall brown man. He said, 'Because of my height I was just looking over everybody. Nobody obstructed my view. I was looking over head and shoulders.' "

Here there was no emphasis on the weakness in the identification evidence so as to alert the jury to the possibility that a mistake could have been made. Two illustrations will emphasise the approach which must be followed even in recognition cases. In **Evans (Kenneth) v R** [1991] 39 WIR 290 at p. 293 Lord Ackner said:

> " But even treating this as a case which did not depend solely on a fleeting glance but upon a witness recognising someone whom she had frequently seen before, her observation of the appellant was made in very difficult conditions. She was suddenly woken up by an explosion. She was lying in an unusual position, across the bed and on her stomach. She merely raised her head to see what could be seen. She did not sit up, let alone stand up, although the judge on two occasions during his summing-up wrongly stated that she got up or stood up and then saw the accused. She was understandably very frightened at the time. Having turned towards the deceased and seeing that he was bleeding and hearing two more explosions, she kept her head down until the men left.
>
> In their Lordships' opinion the quality of this identifying evidence was indeed poor. Since there was no other evidence which supported its correctness, the judge, in accordance with the *Turnbull* direction set out above, should have withdrawn the case from the jury at the conclusion of the prosecution's case and directed an acquittal. His failure so to do is in itself a sufficient reason for the quashing of this conviction."

The other authority is **Michael Beckford, Junior Birch & Joel Shaw v The Queen** Privy Council Appeal No. 23 of 1992 delivered 1st April 1993 where Lord Lowry said at p. 8:

> "... The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?
>
> Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for twenty years and he was conversing with him for half-an-hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule."

Bearing in mind that Marlon McFarlane did not go to the police until two years after the incident, it was obligatory for the learned judge to direct the jury on the issue of his credibility in that context. The explanation that his mother forbade him to do so and that he was sorry for the children of the deceased, required the learned judge to juxtapose that explanation with the identification evidence to demonstrate that this also was an area of weakness. Here is how the learned judge treated this aspect of the matter:

> " You have to consider the lapse of time that took place since the commission of the offence and you have to consider Mr. Foreman and members of the jury, that sometimes in the recognition of close friends or even relatives that mistakes are made."

There were no specific directions that the jury could well find that the explanation was odd given the fact that he still lived with his mother and that the children were always around.

Fourth ground:

The withdrawal of the issue of self-defence from the jury

The learned judge seemed to be somewhat hesitant on the issue of self-defence. Early in his summing up he said:

> " The prosecution must also prove that the killing was unprovoked and that the killing was not in lawful self-defence. We don't need to worry about this question of lawful self-defence. The accused man has never said that he was under any attack and that he was only responding to an attack to prevent further injury to himself, so you don't have to deal with any self-defence at all. But I think I have to deal with the question of self-defence a little later on. So those are the ingredients of the offence of murder." [Emphasis supplied]

Be it noted that the learned judge never returned to the issue of self-defence. So it will be necessary to ascertain if having regard to the evidence in this case, it was obligatory to put the issue of self-defence to the jury. In this regard, the following passages in the learned judge's summing-up are relevant:

> " The Defence's story is that the deceased and other men had some altercation and that he, the accused man, tried to settle the dispute between them. He got cut. He withdrew and then shortly after he noticed that the deceased was lying on the ground and bleeding from the front of the body and was all over in blood."

In recounting the evidence of Bryan Davis in more ample terms, the learned judge said:

> " He said he saw a 'flair-up' started and he heard over the mike a call for security and he went forward and saw a man with a bottle - he didn't know that man before - aiming as if he were about to throw the bottle and he showed you how he held up his hand and how he saw the man."

Since both the Crown and the defence both agreed that there was a call for security, it was clear that there was a need for a peace-maker to intervene. The learned judge continued thus:

> " He said he went straight to him, pushed him and said, 'Cool it.' He said the man actually 'cool it' for a while and then started to beckon with the bottle again. He was trying to tell him to cool it and he cool it for a time then he came back with the bottle. By this, people had gathered around the fight and he noticed that the man with the bottle was in the middle, he and someone else wrestling, he doesn't know who."

