JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 94/94

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA vs. HENZEL MUIR

Lord Gifford, Q.C. for applicant

Miss Audrey Clarke for Crown

July 26 and October 9, 1995

PATTERSON, J.A.:

The applicant was convicted of non-capital murder on the 18th August, 1994, in the Home Circuit Court on an indictment which charged him with the murder of Wayne Hartwell on the 1st December, 1993. He was sentenced to imprisonment for life, and the court specified that he should serve twenty years before becoming eligible for parole. He now applies for leave to appeal against his conviction and sentence.

The case for the Crown was to a large extent based on circumstantial evidence, and having regard to the issues raised before us, it will not be necessary to state the full facts which the Crown placed before the jury. Both the applicant and the deceased were employed to Dual Security Company as security guards and were posted on duty at the Lane Supermarket, Liguanea, St. Andrew for approximately four months prior to the 1st December, 1993. They were unarmed guards, not authorised nor licensed to use a firearm. A senior security guard, Mr. Elisha Parkinson, who was the holder of a firearm user's licence, was also posted at Lane

Supermarket, but he was quite new on the job. He testified that at about 7:00 p.m. he received a firearm from another security guard posted on duty at nearby premises. The applicant persuaded him that, according to practice, the firearm should have been given to him, and so he delivered the firearm to the applicant. Shortly after, Mr. Parkinson's attention was drawn to the storeroom of the supermarket. He went and saw the applicant with the firearm in his hand coming from the storeroom, and on enquiring of him what happened, the applicant told him that he had put down the firearm and went on a scale to weigh, when the deceased took up the firearm and he (the deceased) got shot. The deceased was found in the storeroom lying on his belly with one arm outstretched and the other by his side. Mr. Kingsley Wellington, an employee of the supermarket, got to the storeroom before Mr. Parkinson did, and he said he saw the applicant standing over the deceased, the firearm in his hand, holding it "by the mouth", and it appeared that the applicant was "wiping off the handle" of the firearm.

The applicant told an investigating constable that it was the deceased who had shot himself, but that was not borne out by the evidence of the doctor who performed the post mortem examination which revealed that the bullet grazed the left arm of the deceased, entered the left lateral chest, eighteen inches below the top of the head, travelled straight across the chest cavity and exited a similar eighteen inches from the top of the head on the right side of the chest. There was an absence of gunpowder deposit on the body, and no blackening or tattooing around the entry wound, which strongly suggested that at the time the bullet was discharged from the firearm, it was at a distance beyond twenty-four inches from the body of the victim. The doctor rejected the possibility of the injury being self-inflicted.

The evidence of the arresting officer is important because of what he said the applicant told him. This officer said that he saw the applicant at the Matilda's Corner Police

Station, and he asked him how the deceased got shot, and the answer was, "Hartwell shot himself because of problems he was having." He then cautioned the applicant and the applicant told him, "Hartwell cock the gun; hold it by the mouth and gave it to me by the handle, to release the hammer. In doing so, he pulled the trigger and a bullet went off, hitting Hartwell." An expert testified that the firearm in question was in working order and that it took 3 1/2 pounds pressure on the single action and 8 1/2 pounds pressure on the double action to discharge a bullet from it.

The applicant's testimony coincided with the Crown's case as to how he came in possession of the firearm. He said he was securing the firearm to await the arrival of his supervisor, but nevertheless, he "gave the firearm to Hartwell as he was leaving to work somewhere else that night." He said Hartwell put the firearm in his waist and they both sat talking. The applicant said he went on a scale and when be came off, the deceased had the firearm on cock and said, "Muir, if you know about gun, release this." The narrative of events that followed is most important, as it forms the basis for Lord Gifford's contention that the learned trial judge erred in law in withdrawing from the jury the issue of manslaughter which he said arose from the defence. This was how the learned trial judge narrated the evidence of the applicant to the jury:

> "He, Hartwell was handing me the gun, and he hold the body of the gun, from the barrel come down, only the handle of it he was giving it to me. The gun was in his hand the muzzle point to himself, and he was giving it to me in that position for him, the accused, to release the hammer. According to the accused he said, 'Hartwell, stop playing with the company firearm like that.' Hartwell insisted, 'Come man, you know bout, come man, release this for me.' The accused goes on, 'In doing so I heard an explosion.' 'In doing so', you might wish to consider those words, because the investigating officer in his account said when he asked the accused man what happened he used the exact phrase, 'In doing so'. You might wish to say that that would help you to accept the investigating officer as being truthful. It is not a common phrase. 'In doing so I heard an

> explosion, the gun fell from Hartwell, and he got up from out of the chair he was sitting in, and I said, "Hartwell, Hartwell".' He got no response. 'He held his two hands like this and he fell to the ground on his knees and on his belly, face down. I went over to him, hold his neck, and called his name.' He still got no response. He took up the gun 'with my rag', says the accused."

