JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 147/97

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

REGINA vs PATRICK BAILEY

Frank Phipps Q.C. with Kathryn Phipps for Applicant

Paula Tyndale and Marva McDonald-Bishop for the Crown

23rd February and 26th March, 1998

FORTE, J.A.

The applicant, who had been jointly indicted with two other persons for the offence of murder, was convicted for manslaughter in the Home Circuit Court, on October 30, 1997, and sentenced to two years imprisonment at hard labour. The persons jointly indicted with him were acquitted. His application for leave to appeal his conviction and sentence, having been refused in Chambers by a single judge, he came before us on the 23rd February , 1998, on which date, having heard arguments of counsel, we refused leave to appeal and affirmed the conviction and sentence. As promised, on that date, we now reduce to writing our reasons for so doing.

As the issues raised in the application are directly related to the evidence concerning events at the time of the incident, it is necessary to set out those circumstances.

The deceased, Bernard Thompson met his death on the 8th of January, 1997 at "Dreamland" Farm, Tredegar Park in St. Catherine. When his body was examined at a

post mortem examination by Dr. Royston Clifford, Forensic Pathologist the following injuries were found:

1) On external examination:

   (a) on the right side of the forehead there was a 2 centimetre (about 3/4 ") abrasion; and

   (b) a 2.5 centimetre (about 1") wide abrasion to the right corner of the right eye associated with the right periorbital swelling.

   (c) On the right posterior chest (right side of the back) there were two (2) abrasions 6 centimetres and 2.5 centimetres respectively.

2) On dissection:-

   There was a 5 centimetre (2") area of contusion to the left side of the occipital region. This was associated with a significant amount of bleeding between scalp and skull. The skull was intact, no fracture. The brain showed massive bleeding.

In the doctor's opinion, death was due to head injuries based on bleeding around the brain contusion. The head injury was consistent with infliction by blunt force including a blow on a hard surface such as concrete. The abrasion to the right side of the eye could have been caused by a fist.

The main evidence for the prosecution came from two witnesses but more so from Mr. Ralph Smith, who at the time was working at the farm. On the day of the incident, Mr. Smith was in the kitchen, when he heard a voice calling "Bernard, Bernard". He went outside and from there saw Herman Marsh, (who was jointly tried with the applicant) going over to where Bernard (the deceased) was working. Mr. Marsh then engaged in conversation with Bernard, but the witness could not hear the content of their discussion. Both men were working together. Mr. Marsh then had with him a machete and an orange. They were walking toward the garage in front of which

a car was parked. The witness returned to the kitchen, but having heard a sound (some-one expressing an expletive) he left the kitchen and went over to the main building from which the sound had come. There he saw Bernard on his back on the ground with the applicant sitting over him punching him. He observed the applicant deliver four punches to the deceased and as a result questioned the reason for it, saying "What is this?, What is going on?". The applicant replied that he should keep himself out of it. The witness then replied, "How must I take myself out of this and you come on the farm beating the man just like that?" He again asked the question saying he would like to know what was going on. Bernard was still in the same position. The applicant answered "Don't get yourself mixed up in this? Mr. Marsh was standing by, so the witness said to him. "Mr. Marsh, I know you, I am going to call the police". In reply, Mr. Marsh said "When you call the police what does that have to do with me". The applicant held the deceased in the shirt and said - "Tell her that you sorry". He pushed the deceased towards the car, and at this stage the window of the car came down and the witness then saw Mrs. Oliver, the other co-defendant sitting in the car. The deceased, bent down and then applicant delivered an upper cut which caught him in the face. He fell backwards on to his back on the concrete. The applicant then lifted him from the ground by the shirt and then chucked him down. Blood was coming from the nostrils of the deceased. The applicant drew him and put him to lean against a wall in front of the dog-house. The witness then left saying he was going to call the police. He soon after, saw the same car pass as he walked along.

The witness also testified, that while he was leaving the scene to call the police, he saw Mr. Anderson (the other witness for the prosecution) going towards the main building. He had spoken to Mr. Anderson earlier, just before he had heard the sound.

Mr. Guildford Anderson, who does " a little farming" on the property also heard the shout "Bernard, Bernard", and he answered saying that Bernard was over the big house. At that time he saw two men, the applicant and the co-defendant Mr. Marsh. Some twenty minutes later he also heard "a sound over the big house" and spoke with the witness Smith who left in the direction of the sound. He remained for "about two minutes or so" and then left in the same direction. On his way he heard the witness Smith saying "Good God, look what oonu do the man!" When he arrived on the scene he saw the deceased on his bottom with his back leaning on the dog-house. He called to the deceased about three times, but got no response. Mr. Marsh and the applicant were present.

