C.A. CRIMINAL LAW — Trial — Manslaughter — Self defence — Sentence
Whether judge's direction to jury on self-defence was confusing, inadequate/wrong and contained a material omission in law. Whether sentence of 10 years imprisonment excessive.
Appeal dismissed. Cases referred to:
R v Colin Johnson (unreported) SCCA 19/6/87
R v Talbot and Kerr 12 JLR 1667
R v Cole Davis SCCA 178/87 (22.7.88) (unreported)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 54/88

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

v

ERNEL EDWARDS

K.D. Knight for the Appellant

K. Pantry for the Crown

November 14, 15, and December 5, 1988

WRIGHT, J.A.:

Herman Lee died on the 8th day of April, 1987 at Portsea in the parish of St. Elizabeth from a stab wound to the chest which penetrated the anterior and lower right ventricles of the heart. From the description of the weapon (Exhibit 1) it was a rather large knife (referred to as a miniature machete) and in the doctor's opinion infliction of the injury with that weapon required a considerable degree of force. What was not in doubt was that the knife was in the hand of the appellant at the moment when that fatal injury was inflicted. Indeed, the evidence is that after the killing the appellant went to the Bull Savannah Police Station accompanied by the Crown witness, Desmond Rochester, who was present when the stabbing took place as well as two other persons and reported to the police "officer me just kill a man up de road. Him come stand up in front of me like him want to fight and me push the knife in a him". The applicant disputed that those were the words he used but

did not dispute possession of the knife at the relevant time. At a trial in the St. Elizabeth Circuit Court held at Black River before Patterson J. and a jury, the appellant was on March 10, 1988 convicted of Manslaughter and sentenced to imprisonment at hard labour for 10 years. Against this conviction and sentence he has appealed. To the three grounds of appeal originally filed, there was added a fourth ground by leave. Under this latter ground are subsumed grounds 1 and 2 of the original grounds. This ground reads:

> "The learned trial judge's direction on self-defence was confusing inadequate/ wrong (17-19-31) and further his final direction contained a material omission in law (p.31)."

This is a case which reveals the increasing wantonness with which human life is being destroyed. It appears that at the relevant time there was a water shortage in the area and the amount in the parish tank which supplemented private sources was dwindling. On the day in question Desmond Rochester, the main prosecution witness, observed that the appellant who had a private tank had attached a hose to the outlet from the parish tank by means of which he was filling one drum while another drum stood by to be filled. Taking the view that such action on the part of the appellant was unfair to the poorer members of the community who had no tank and whose sole source of supply was the parish tank, Rochester disconnected the hose and gave his reason to the appellant who subsequently arrived to discover that the drum which takes one hour to fill up was not full although he had connected the hose only three-quarters of an hour earlier. He obviously did not share Rochester's concern for the poor and promptly re-connected the hose which Rochester as promptly disconnected. Rochester's evidence is that the appellant took up two stones and threatened to hit him down. A quarrel resulted which involved Herman Lee as well who came on the scene. Rochester testified that Lee told the appellant to behave himself and that he could not do anything to Rochester. The appellant is alleged to have kicked at Lee and the resultant fuss attracted the attention of other people who told them to finish away with the fuss.

On the prosecution case, no blows passed but the appellant related that he told Rochester to stop cursing him whereupon Rochester ran up to him and chucked him causing him to stagger and thereafter he picked up two stones but did not throw them.

After the intervention of the people, the appellant left in the direction of his home which was about 3½ chains from the pipe-house. The appellant admitted this but explained that he went to shift the hose to the other drum which he intended to fill eventually. It appears that all along the appellant was wearing a pair of tall leather boots. He returned to the pipe-house after about five minutes and said "Me come sah" whereupon Lee said, "You come sah, do what you feel like doing". Rochester's evidence is that no sooner had Lee spoken than the appellant raised his right foot and from the leather boot he drew a large knife which he straightway plunged into his breast with the consequence disclosed by the doctor. The foul deed done, the appellant walked away. At that instant Rochester, who said he was a little way off leaning on his cart ran to Lee and held him. Blood, he said, was "flying all over the place" and having regard to the extent of the injury this is easily understood. Further, Rochester said no one was attacking the appellant and neither he nor Lee was armed.

