

CA (Criminal) - Murder - Evidence - Intent - whether justifiable
up - with regard to intent - whether justifiable - test to be applied
Matter dismissed. Murder classified as non-capital.
JAMAICA Cases referred to.
(See p 11 (end))

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 15/91

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

REGINA

VS.

ROBERT BROWN

Mr. Dennis Daly Q.C. for Applicant

Mr. Kent Pantry, Senior Deputy Director of Public
Prosecutions and Miss Vinette Graham for the Crown

October 4 and 5, 1993 and March 14, 1994

RATTRAY P.:

The applicant Robert Brown was convicted in the Home Circuit Court, on the 28th of January 1991, on an indictment which charged him for the murder of one Kenneth Sherwood. He received the mandatory death sentence. The applicant was a gardener employed to the deceased Sherwood and lived in Mr. Sherwood's home, 44 Norbrook Road, St. Andrew at the time of the murder, apart from some week-ends when he went to his own home.

There was also employed in the home a domestic worker named Miss Rose Thompson. She gave evidence that when she was away from her work-place every other week-end the applicant would perform her chores at the Sherwood's home. On the 28th of July 1989 both herself and the applicant were on the premises at Norbrook Road performing their respective duties. At about 6 p.m. the applicant had his dinner in the kitchen as was usual. When he was finished he went downstairs which was the part of the house in which they both lived in separate quarters. The members of the family

occupied upstairs and the kitchen was on that level. The applicant drew the kitchen door on leaving and she did not expect him to return. She was completing her duties in the kitchen when between 6:30 - 7:00 p.m. she saw the applicant who came back into the kitchen and asked her to come and watch television with him. The television set was in Mr. Sherwood's bedroom. She did not accompany him to Mr. Sherwood's bedroom. When she had finished what she was doing she went into a passage to put down some towels and she saw the applicant coming down the passage and they had a conversation. The applicant went back down into the kitchen. He helped her to lock the kitchen windows and said he was going to watch television in Mr. Sherwood's bedroom. She went to watch television in the den.

The Security Guard came on duty whilst the applicant was watching television in Mr. Sherwood's bedroom. The applicant finished watching the television and went outside leaving the witness writing up the grocery list in the kitchen. She locked the kitchen door. About half an hour afterwards she went upstairs to check the windows and saw the applicant and one Tony in a bedroom usually occupied by Mrs. Sherwood's son. The applicant was in a corner of the room and Tony was standing behind the door on a chair. She asked the applicant what he was doing there and he replied that he was watching television. There was a television in the room also but it was not working. She quarrelled with him about bringing Tony in the house when he knew that Mr. Sherwood would soon come home. Tony left her quarrelling with the applicant and after he left the applicant and herself came down to the kitchen. She warned him not to do it again and he promised that he would not. She then let him out through the kitchen door and locked it. Apart from two doors which lead outside from the kitchen the house can be entered through the front door, a garage door and a door downstairs which is a sliding door opening to the pool area.

Later on she retired to her room. About half an hour to an hour after she had retired she heard a knocking on her window. On opening it she saw the Security Guard who spoke with her. She went outside and found the guard there with some policemen and a police vehicle. She went with them to the back of the premises. The sliding door was open. In the living room she saw Mr. Sherwood's body lying on its back on the carpet. He appeared to her to be dead. His hands were tied in front of him on his belly with a piece of electric cord. A towel was wrapped half way around his head. The sliding door is normally kept locked. She had not checked it before retiring that night. She had expected Mr. Sherwood home that night. The electric cord which bound Mr. Sherwood's hand was black and white. She had seen this same cord before under the applicant's mattress in his room. She had missed some soap which she had recently bought and went checking in his room as she suspected that he might have taken them. Apart from this black and white electric cord under the mattress there was a piece of white extension cord. A few minutes after she saw Mr. Sherwood tied in the manner she described with the black and white electric cord she went into the applicant's room and looked under the mattress. The black and white cord was missing but the white extension cord was still there.