The applicant wet the head of the deceased, but there was no response. The witness then said "What have you done, what have you people done" Mrs. Oliver the other co-defendant, who was in the car then said that he didn't stop pestering her at her house. The applicant then offered the opinion that the deceased was pretending whereupon the witness Anderson said "A wey oono a go do, oono can't leave him here oono have to take him to the hospital or doctor".

A little blood was coming from the mouth of the deceased and there was a "coco" on his forehead. The two co-defendants, and the applicant, thereafter put the deceased in the car and left with him.

Later that day at about 5:00 p.m. the applicant and the two co-defendants arrived at the police station in St. Catherine North Division where the applicant made a report to Detective Inspector Winston Grant, that they had taken "a man to hospital and he is dead". Mrs. Oliver then stated that it happened at Dreamland Estates at Tredegar Park. She thereafter drove Detective Grant to the scene, where the applicant pointed out the spot where the car was parked when they had visited

earlier, and also a concrete area where he indicated that the deceased had fallen and hit his head.

Mr. Anderson attended on the scene while Detective Grant was present, and having pointed to the spot on the concrete where he had seen Bernard (the deceased), in the presence of the applicant, Mr. Marsh and Mrs. Oliver he said that "These were the three persons who came there earlier on, beat up Bernard, put him in the car, drove away with him." In response the applicant said that it was not his intention to hurt anyone, he only wanted him to apologise to Mrs. Oliver. The Detective later visited the Spanish Town funeral home where he saw the body of the deceased. He then noticed that that there was a swelling and a wound to the right eye of the deceased. On his return to the station, the officer cautioned the applicant, who said " I only wanted him to apologise to Mrs. Oliver".

In his defence the applicant gave sworn evidence in which he admitted going to the farm on that day, but for three reasons:

i) to inspect the farm in pursuance of an agreement he had with Mrs. Oliver to lease it,

ii) to return certain equipment; and

iii) to talk to the deceased who it was alleged, had been molesting Mrs. Oliver.

He had gone there in the company of Mr. Marsh and Mrs. Oliver. After Mr. Marsh and himself had inspected the farm, he saw Mr. Anderson and asked him for the deceased. Mr. Anderson directed them to the big house and on their way they saw the deceased, who continued walking with them. They told the deceased that Mrs. Oliver was in the car and wanted to see him. On their way to the car, he walked beside the deceased, while Mr. Marsh was ahead. While walking with Bernard, he said to him "you can't be going to the lady's house harassing her and uninvited. You will get yourself in trouble

with the police. This must stop". They continued walking, and when they got to a spot where they could see the car, Bernard turned and pushed him and he then came after him immediately, and then he punched Bernard two to three times in the chest. After that he said, "You are going to behave, stop this now, and go and apologize to the lady. Bernard then raised his hands and said," All right, all right". Bernard then went to the driver's window of the car, and Mrs. Oliver wound down the window. Then Bernard said "Sorry Miss Rose". The applicant testified that he was about seven or eight feet to the left of Bernard , when Bernard started moving backwards, stumbled backwards and fell. He laid on his back, and then turned on his right side. The applicant walked over to him looked at him and saw blood in his nostrils. At this time the applicant looked up and saw the witness Ralph Smith about 6 yds from them coming on the scene. Smith was on his way back when Mr. Anderson arrived. With the help of Mr. Marsh, he removed the deceased into the shade, and administered first aid to him, but to no avail. He along with Mr. Marsh and Mrs. Oliver took the deceased to the hospital, where he was pronounced dead.

The main focus in the arguments by Mr. Phipps Q.C. for the applicant was his complaint that the learned trial judge did not leave for the jury's consideration, the defence of self-defence.

In withdrawing self-defence from the jury these are the words used by the learned trial judge after briefly telling the jury about self defence:

> "Now here too, you remember Mr. Bailey said he punched the deceased when the deceased held on to him. Well that would be, if you accept that, that would be no offence. You are entitled to defend yourself, somebody grabbing on to you, you are entitled to use reasonable force to release yourself, so to speak. So that would be no offence at all.
>
> But what you must remember here is that the accused is not saying that, Mr. Bailey is not saying he punched the

> man in the face at all, he is saying apart from those three punches he did not punch the man. And on the evidence before you what really caused the death of the deceased is the fall to the ground hitting the back of his head, resulting in contusion.
>
> So, here too apart from the little tussle, if you want to call it so, as Mr. Bailey described it, there is no evidence of, there is no, the issue of self- defence doesn't arise. So Members of the Jury, you must bear those directions in mind".

