IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 1/97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA vs. HOWARD SMITH

Arthur Kitchin for the appellant

Kent Pantry, Q.C. and Miss Deneve Barnett for the Crown

July 7 and 31, 1997

BINGHAM, J.A.:

At an hearing in the Home Circuit Court before Ellis, J. and a jury on February 27 and 28, 1997, the appellant was charged on an indictment for murder committed on 9th August, 1996. He was found guilty of manslaughter and sentenced to a term of imprisonment of ten years at hard labour.

The matter came before us as an appeal, leave having been granted by the single judge. After hearing arguments raised by counsel, we reserved our decision. Our judgment now follows.

The facts out of which the conviction and subsequent appeal arose were as follows:

Allan Jones, the sole eyewitness, is a Pastor of the Seventh Day Adventist Church. On the morning of 9th August, 1996, he was driving his motor car down Red Hills Road in St. Andrew when he observed two men running through the entrance of the Builders Arcade, one behind the other. The man behind (the appellant) held unto the back of the shirt

collar of the man in front (the deceased). He then pulled a gun from his waist and used it to shoot the deceased in the back of his head. The deceased fell to the ground and laid motionless. The appellant then stood over him.

Mr. Jones parked his car a little further down the road and walked back to the scene of the shooting. A crowd had by this time gathered there. He remained on the scene until the police arrived.

The witness did not speak to the police that day nor give a statement, and did not do so until the deceased's sister contacted him, sometime after the incident. This was after he had attended at his Church one Sabbath day and preached about the incident of the shooting. The deceased's sister, who is also a member of the same faith as the witness Jones, heard about the sermon and later contacted Mr. Jones. It was after this that he gave a statement to the police.

The investigating officer, Detective Sergeant Ruddock, recalled being on patrol duty on the morning of the incident, receiving a radio message and going to the Builders Arcade. There he saw the body of the deceased lying in a pool of blood. He appeared dead. He spoke to the appellant, took from him a .38 revolver, five bullets and one spent shell and took him to the police station. He then cautioned the appellant and he said, "A hold me a hold unto him, we fell and the gun went off and shot him." Detective Sergeant Ruddock also collected a "Tangit", a pipecock and a receipt near to the body. He observed that the appellant had an injury to his knees.

The medical evidence revealed a gunshot wound to the back of the right side of the deceased's neck, eighteen inches below the top of the head. The bullet had travelled upwards into the cranial cavity, what is also called the left occipital area, where the bullet was located, extracted and handed over to the police. There were no powder marks seen at the site of the entry wound indicating that the muzzle of the

gun was held at a distance not less than twenty-four inches from the deceased's body when the shot was discharged. This evidence ruled out the possibility that the gun was discharged from a point-blank range.

The appellant in his defence, as is now commonly the case, made an unsworn statement from the dock. He recalled being on duty as a security guard in the area of the Builders Arcade on the morning in question and of hearing the shouts for "thief" and seeing the deceased running away. He had his licensed firearm with him. He gave chase across the road unto Red Hills Road. His firearm began to fall out of his waist. He caught it in his right hand and caught up with the deceased. He held him in the collar of his shirt. They struggled and fell and "he accidentally discharged the firearm. ...He had no intention of hurting the deceased. He was only doing his duty."

Having regard to the prosecution's case, the killing of the deceased would have amounted to a clear case of murder as based on the account as related by the sole eyewitness, Allan Jones. The death would have resulted from the shooting of an unarmed man by an assailant from behind, at close range in circumstances where, on the medical evidence, death was instantaneous.

Although the defence of accident arose both on the Crown's case, based on the statement made by the appellant following the caution administered by Detective Sergeant Ruddock, and in the appellant's unsworn statement from the dock, this defence would have been negatived if the jury accepted the account of the witness Allan Jones as being a credible narrative of the events as they unfolded on the morning in question.