On receiving a message at the Constant Spring Police Station Detective Morgan arrived at the Sherwood's home and saw the body of Mr. Sherwood in the manner as previously described. Along with other policemen he went to Norbrook Hill to a shack occupied by the applicant. He found the applicant there along with Tony and a young lady and he took them to the Constant Spring Police Station. He took possession of a knife which the applicant said belonged to him. He was instructed to search the applicant, which he did. He found on the applicant, cash \$742.00, one Canadian \$5 bill, a U.S. \$20 note, a U.S. Travellers Cheque and an Alico Health card in the name of Kenneth Sherwood as well as two sets of keys.

He cautioned the applicant and asked him where he had got these articles. The applicant said: "A out a mi boss pocket me get dem when mi did hold him up". The Travellers Cheque was made out to Restaurants Associates Limited of which Mr. Sherwood was Managing Director. It was an expired Travellers Cheque.

Dr. Royston Clifford, the Government Pathologist, examined the body of Mr. Sherwood and found the cause of death to be asphyxia, that is compression to the neck due to ligature strangulation which caused the blocking of the air to the lungs and other vital organs. There was a 2½" by 2" contusion to the left frontal scalp. The deceased had bruises on both lips and these bruises extended to the inside of the mouth. There were small fractures of the first and second premolars of the right mandible with slight bleeding of the gums. The deceased also had a slashing type incised wound described as a defensive wound extending against the palmar aspect of the third and fourth fingers of the left hand. This is a sort of wound which is expected if he was attempting to defend himself. There was a groove mark extending to both sides of the neck. The ligature strangulation from which death resulted could have been caused by the black and white extension cord. The knife taken at the applicant's home was shown to Dr. Clifford and he gave evidence that this could have caused the defensive wound found on the hand of the deceased.

Mrs. Yvonne Cruickshank, the Government Analyst, gave evidence of the deceased having blood type AB which is the rarest of blood types. This type is had by about 4% of the Jamaican population. She also examined the knife which was taken from the deceased's home and found blood on it of type AB as well.

Detective Sergeant Cornwall Ford otherwise called 'Bigga Ford' drove the car which took the applicant from the house at Norbrook Hill to the Constant Spring Police Station. He gave evidence that in the car the applicant said to him: "Mister Bigga Ford, mi neva mean fi kill mi boss". In this regard his evidence is supported by Deputy Superintendent Daley who was also in the car. Det. Sgt. Ford also

supported Det. Morgan's evidence as to the items taken from the pocket of the applicant and the fact that he said on being cautioned that it was out of his boss pockets he had taken the items when he hold him up. Det. Insp. Noel Asphall gave evidence that he too went to the shack at Norbrook Hill at about 4 o'clock that morning and he supported the evidence of what took place there and that the applicant said when asked about the items taken from him: "A out a mi boss pocket me get dem when mi did hold him up". The keys taken from the applicant fitted the driver's door and trunk of the deceased's Toyota motor car. There was no evidence of signs of a break-in at the Sherwood's home.

The gravamen of the complaint of counsel for the applicant relates to the direction given by the learned trial judge with respect to intent and his failure, it is urged, to relate his direction on the law to the evidence in the case. The applicant had given an unsworn statement at the end in which he denied any participation in the murder of Mr. Sherwood stating that he was not there at all. He ended his statement by saying: "My lord, I don't have any intention of doing that to him, my lord, because him so good to me, my lord". In his unsworn statement he also said: "I never have no intention of doing Mr. Sherwood nothing because him so good to me". Asked by the trial judge to repeat he said: "I nuh have no intention of doing Mr. Sherwood anything because him so good to me, and sometimes, my lord, him give me a extra money to mek me feel good, my lord".

The learned trial judge directed the jury specifically on the intent necessary to convict for the offence of murder. He said:

"The offence of murder is committed when one 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 an act which was done by accident, an accidental killing is no offence at all.