Mr. Phipps contended that, though the defence did not put forward self-defence, the evidence of the applicant nevertheless gave rise to that defence and consequently the learned trial judge had an obligation to leave it for the jury's consideration. In his usual attractive manner, counsel argued, that the defence arose, because the fall of the deceased could have been a delayed reaction to the blows which the applicant delivered to him in circumstances where he alleged he was defending himself from an attack made upon him by the deceased. For this argument to be successful, some evidence would have had to establish that the fall could have been so caused. In this regard Mr. Phipps relied on the following evidence of the forensic pathologist, as summarized by the learned trial judge in his summation to the jury:

> "But he agreed with counsel that there need not be any connection with the two injuries. In other words, that they might be independent, in other words not necessarily punched and fell, but that the witness could have, the doctor used the word and insisted on, collapsed, and he said that if the witness was in a fight and moved off on his own, stumbled and fell, he would call that collapse, that the witness collapsed".

On reading the learned trial judge's summing-up it appears that this passage relied on by Mr. Phipps ought to be read in context with the previous passage where the pathologist in cross-examination was answering questions relating to the injury he saw to the face. The learned trial judge summed it up as follows:

> "... what the doctor said finally, members of the jury, is that all the injuries could not be caused from a fall. And he went on to say that the injury to the face that he saw to the eye in particular, remember counsel put it to him if the deceased had fallen and then turned to the side, to the right, and hit his face on the concrete and the doctor said no, it couldn't have been caused that way".

Although the doctor was never asked specifically whether the effect of the three punches, admittedly delivered by the applicant, could be a delayed falling of the deceased, Mr. Phipps contends that the doctor's answer in respect of the deceased having been in a fight was evidence upon which the jury could have found that the deceased fell as a result of those punches.

In any event, the validity of this contention must be determined on the background of the issues of facts which were before the jury

The critical issue upon which the jury had to make their determination was whether the applicant delivered a blow to the face of the deceased which caused him to fall, the defence having denied that any such blow was delivered.

In those circumstances, the learned trial judge directed the jury to acquit the applicant, if they found that he did not strike the applicant in his face. He did so as follows:

> "If you accept Mr. Bailey, too, that they only went there to talk and that - his evidence is that he only gave three punches - in the circumstances, he said, when Mr. Thompson held on to him then he, too would not be guilty of any offence".

And again under the heading of accident:

> "Such death would be purely accidental if the deceased was talking to Mrs. Oliver by the car and stepped back, stumbled, fell, hit his head and succumbed from the resultant injuries, then the accused would not be guilty of any offence.

> Now, if you accept his evidence that it happened as he said, that - sorry, that Bernard stepped back, stumbled, fell, hitting his head and he didn't cause that at all then, members of the jury, you would have to acquit him or if you are in doubt as to what really happened, how Bernard came by this injury, you will have to acquit all three of them".

As it was never the case for the defence or the prosecution, that the deceased could have stumbled and fallen as a result of the earlier punches, it was not incumbent on the learned trial judge to leave that as an issue for the jury. Nevertheless the directions set out above clearly indicated to the jury that once they had eliminated the punch to the face as a fact then they would be left with the earlier incident which would necessitate a verdict of acquittal. In our view the learned trial judge was correct in separating the incident into two parts, as the first if it occurred in the manner described by the defence, would have had no bearing on culpability so far as the death of the deceased was concerned: a result which would be the same if the description by the prosecution of the earlier incident was accepted by the jury to the exclusion of the latter. In short, the way the case was conducted did not call for a determination as to any connection between that incident and the cause of death, the real issue being whether the deceased fell and hit his head as a result of a blow which was struck to his face by the applicant. The learned trial judge having directed the jury to acquit if they found that no such blow was struck, or if they were in doubt about it, would be bound to acquit, even if they found that the deceased fell and hit his head as a result of the earlier punches. The verdict of the jury therefore discloses, that they accepted that the applicant punched the deceased in his face just before he fell, hitting his head on the concrete. As the defence in so far as that blow was concerned, was a denial, and an allegation that the deceased stumbled and fell, no question of self-defence arose in respect of that assault. Even if, as the defence contends that

the deceased first assaulted the applicant causing the applicant to defend himself, on the applicant's evidence, that attack had subsided at the time of the delivery of the blow to the face and no attack or any basis for grounding a belief that there was about to be an attack was evident at the time.