As to the intervention, here is how it emerged in the summing-up:

> " He said he pushed back into the crowd where the fight was and saw a youth like he had blood on his clothes. He held on to both of them, trying to pull them apart and then he said he received a cut to his hand and backed out of the fight at that time."

Turning to the evidence of Byron Tenhue for the defence who was present at the dance, the following passage in the summing-up indicates the evidential basis which should have alerted the judge on the issue of self-defence:

> "... He said that he knows the accused. At one time he was in his battalion but not now and he had known him for about roughly eight years. He said he saw the accused that night during the fight. He said that two men were fighting. 'I did not speak to the accused and he never spoke to me.' He said he was standing in the

> dance and heard a man cursing a bad word. Then, he came between them trying to end the argument. He said he parted them and told them to cool it. He said that one of the men walked away and somehow two minutes after he saw one of them again with a bottle in his hand and he was holding it as if he was going to fling it but he was faking. He said he again went back between them, that is this witness, and then when he looked he saw the man behind him. The witness was between both parties, then. He said he looked back and he saw the next man with a knife in his hand; that is the man behind him had a knife in his hand and the deceased man was in front of him with a bottle in his hand and each of them were faking with their respective instrument and the crowd got aside and were moving about. He said he moved from between them, apparently fearing that something may happen to him."

Again the following passage, the version of Tenhue, is useful as it supported the defence on the issue of poor lighting. Any identification made in such difficult circumstances, should at least be emphasised as an area of weakness if it did not warrant withdrawal of the case from the jury. Here is the passage:

> " He said he had gone there with a female companion and that it was inside the dance he saw Mr. Davis, the accused man, for the first time. He said he never took any further part in what was taking place. He said he saw Mr. Davis, the accused man, went and pushed the man with the bottle and told him to cool it. The man with the bottle walked away and everything was back to normal for about five minutes. Then, after that he saw the crowd start to move again and he saw the man with the bottle and then he saw Davis come again and pushed the same man with the bottle and at that time he saw the man with the knife was advancing behind Davis. He said that the crowd covered his sight. 'I could not see anything afterwards and my girlfriend pulled me and took me away. I went outside and left the dance, left the area.' He said he never saw when anybody got cut..

> He said that inside the dance floor was dark. The only place that had light was right where the music was and where they sold the drinks. That was the extent of his evidence in chief."

To reiterate the issue of justification by reason of self-defence , it is pertinent to refer to section 14 (1) of our Constitution which recognises and enshrines the necessity for intervention "for the defence of any person from violence" as a fundamental right. That justification emerges thus in section 14:

> "**14.**-(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
>
> (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -
>
> (a) for the defence of any person from violence or for the defence of property;..."

Institutional writers such as Hale in (1 Pleas of the Crown 484) have long recognised this aspect of self defence. Edmund Davies J as he was then, cited this authoritative text and put the issue thus in the case of **R v Duffy** [1965] 50 Cr. App. R. 68 at pp. 71-72:

> "... Quite apart from any special relations between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony. That is not to say, of course, that the newcomer may lawfully join in a fight just for the sake of fighting. Such conduct is wholly different in law from that of a person who in circumstances of necessity intervenes with the sole object of restoring the peace by rescuing a person being attacked.

> That, credible or otherwise, was the basic defence advanced by the appellant."

Then the learned judge continued thus:

> "... The necessity for intervening at all and the reasonableness or otherwise of the manner of intervention were matters for the jury. It should have been left to them to say whether, in view of the appellant's proved conduct, such a defence could possibly be true, they being directed that the intervener is permitted to do only what is necessary and reasonable in all the circumstances for the purpose of rescue. It might well be that, having been so directed, the jury would nevertheless have returned the same verdict, but we do not consider that this would necessarily have been so. The appellant was at least entitled to have her case left to the jury."

In the instant case the accused was entitled to have the issue of self-defence put to the jury since it was raised on the evidence.

Conclusion

This conviction cannot stand. On every ground of appeal, the appellant has succeeded. So the appeal must be allowed. We quash the conviction for manslaughter and set aside the sentence of ten years hard labour. A judgment and verdict of acquittal must be entered.