The first ground argued by Lord Gifford, Q.C. is based primarily on the evidence of the applicant. It is couched in this fashion:

> "1. The learned trial judge erred in law in withdrawing from the jury the issue of manslaughter; since according to the Appellant's version of the event, both as stated to Detective Constable McLeish (page 32) and as given in evidence on oath (page 36-37), it was open to the jury to conclude that the appellant and the deceased were playing about with a firearm, and that the appellant indulged the request of the deceased to release the hammer, not intending any harm to result, but being reckless in his handling of the firearm."

It was contended that the evidence clearly points to an act of gross negligence on the part of the applicant, and in the circumstances, the learned trial judge should have left the issue of manslaughter for the consideration of the jury.

It is undoubtedly the duty of a judge to leave for the consideration of a jury all issues arising from the evidence, and to assist the jury by pointing to such evidence and dealing adequately with it. If, upon the evidence, a verdict of a lesser offence than that charged in the indictment becomes possible, it is the duty of the judge to point a jury to the evidence and leave the issue for their determination, although the defence may not have relied on it or even mentioned it. But, equally, a judge should only leave an issue to a jury if and only if evidence has been adduced which is fit for their consideration. A jury should not be asked to speculate; their verdict must be based on the evidence in the case and the reasonable inferences that may be drawn from proven facts. In ***R. v. Bonnick*** [1978] 66 Cr. App. R. 266 the court observed that the question of whether there was sufficient evidence to raise an issue fit to be left to a jury

was one for the trial judge to answer, applying commonsense to the evidence. We must now determine whether the trial judge was right when he told the jury, "there is no question about manslaughter."

The question of death as a result of an accident was highlighted, which, if accepted, would have given rise to an acquittal, but the offence of manslaughter resulting from an act of gross negligence on the part of the applicant was not left as an issue. For that issue to arise, the evidence must be such that it establishes both a duty to take care and a high degree of negligence in the discharge of that duty, and that as a result, death ensued. Simple lack of care is not enough. It was submitted that what was said by the applicant in his testimony quoted above, gave rise to "a clearly possible interpretation that it may have been his hand that caused the gun to be fired, in which case the issue of gross negligence clearly arose for the consideration of the jury." But that was not all the evidence that the trial judge had to consider in deciding whether or not the issue of manslaughter ought to be left to the jury. When the applicant was cross-examined, he said that the deceased's hand was into the trigger guard, and he demonstrated how it was to the court. He further said that the police asked him questions and he told them that, "Hartwell was handing me the gun and I tell him not to play with the gun. I told the police that Hartwell shot himself. He Hartwell cocked the gun and I said 'Stop it.' I attempted to take the firearm but never held the handle." It seems quite clear to us, therefore, that by the specific evidence elicited in cross-examination, the "possible interpretation" contended for by Lord Gifford, Q.C. becomes otiose. There can be no doubt that the applicant's version of the incident is that he at no time pulled the trigger of the firearm to cause the shooting of the deceased, nor did he do any act which caused the firearm to go off killing the deceased. Undoubtedly, the applicant is denying negligence on his part and is saying that he took no part in the shooting,

and that the deceased died by his own act, be it suicide or accident.

During the course of argument, we were referred to the case of ***R. v. Lamb*** [1967] 51 Cr. App. R. 417 and we were supplied subsequently with copies of the judgments in ***R. v. Hopper*** [1915] 11 Cr. App. R. 136 and ***R. v. Porritt*** [1961] 45 Cr. App. R. 348. We are grateful to Queen's Counsel for his industry.

In ***R. v. Lamb*** (supra) the evidence established that the appellant fatally shot his friend in jest. The defence was that the appellant was unaware that by pulling the trigger of a revolver a bullet would come under the firing pin and be discharged, and that the killing was an accident. Manslaughter was left for the consideration of the jury on the basis of criminal negligence. The court held that:

> "...when the basis of the charges was criminal negligence, the jury had to consider among other matters the state of the defendant's mind, including whether or not he thought that what he was doing was safe. It would have been open to the jury, if properly directed, to have found him Guilty because they considered his view that there was no danger formed in a criminally negligent way. The defects in the summing-up were, however, such that the verdict could not stand and the conviction must be quashed."

In ***R. v. Hopper*** (supra) the appellant, an army sergeant, shot and killed a soldier under his command. The defence set up by him was that his rifle which had a very light pull, went off accidentally as he raised it to protect himself against an imminent attack. There was undoubtedly clear evidence of provocation and threats directed at him which was sufficient to support a finding of manslaughter on the ground of provocation. The issue of manslaughter was not left for the consideration of the jury and the conviction for murder was quashed on that ground.

In ***R. v. Porritt*** (supra) the appellant shot and killed his stepfather. His defence was that he did so in defence of his stepfather who was under attack and in imminent danger.

It was conceded that there was evidence of provocation sufficient to justify a conviction for manslaughter, but the issue was not left to the jury, nor was it raised.

These cases underscore the principle that it is the duty of the trial judge to leave for the consideration of the jury the issues fairly arising from the evidence, even where the defence has not relied on it or even if it is inconsistent with the defence which has been raised. That is indeed good law, but those cases are easily distinguishable from the instant case. Here the appellant's defence is that he did not cause the death of the deceased, and that the deceased died by his own hands, whether by accident or by suicide. He has not admitted to doing any act which could have caused the discharge of a bullet from the firearm, and in the circumstances of this case, it would be wrong to infer that he may have been "playing about with a firearm" and that "he indulged the request of the deceased to release the hammer, not intending any harm to result, but being reckless in his handling of the firearm." To invite the jury to consider such an inference would be tantamount to an invitation to speculate.