I will venture to tell you, Mr. Foreman and members of the jury, that whatever view you take of this case, one thing that you can be certain of is this, that Mr. Sherwood's

"killing was no accident, that was not an accidental killing. When we talk about accident we are talking about circumstances where a person is doing something legitimate, something lawful and out of that lawful act something unfortunate occur.

In order to amount to murder the killing must be 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."

He said further:

"If you believe all of the circumstances and evidence which the prosecution has called in order to prove its case and you believe that this accused man made this statement, 'I didn't mean to kill mi boss', and you are prepared to interpret that statement as meaning that he is confessing that he killed Mr. Sherwood but saying he did not mean to kill him, and if you believe the statement; if you believe first of all the evidence that those exhibits were taken from the possession of this accused man and that he explained that he got them when he held Mr. Sherwood, if you believe all of that, then that would be evidence on the basis on which you could safely say that it is this accused man who killed Mr. Sherwood."

He further continued:

"Fourthly, the prosecution must prove not only that it was this accused man who killed Mr. Sherwood but at the time that he killed Mr. Sherwood he intended either to kill him or to cause him really serious bodily injury.

Now, Mr. Foreman and members of the jury, as intelligent people you must appreciate that this question of intention is not something that is capable of positive proof. The only practical way of proving a person's intention at any given time is to infer from words used, if any words are used by the person at all, or from his conduct you find - that is if you find the accused did anything at all - what his intention must have been at that time."

"In the absence of evidence to the contrary, you are entitled to regard this accused man as an ordinary responsible person, capable of reasoning.

In order to discover his intention, therefore, in the absence of an expressed intention, you will look at what the accused man is alleged to have done and then you ask the question, whether as an ordinary responsible person, that as a reasonable man, this accused man must have known that either death or really serious injury would result from putting this cord around a man's neck and pulling it so tightly that he makes it impossible for that person to breathe so that oxygen, which is so vital for life, is cut off from the lungs and other parts - vital parts of the body.

You remember Dr. Clifford's evidence. Dr. Clifford said that that was the cause of death. A ligature was put around the deceased's neck and compression was applied. It was pulled so tightly that it cut off his supply of oxygen. The man couldn't breathe and so he died.

Now, if you find that anybody who does that to another man must have known that if he did that he was either going to kill or going to cause the man really serious injury, you may infer that the person who did that act intended the result of his act. And if you find that the person who did that act must have had that intention in his mind at that time, then, that would be proof of intention, required to establish this charge of murder."

Further he continued:

"If you believe that it is this accused man who killed Mr. Sherwood, then you have to consider this question of intention. Did he intend, really, to kill him or to cause him really serious bodily injury? Because this accused man has made statements which you can interpret as meaning that he didn't intend to kill him. He killed him but he didn't intend to kill him because he was so good to him."

"Now, Mr. Foreman and members of the jury, the Prosecution is saying, "How could this accused man have put this electrical cord or lead around Mr. Sherwood's neck and draw it so tightly that he killed Mr. Sherwood? Cut off his supply of oxygen so that Mr. Sherwood could not breathe? How could he have done that and turn around and say, 'I didn't mean to kill him'."

The Prosecution is saying, 'How could he be heard to say that I didn't mean to kill him or to cause him really serious bodily injury?'

The Prosecution is saying it is ridiculous for this accused man to have done what he did and turn around and say afterwards, 'I didn't mean to kill him'.

The accused has made at least one statement which is capable of the interpretation, 'I killed him but I really didn't mean to kill him'.

So you ask yourselves the question, 'Do we find as a fact that this accused man took this length of electric cord and used it as a ligature around Mr. Sherwood's neck, pulled it so tightly that it caused asphyxia from which Mr. Sherwood died? Do we find that this accused man did that?' If he did that, if you say, 'Yes, we find that he did that,' then, you ask yourselves, 'What would he, as a reasonable man, have had in his mind at that time? What did he have in his mind at the time?' If you find that, as a reasonable man, he must have known that the likely result of his act would be that Mr. Sherwood was either going to die or suffer really serious bodily injury, you may infer that this was the intention that he had in mind at the time. You decide if you find that this accused man did anything at all, that is the first thing, and if you find that he did something, you consider this question of intention, as I have suggested you should".