The unsworn statement of the appellant could be seen as exonerating him from any responsibility for the killing of the deceased. His statement, "We struggled and I fell and I accidentally discharged the firearm", while admitting that the deceased's death was the result

of his act, meant that the killing was accidental in the sense that it was not brought about by any deliberate or intentional act on his part.

In his summation the learned trial judge left the defences of accident and lack of intent to kill or cause grievous bodily harm to the jury. Whilst accident was at the crux of the defence, lack of intent arose on the appellant's unsworn statement where he said:

> "I had no intention of hurting the deceased. I was only performing my duty."

Leave was granted to Mr. Kitchin for the appellant to argue the supplemental grounds of appeal, which read:

1. "The Learned Trial Judge's definition of accident was wrong in law, insufficient, incorrect and wholly unhelpful to the jury and amounted to a misdirection (Page 11, paragraph 1, lines 1 to 6).

2. The Learned Trial Judge failed to adequately put the defence of accident for the consideration of the jury, and thereby deprived the Appellant of a fair trial and the opportunity of a complete acquittal (Page 11, paragraph 1, lines 1 to 6; Page 22, paragraph 3, last line; Page 22, paragraph 4, last line; Page 23, paragraph 1, lines 4 & 5; Page 26, paragraph 3, lines 3 to 6; Page 27, paragraph 2).

3. In his final charge, the Learned Trial Judge failed to leave the defence of accident for the consideration of the jury and did not relate how an accident could have arisen on the evidence, and thereby deprived the Appellant of a fair trial and the opportunity of a complete acquittal (Page 27, paragraph 2).

4. The learned Trial Judge failed to give the jury clear and unambiguous directions on the defence of accident and to isolate and distinguish the issues of accident and manslaughter when the jury requested clarification of the latter, which must have confused or misled the jury and caused them to reach a verdict adverse to the Appellant, since the absence of intention for murder is consistent with the existence of an accident (Pages 29 to 30)."

Ground 1

In advancing this ground, Mr. Kitchin for the appellant submitted that the definition of the learned trial judge of accident was unhelpful, wrong in law, and confusing. He ought to have told the jury that the appellant was performing a lawful act and that the killing was not the result of any negligent act on his part.

This definition of accident relied on by Mr. Kitchin was considered by this court in S.C.C.A. 141/89 ***R. v. Michael Bailey*** (unreported) delivered on 31st January, 1991. There the killing resulted from an incident in which there was a struggle between the appellant, a police officer, and the deceased and his brother for possession of the appellant's firearm. During the struggle the weapon was discharged killing the deceased.

The learned trial judge, in leaving the case to the jury, dealt with the issue of accident as being the only defence arising on the evidence. He omitted to leave for the jury's consideration the issue of self defence, which arose on the evidence. He also failed to explain to the jury the meaning of accident.

In delivering the judgment of the court, Carey, J.A. said, inter alia:

> "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."

In this case, with due respect to learned counsel for the appellant, the facts do not support such a definition as that acceded to by the court in ***R. v. Michael Bailey*** (supra). On the facts in this case, the learned trial judge gave what, in our view was, a helpful

definition in keeping with the evidence and explained to the jury the effect of an acceptance on their part of the defence being advanced by the appellant.

In his directions at page 11 of the record, having explained to the jury the effect of the appellant's statement to Detective Sergeant Ruddock and also in court in his unsworn statement, the learned judge then said:

> "Let me just give you this as we are dealing with accident here members of the jury, so that you have what it means, what is required. In the popular sense, members of the jury, an accident is any unexpected injury arising from any 'un-looked' for, to coin a phrase, 'un-looked' for mishap, or occurrence. That is an accident. It is a simple definition, so you will have to consider whether the prosecution has negative (sic) this idea of accident to the requisite standard. Remember too, you know that when you consider the accused man's unsworn statement, if you accept it and give it the weight which you think it deserves and you are thinking or you think that it is the truth, you have to acquit him."