We are of the view that on the totality of the evidence, the question of manslaughter resulting from gross negligence on the part of the applicant did not arise. There was no evidence, direct or by inference, to support a finding that the applicant even attempted to release the hammer of the cocked firearm, or that, he displayed a reckless disregard of danger to the deceased by the accidental discharge of a bullet from the firearm. We find no factual basis or cogent evidence on which manslaughter could arise; consequently, we find that the learned judge correctly withdrew from the jury the issue of manslaughter.

It was also contended that "the learned trial judge failed to give adequate directions to the jury in relation to the defence of accident." The case of ***R. v. Michael Bailey*** (S.C.C.A. 141/89 dated 31.1.91 - unreported) was cited in

support. The defence put forward was that of an accidental killing. Carey, J.A., in delivering the judgment of the court, said.:

> "But with all respect to the trial judge, it is too clear for words that self defence arose on the appellant's unsworn statement. But having identified the defence as accident, he was in our judgment, bound to explain the meaning of accident. No directions in this regard were given to the jury. He would have had to tell the jury that a killing which occurs in the course of a lawful act without negligence is, accident which they had to have in mind. It plainly was not the jury's laymen's view of accident which mattered."

In the instant case, the learned trial judge, in his general directions, told the jury that on a charge of murder, it is the duty of the prosecution to prove, inter alia, "that it was this accused man who killed the deceased; and thirdly, that it was by a voluntary and deliberate act, that is, not by accident." He went on further to say:

> "Remember that the gravamen of the defence is that this accused man did not do the act. Seeing that he is putting forward the explanation that it was an accident, pure and simple, bear in mind that an accidental killing is no offence."

Still further on he said:

> "Of course, you take into consideration any explanation given by the accused person. In this case the accused person is saying, perhaps more than one thing; at one stage he is saying it was an accident, pure and simple. At another stage, it is for you to say, if you accept it, he said that the accused person, a witness was told that the deceased discharged the firearm or killed himself because he was having worries. ...So you consider both suicide, accident, or you consider what the prosecution is putting forward, that it was pure and simple cold blooded murder. Those are the three issues or alternatives which you have to apply to this evidence."

The jury returned for further "guidance" on "the legal definition of murder", and the learned trial judge directed them thus:

> "The offence of murder is committed when a person by a deliberate or voluntary act, intentionally kills another.

> In order to amount to murder, the killing must be the result of a deliberate or voluntary act, that is to say, it must not be by accident. An accidental killing is no offence. And by intentional, that is to say the act which results in death, must have been done or committed with the intention either to kill or to inflict really serious bodily injury. In addition to that, the ingredients of the offence, that is what the prosecution must prove, the death of the deceased; that the person named in the indictment, Hartwell.
>
> Secondly, that it was this accused man who killed him. Thirdly, that the killing was by a voluntary and deliberate act, that is not by accident.
>
> Fourthly, that the accused either intended to kill the deceased, or to inflict really serious bodily harm on him and this intention has to be proven like any other facts in the case. But you will readily understand, members of the jury, that the prosecution cannot call a witness to tell you what was in the mind of the accused person when he did the act, but what the prosecution does, is put before you, evidence as to what was done; what was said and then invite you in the way that I directed you, in the way to drawing of reasonable inference to infer from what was done or said, that the accused intended to either kill, or inflict serious bodily injury. In arriving at that intention, you have to consider what the accused man has said by way of an explanation and taking the facts as you find them and the explanation by the accused, if you accept it, then you arrive by this means as to what was the intention in the mind of the accused person."

In our view, these directions of the learned trial judge made it quite clear to the jury that the question of accident or suicide arose by way of explanation by the applicant as to the possible cause for the deceased shooting himself. He told the jury what the defence was, namely, that the applicant "did not do the act." If the evidence supported a finding that the deceased died at the hands of the applicant as a result of an unfortunate mishap, an event which was "not expected or designed", then it would have been incumbent on the learned trial judge to direct the jury accordingly and to explain the meaning of accident. But since, in our view, the issue of an accidental killing of the deceased by the applicant did not arise either on the prosecution's case or on the defence, we

consider the directions adequate and that it was quite unnecessary to explain the meaning of accident.

Two other grounds of appeal were filed, but they were not argued, and rightly so since in our view, they were without merit.

Having all these considerations in mind, we have come to the conclusion that the trial judge did not fall in error in his summing-up to the jury, and accordingly, the application for leave to appeal is refused.

Cases referred to

1. R v Bannister [1978] 66 Cr. App R 266
2. R v Lamb [1967] 51 Cr. App R 417
3. R v Hopper [1915] 11 Cr App R 136
4. R v Powell [1961] 45 Cr App R 348
5. R v Richard Bailey – S.C.C.A 141/89 – 8.1.91 unreported