JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 74 OF 94

BEFORE: THE HON. MR. JUSTICE RATTRAY - PRESIDENT
THE HON. MR. JUSTICE DOWNER J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA V. PETER LEWIS

Arthur Kitchin for the Applicant

Miss Debra Martin for the Crown

May 29 and July 31, 1995

RATTRAY P.;

On the 29th May 1995 we heard submissions from counsel on behalf of the applicant on this matter and we reserved our decision.

The applicant was charged that on the 22nd of December 1992 he murdered Angelee Campbell. On the 19th of July 1994 in the St. Catherine Circuit Court he was convicted of manslaughter.

The facts emerging from the trial were as follows: On the 22nd of December 1992 Sophia Masters along with her sister the deceased Angelee Campbell and in the company of one Sheryl went to Miss Winnie a dressmaker who was making a garment for the deceased. Sophia gave evidence that on the way to Miss Winnie's home the applicant Peter Lewis who is the father of the deceased's baby was walking behind them. At the time the deceased and the applicant were estranged. The applicant followed them to Miss Winnie's gate and while they were talking to Miss Winnie on her verandah he called out to the deceased: "Angie, waan talk wid yuh." The deceased replied: "Yuh nuh see me talkin' wid Miss Winnie." Thereupon the applicant pulled the gate, came onto Miss Winnie's verandah, pulled a knife from his side and cut after Angie with it. She said: "Put down de knife, Peter", and started to hold on to him. Angie, the deceased, was trying to get into Miss Winnie's house but Miss Winnie pushed her out of the house. The applicant was holding on to the deceased and bashing her with the knife. She ran for a piece of plywood to hit him with it but it was too light. She ran and called out "Derma, Derma, Peter over de a kill mi sister." She ran back and saw Peter walking in front of the deceased with the knife in his hand. There was blood on the knife. The deceased said to her: "See Peter kill me here." She noticed urine running

down her sister's legs. Her sister fell in the road. She later saw her dead at the hospital.

Miss Winnie supports the evidence of the arrival of the deceased, her sister and Sheryl. The applicant called to the deceased: "Angie, come here." The deceased said: "Ah soon come, a talkin' to Miss Winnie." He opened the gate and came onto the verandah and said to the deceased: "I don't like how yuh dis me." The applicant held the deceased in her collar and the deceased fell back on her machine. She pushed them off and the deceased said: "Sophia, I get a stab." She saw the applicant holding up a knife. Nobody had attacked the applicant.

At the end of the Crown's case a no-case submission was made by counsel for the defence and heard in the presence of the jury. The trial judge ruled that there was a case to answer. This created one of the grounds of appeal which was that the trial judge erred in allowing the no-case submission to be made in the jury's presence.

It has been hitherto the practice in Jamaica for no-case submissions to be made in the presence of the jury. Indeed sometimes this is done on the application of counsel for the accused seeking the added advantage of submissions at this stage to the trial judge being really in fact an additional address to the jury in whose presence and hearing the submissions are made.

In **Rupert Crosdale v. The Queen**, Privy Council Appeal No. 13 of 1994, delivered on the 6th of April 1995, the Judicial Committee of the Privy Council pronounced the practice to be unsound and stated that it should be discontinued. The mischief being sought to be prevented is the misconception by the jury that the judge's ruling of a case to answer is an indication of his view of the guilt of the accused rather than a provisional observation which "in no way forecloses the question of guilt or innocence which is for them alone."

The Board however, stated in **Nigel Neil v. The Queen**, Privy Council Appeal No. 22 of 1994, delivered on the same day as **Crosdale's** case:

> "This is not to say that in every instance where the jury has remained in court, whilst a submission of this kind has been made and rejected, an appeal on this ground will be allowed. Far from it. The appellate court may well conclude, after examining a transcript of what passed between the judge and counsel, that there was no harm serious enough to imperil the fairness of the verdict. But some cases may be in a different category, ..."

In his summing-up to the jury the learned trial judge directed as follows:

> "When the Prosecution closed its case, Mr. Kitchin made a no case submission. I did not agree with him and I told you, you must not think that because I said this, that the accused was to answer, the accused

> "was guilty of anything. In this case here, nobody can say an accused is guilty or anything. Only you, the twelve people there (indicating) because he is in your charge to say whether or not he is guilty. All I was doing was, to put something before you to enhance your stature as judges of the facts. You will have to eventually say whether he is guilty."

The direction was so clear as to the sole responsibility of the jury to determine innocence or guilt that in our view there could be "no harm serious enough to imperil the fairness of the verdict" or which "could lead to a risk of injustice."