"Unlooked" for in this sense would have meant no more or less than unforeseen and this would satisfy the necessary criteria for the definition.

Ground 2

The main areas of complaint were those canvassed in grounds 2 and 3 which, succinctly put, challenged the directions in contending that the defence of accident was not properly left to the jury thus depriving the appellant of a complete acquittal. This will be considered later on in the judgment. As all four grounds touched on the defence of accident, it will now be necessary to examine the manner in which the learned judge dealt with this issue.

The learned trial judge commenced his directions in this area thus:

> "I told you before that the accused man says, 'I was involved in it but it was not a deliberate act, it was an accident'."

Later on, in putting the case for the defence, he said:

> "The accused case is this, that 'I was involved in this killing but it wasn't a deliberate act on my part, it was an accident; and in any event, I had no intention of killing the deceased.'
>
> The question of accident, members of the jury, is one of the elements which arises in the allegation that the act was deliberate. You remember I told you that it is the prosecution who has to prove the deliberateness of the act. The prosecution has to prove to you that it was not accidental. And in so proving, the proof must be so that you are satisfied that you feel sure, satisfied beyond a reasonable doubt that there was no accident."

When the summation is examined as a whole, this ground is untenable. Apart from the three areas taken from the learned judge's directions to which reference has already been made, there were at least seven other occasions in a summing-up consisting of twenty-eight pages that were devoted to this defence. At the conclusion, the directions given on that issue which was at the very heart of the defence's case would have been indelibly imprinted on the jury's mind as to the effect of their acceptance thereof.

This ground accordingly fails.

Ground 3

In leaving the case to the jury, the learned trial judge left four possible verdicts, viz.:

1. Guilty of murder
2. Not guilty of murder
3. Guilty of manslaughter
4. Not guilty of any offence.

The first two verdicts were dependent on whether the jury, having accepted the Crown's case, viz., the account of Allan Jones, as to how

they resolved the question of intent. The verdict given upon their returning to the jury box on the first occasion, indicated that they accepted the Crown's case in part in so far as it related to the appellant's responsibility for the killing of the deceased. By the same token, their request for further assistance in relation to the offence of manslaughter was an indication of their rejection of the defence of accident.

In seeking further clarification on manslaughter, although, in our view, the directions given could have been more helpful, being in the circumstances somewhat terse, they were, in the light of the evidence in the case, sufficient. One needs to be reminded that while the appellant may be seen as being over-exuberant by his conduct he was in the act of attempting to apprehend a suspected felon. Moreover, his statement was that, "I did not intend to hurt anyone. I was only carrying out my duty."

In this regard, the brief instructions to the jury to clarify the necessary requirement as to this offence, to the effect that:

> "Mr. Foreman and members of the jury, you remember what I told you as to how you may find manslaughter, that if you find the lack of intention, you understand? If you find that there was lack of intention you may find manslaughter."

In the light of this direction, the jury could have had not the least difficulty in understanding what was meant, having regard to the earlier directions as they indicated their response by the unanimous verdict to which they came.

Ground 4

This ground has already been subsumed in the consideration of ground 3. Although, in leaving the case to the jury, the learned trial judge did not spell out in a specified manner how the fourth possible verdict of not guilty could result on the evidence in the case and given

what, in our view, was his painstaking and careful directions on accident, his directions could only be understood by the jury as referring to a factual situation occurring in which they either rejected the Crown's case or accepted the defence's explanation that the killing was accidental.

Conclusion

Once the jury requested further clarification in relation to manslaughter, it is clear that while ruling out murder they were also rejecting that the killing was accidental. In this context, they were still considering the conduct of the appellant, in so far as on the possible view that he may have intended some harm, albeit not the kind of harm requisite to establish murder.

In the result, the appeal is dismissed. The conviction and sentence is affirmed. The sentence will commence as from 28th May, 1997.

The court wishes to record its indebtedness to counsel for their able and interesting arguments raised in the matter.