In those circumstances, there was no evidence, given the issues as they arose on the case, which necessitated the learned trial judge leaving self-defence for the jury's consideration. At the end of the evidence, it was either that the jury accepted that the deceased stumbled and fell, as contended for by the applicant or that he was hit by the applicant as a consequence of which he fell to the ground, hitting his head on the concrete. This issue was clearly and adequately left by the learned trial judge to the jury; and consequently we find no merit in this complaint.

STALKING

Mr. Phipps made attempts to advance, the theory that because of the allegations of harassment of Mrs. Oliver by the deceased on earlier occasions that was a matter which could be taken into consideration in the jury's contemplation of whether the physical assault of the deceased by the applicant was done in defence of Mrs. Oliver.

It is conceded that there was no allegation of stalking taking place at the time when the deceased met his death. It was however, put forward as justification for the applicant's attendance upon the deceased to speak with him about his (the deceased's) previous behaviour to Mrs. Oliver. There was really no issue as to whether the applicant was so justified, and the case was really considered on the basis of whether the applicant justifiably caused the death of the deceased. No authorities were cited and indeed none could have been to support this contention. The defence of

self-defence must relate to some real danger of physical harm or honest belief that such harm, would befall the person defending himself or the person whom he is defending. In our view, harassment or stalking of a female may in the appropriate case, depending on the circumstances, amount to evidence upon which provocation in the female's close friend or family may be considered, but tnis as this evidence unfolded, was not for consideration in this case, given the circumstances.

We found this complaint, also to be without merit.

Another complaint related to the learned trial judge's refusal to withdraw the offence of murder from the jury's consideration, at the end of the Crown's case. We found no merit in this complaint. The question of what intention the applicant would have had when he delivered the blows to the deceased was a question of fact for the jury. It is clear from what the learned trial judge said to the jury that he had an opinion of his own in that regard. Here is what he said:

> "So members of the jury, I would daresay that on this evidence you would be really hard put, in my view - but my view, you may throw it out or you may accept it - you will be hard put to find murder and it would appear to me that what should really give you concern, take up your time, is whether or not manslaughter is established to your satisfaction by the prosecution, of course".

Then the learned trial judge left it for the jury's deliberation in the following passage in which he again highlights the issues in the case, and directs them in a manner which also affects the complaint made in respect of self-defence:

> "Now if having considered the evidence you are not satisfied that Bailey punched the deceased in the face and that he fell and hit his head -- because remember that is essential because he is saying that is the punch which felled him and he hit the back of his head. Now, if you are not sure that that happened, then you will have to acquit him. That is the gravamen of the crown's case.
>
> However, if you are sure that it happened in the way Mr. Ralph Smith said it happened, that upper-cut, and that he

> fell, if you are sure that it happened that way, and all the ingredients are satisfied, then you have to look carefully at intention. The police said he made certain statements, some of them have been denied by him, as to his intention. If you find as a fact that he punched Mr. Thompson in the face, he fell, hit his head, then, members of the jury, if you conclude, having looked at the evidence, as I said, and asked yourselves the question, what did he intend? If you conclude that he intended to kill or to cause really serious bodily injury and all the other ingredients there, then you may find it open to you to convict him of murder.
>
> As I said before, you would be hard put, in my own view to find murder. If you are in doubt about that specific intent then you may not find him guilty of murder; you would have to go on to consider manslaughter".

In our view, the learned trial judge cannot be faulted for having left it to the jury to determine on the evidence what the intention of the applicant was at the time he delivered the upper-cut to the deceased.

One other matter was advanced and that relates to the learned trial judge's refusal to accede to no case submissions made on behalf of the two co-accused. Mr. Phipps contended that, that refusal operated to the prejudice of the applicant as he had to answer a case in which he was jointly charged with two others. Here is what he advanced.

> "It was embarrasing and prejudicial to a fair assessment of his case to have it considered along with two others, Marsh and Oliver, against whom there was absolutely no evidence. In the circumstances, the verdict must have been a compromise.
>
> It is submitted the failure of the learned trial judge to withdraw all charges against Marsh and Oliver and withdraw the charge of murder against the applicant may have led to confusion and amounted to a miscarriage of justice".

Not much needs to be said about this complaint other that it is without merit.

The case of each co-accused had to be considered separately, consequently a consideration by the jury of the applicant's case could not be affected by any consideration of the cases of his co-accused. In addition, there is really no ground for alleging that the learned trial judge's ruling against the no case submission might have resulted in a compromise verdict, as the verdict returned is consistent with the evidence and the issues raised, given the way the case was presented both by the prosecution and the defence.

In relation, to the sentence, we found that there was nothing advanced upon which we could conclude that the sentence was manifestly excessive.

In the event, we made the order earlier stated.