The contrary account of the appellant is that when he returned to the scene Lee was by the pipe-house and Rochester about one chain away on the road. Lee resumed cursing the appellant having previous to the appellant's departure invited Rochester, Lee's nephew, to join with him in beating the appellant. The appellant said he sat on a stone awaiting the departure of both Lee and Rochester so he could continue filling his drums. Lee, he said, took off his shirt and tied it around his waist declaring meanwhile "mi ready to fight you b....c now". Rochester took up two stones and approached him as he stood up. Lee then thumped at the appellant who ducked the blow. Lee then grabbed him and it was in those circumstances he pulled his knife from his boot "to keep him off, and as he came up with it, it stabbed him in his chest".

From this account, it is clear that his cardinal defence was accident which, having regard to the nature and extent of the injury, the size of the knife which the jury saw and the considerable degree of force required to inflict the fatal injury, the jury in their forty minutes retirement could have had no difficulty in rejecting.

The other issues left for the jury's determination were self-defence and provocation neither of which was actively pursued by the defence but which fairly arose on the evidence. There is no complaint about the treatment of provocation as to which the directions were correct and adequate. Two portions of the summing-up dealing with self-defence are called into question by the ground of appeal set out earlier. At page 17-18 of the summation, the learned trial judge said:

> "Now, it is for the prosecution to satisfy you on the evidence that the accused was not acting in self-defence once self-defence is raised as it has been. There is no duty on the accused to show that he was acting in self-defence. The onus remains throughout on the prosecution, and if therefore on a consideration of all the evidence you are left in doubt whether the killing may not have been a lawful self-defence, the proper verdict would be not guilty.
>
> Now, if the accused may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief as to the facts, and that is so whether the mistake was, on an objective view, a reasonable mistake or not. If, therefore, you come to the conclusion that the accused honestly believed, or may have believed that he was being attacked and that force was necessary to protect himself against the attack or the threatened attack, and the force used was reasonable in the circumstances, then the prosecution have not proved their case and your verdict must be not guilty. If, however, the accused allegedly, if, however, the accused alleged belief was mistaken, and if the mistake was not a reasonable one, that may be a powerful reason for coming to the conclusion that his belief was not honestly held, and in that case you should reject the defence of self-defence."

Thereafter, the learned trial judge proceeded to deal with the burden of proof in relation to self-defence.

In all fairness to Mr. Knight, it must be said that he did not demonstrate much confidence in the criticism levelled at this aspect of the summing-up which he dealt with en passant stating that it was wrong.

The inclusion of a direction on mistake in this summing-up must have been induced by an abundance of caution and could only relate to the extra-judicial statement allegedly made by the appellant to the police viz.:

> "Officer, me just kill a man up de road. Him come stand up in front of me like him want to fight and me push the knife in a him."

That was the evidence of Desmond Rochester and the Police Officer, Blake. But the appellant did not agree that any such words were used by him. It was his evidence that contrary to the evidence of Rochester and Constable Blake that the appellant was the first to speak on arriving at the Police Station, it was Rochester who first spoke saying "The man deh kill one man up so sah" to which he said his response was -

> "Is two man attack me sah and I cut one, is two man attack me and I cut one."

That is what he said his extra-judicial statement was but he did not make that a part of his defence. In fact, his defence before the jury indicating that Lee had been accidentally stabbed was an implicit repudiation of self-defence inherent in the statement attributed to him. Further, the prosecution did not present that statement to explain the killing but merely as a part of the narrative. Nor can the defence presented before the jury accommodate a mistaken belief that the appellant was under attack or about to be attacked. His defence is an actual attack during which the deceased, Lee,was injured but not by the deliberate act of the appellant. It is gratuitous to import mistake into such a situation. The summing-up on Self-Defence, which could be said properly to have arisen on his account if the jury rejected the defence of accident, was otherwise proper and adequate and there was no prejudice to the appellant arising from the learned trial judge's over-generous treatment of the evidence. Trial judges should be careful not to construct defences out of extra-judicial statements which are either repudiated or not adopted by an accused person. See R. v Colin Johnson (unreported) S.C.C.A. 19th June, 1987 in which this issue was comprehensively dealt with by this Court and in the process over-ruling R. v Talbot and Kerr 12 J.L.R. 1667 which had

erroneously imposed a duty on the trial judge to place before the jury any defence suggested in such statement.