The other ground of appeal related to how the trial judge dealt with the issue of self-defence. In an unsworn statement the applicant said inter alia that he was waiting at Miss Winnie's gate for about twenty to twenty-five minutes and then he came onto the verandah and said to the deceased: "I wait so long and you in here". He then boxed her. Angie had a bag:

> "I saw her look down in the bag. I dip down in the bag. Angie also dip down and my hand hang on to the handle of a blade and then we came outside of the verandah and I see Sophia run come towards me with a shine looking instrument in her hand. I had the knife in the air. Sophia made two jook after me and I side-step them and still hang on to Angie."

Then he continues:

> "She stab at me [that is Sophia] two more time. I make back two more jook at her. The second one, on the second jook, I hear my baby mother said, 'I get a stab'. ... I did not have the intention to stab her as she was not attacking me."

Mr. Kitchin has contended that the learned trial judge:

> (a) failed to properly direct the jury on the issue of self-defence particularly in respect to the subjective test, and thereby deprived the applicant of a fair trial;
>
> (b) that his directions on self-defence were inappropriate in the sense that they seem to have cast an onus on the applicant to prove that he acted in self-defence.

The learned trial judge was clear in his directions to the jury as to where the onus lay in relation to self-defence. He said:

> "Remember, that when an accused person raises this concept of self-defence, he is under no duty or no obligation to prove that he was acting in self-defence. He just raises it and it is the Prosecution who must negative the self-defence."

He further directed as follows:

> "You will consider this concept of self-defence, Mr. Foreman and Members of the Jury. It is a commonsense concept because it operates like this. If a person is attacked so that he honestly apprehends danger to his life

> "or his body, he may use such force as is reasonably necessary to prevent and resist that attack and in so doing, he causes the death of another, particularly, the person who was attacking him or transfers it to somebody, then he commits no offence. As I told you before, it is not for the accused to prove that he was acting in self-defence. It is for the Prosecution to negative that."

Counsel for the applicant Mr. Kitchin relied heavily on the judgment of the Board in ***Beckford v. R.*** [1987] 3 All E.R. 425 which held that if a plea of self-defence is raised the real test was "that a person could use such force in the defence of himself as was reasonable in the circumstances as he honestly believed them to be." This is the subjective test in respect of which Mr. Kitchin complained the jury were not properly directed.

The defence as stated in the unsworn statement of the applicant was not in respect of any honest belief by him that Sophia was attacking him. His case was that Sophia was in fact attacking him and he defended himself by stabbing at her with the knife. In so doing he unintentionally stabbed the deceased and this resulted in her death.

We can find no fault in the direction of the judge in respect of self-defence.

The further submission of Mr. Kitchin is that the trial judge failed properly to direct the jury on the question of accident or transferred malice. With respect to accident the learned trial judge told the jury that for the killing to be murder it must not be accidental. He then continued:

> "... remember, in this case here, Mr. Foreman and members of the jury, there is a little thing absent because he tells you that he didn't, he was stabbing up at the other person. You will have find that before you can consider this question of accident. If an act is done in accident, by accident, it does not give rise to any criminal charge. But you will have to look at all this in the background of the circumstances that here was a man who has a knife in his hand from the beginning or at least some stage in this thing and then this happened. You will have to make up your mind whether the idea of an accident arises in this."

Later in the summing-up he continued:

> "And thirdly, the act must be voluntary and deliberate, not accident and it must be done with the intention of causing death, of causing really serious bodily harm."

On the facts of the case in our view the direction to the jury on the question of accident cannot be faulted.

On the question of transferred malice the defence relied upon by the applicant was fully put to the jury, which was that Sophia was attacking the applicant and defending himself against Sophia's attack by the use of a knife, with no intention to inflict any harm on the deceased, the mother of his child, the deceased was stabbed. The learned trial judge told the jury:

> "You have to look at what he tells you. Give it the weight that it deserves.
>
> If the weight is one of truth, then you have to acquit him. If it leaves you in any reasonable doubt, equally, you have to acquit him. If you disbelieve, that doesn't give you the right to say that he is guilty because he has no burden. In our system, you have to go and look at the evidence that the Prosecution has put before you and the witnesses on whom the Prosecution rely as to the facts are Sophia Masters and Miss Winnie Mowatt."

He had already told the jury that if a person attacked honestly apprehends danger to his life or his body he may use such force as is reasonably necessary to resist the attack and if "in so doing, he causes the death of another, particularly the person who was attacking him or transfers it to somebody [emphasis supplied] then he commits no offence."

In the circumstances the case for the prosecution and the defence had been fully and fairly put to the jury with

the appropriate directions in law, and there being nothing to impeach the fairness of the trial the application for leave to appeal is refused. Sentence to commence on the 19th October 1994.

Cases referred to

(1) Richard Craven Co. v The Queen P.C Appeal 13/94 - 6/4/95

(2) Nigel Neil v The Queen P.C Appeal 22/94 - 6/4/95

(3) Re Byrne, P.C [1987] 3 ALL E.R 425