The other portion of the summing-up which the ground of appeal seeks to impugn appears on page 31 in the penultimate paragraph of the summing-up thus:

> "So, Mr. Foreman and members of the jury, the verdicts open to you are, not guilty as a result of lawful provocation, not guilty as a result of accident, not guilty of murder but guilty of manslaughter as a result of legal provocation, guilty of murder as charged. Those are the verdicts which are open to you on this indictment."

Mr. Knight submitted that this final direction contained a material omission in that the question of doubt relating to the issues of legal provocation, self-defence and accident has not been included here and that the result is that it cannot be said with any degree of assurance that the conclusion would have been the same, had the jury been reminded of the middle position of doubt on any ground which would require them to acquit. For this proposition he relied on R. v Carl Davis S.C.C.A. 178/87 (22.7.88) (unreported). While it is clear that the submission was sought to be modelled upon the language in Carl Davis, it is patent that that case is distinguishable and cannot avail the appellant.

In Carl Davis the defence was alibi. During his summation, the learned trial judge had given correct directions in law on alibi. However, just before the jury retired he reminded them of the verdicts which were open to them including the verdict of not guilty but he did not elaborate on the bases for such verdicts. Furthermore, at that point he did not project the defence of alibi as a basis for a not guilty verdict. It was held: (Rowe, P.) at page 6:

> "We cannot say with assurance that the jury would undoubtedly have had in mind that the appellant's alibi was the basis on which they could find the appellant guilty."

That was one reason why the conviction for murder was quashed and a new trial ordered. Mr. Knight sought to achieve a similar conclusion here.

But what is the position in the instant case? Mid-way on page 30 of the summation the learned trial judge indicated that he was winding-up and proceeded in that and the next paragraph to deal with the basis on which a verdict of guilty of murder could be found. The next paragraph deals with provocation and self-defence and in the paragraph immediately preceding the impugned paragraph, he dealt with accident. In dealing with each basis the effect of doubt was dealt with. It is patent, therefore, that this is not a situation akin to Carl Davis. The complaint is groundless and totally lacking in any merit whatsoever.

The words "lawful provocation" in the paragraph attracted criticism as a possible cause of confusion. However, we are satisfied from the portion of the transcript dealing with the winding-up that the words represent a typographical error and that what the learned trial judge must have said was self-defence.

Before parting with this aspect of the appeal, we wish to deal with a submission of Mr. Knight made in the course of developing his argument. In dealing with the standard of proof, the learned trial judge directed the jury in the accustomed manner regarding the treatment of a defence raised. Said he at page 4 of the summation:

> "If you accept what he has said, if you accept that his attempt has succeeded, then he is not guilty. If it leaves you in a state where, you know, where you can't say whether to accept or reject what he has said, then, again, you will have to say he is not guilty, because it would mean that the prosecution has not satisfied you to the extent where you can say you feel sure of his guilt; but even if you should reject what he has said, if he fails in his attempt, then you must consider all the evidence including what the accused has said, his evidence, and see whether you are satisfied so that you can feel sure that the prosecution has proved its case."

The criticism raised here is that it is wrong to invite the jury to consider the appellant's defence after it had been rejected. Were we not persuaded as to Mr. Knight's sincerity in raising his objection to this direction, we would let the matter pass but based as it obviously is on a fallacy we feel obliged to attend to it in the hope that the matter may thus be laid to rest.

The fallacy in the argument stems from the misconception that once a defence is rejected as the truth it is spent of all possible effects. Though viewed by itself it may not be accepted as the truth yet when viewed with the rest of the evidence in the case it may create doubt about the prosecution case and so achieve the same result as if it had been accepted.

Enough has been said to show that this ground of appeal fails.

The other ground of appeal complains that "the sentence of the Court was excessive in the circumstances". Peculiarly, enough, Mr. Knight did not say he was abandoning this ground of appeal yet he made no submissions thereon.

The sentence of the Court was imposed after the Court had heard character evidence from the police as well as two witnesses called on behalf of the appellant. The record of the case shows that the learned trial judge gave very careful consideration to all that was put before him before imposing the sentence which, in the circumstances, is neither harsh nor excessive. We can see no reason for disturbing the sentence.

In the result, therefore, the appeal is dismissed and the conviction and sentence affirmed. In the exercise of its discretion the Court orders that the sentence will commence from the date of conviction.