We find no merit in the submission that the directions of the trial judge on the law was not sufficiently related to the evidence in the case.

Learned Queen's Counsel for the applicant has criticized the summing-up of the trial judge with regard to intention on this basis:

- (i) that a careful direction on intention was required;
- (ii) that the applicant said he did not intend to kill the deceased;
- (iii) that the standard of what a reasonable man would intend was an objective test and that the proper test must be a subjective one i.e. the specific intention of the applicant.
- (iv) that the primary intention of the applicant would have been to silence rather than to cause serious bodily harm.

As far as the evidence is concerned the deceased suffered injuries resulting in his death which indicated a vicious attack on his person. Such an attack, a blow to his head, a knife cut which indicated that the deceased attempted to defend himself against attack and strangulation would negate any suggestion, not put forward by the applicant at the trial, that he intended to silence rather than to kill or cause serious bodily harm to the deceased. The trial judge reminded the jury that there was evidence that the applicant said he did not intend to kill the deceased. This the jury had to consider in the light of all the other evidence and the judge's direction on intent. It leaves therefore the question of the test, whether subjective or objective which the learned trial judge directed the jury to apply.

It is clear that what the learned trial judge told the jury was that it was the applicant's intention which had to be considered and since there is no evidence to the contrary it is to be considered in the context of the applicant as a reasonable man. It is not the hypothetical reasonable man whose intention it was being sought to discover on the direction of the learned trial judge. It is the particular applicant whose intention must be determined. It had to be discovered from what he said and what he did and in the absence of any peculiar features relating to him, he is expected to act as a reasonable person would.

The question of whether a subjective or an objective test is to be applied in establishing the intent required for conviction on a charge of murder has received consideration both in England and in Jamaica. See Director of Public Prosecutions v. Smith [1960] 3 All E.R. p. 161; Hyam v. Director of Public Prosecutions [1974] 2 All E.R. p. 41; R. v. Cunningham [1981] 2 All E.R. p. 863. The effect of these cases in England and the statutory abolition of constructive malice is that "malice aforethought" is:

- (i) an intention to kill any person;
- (ii) an intention to do an act knowing it is highly probable (or perhaps probable) that it will kill any person;
- (iii) an intention to cause grievous bodily harm to any person;
- (iv) an intention to do an act knowing that it is highly probable (or perhaps probable) that it will cause grievous bodily harm to any person. [See Smith and Hogan, Criminal Law, 5th Edition, pages 291-292].

In our jurisdiction the position was clearly examined in R. v. Loxley Griffiths, Supreme Court Criminal Appeal No. 31/80, in a judgment delivered on the 26th October 1981 in which the authorities were examined in relation to a summing-up of Ross J. which was challenged in the Court of Appeal on the very point with which we are now concerned. Rowe J.A. in delivering the judgment of the Court of Appeal said:

"Ross J. was careful to stress that if as an ordinary responsible person, the applicant must have known that death or serious bodily harm would result from his actions, the jury could infer that he intended such harm. The learned trial judge was not concerned with the legal abstraction 'the reasonable man' as an entity separate from the applicant and he did not direct the jury to find what that abstraction would have intended. Neither did he go on to tell the jury that if the reasonable man would have had the specific intent, then they must on that basis alone say that that was the intention of the applicant".

The summing-up of Ross J. was in the same terms as the summing-up given by the learned trial judge in this case. A summing-up which directly requires the jury to discover the intent of the person charged and which in the absence of evidence to the contrary imposes on him the standard of the reasonable person cannot be faulted on the basis that it applies an objective and not a subjective test.

In the result therefore the ground of appeal fails. The application is treated as the hearing of the appeal which is dismissed. The conviction is affirmed.

CLASSIFICATION

The evidence discloses that there was no break-in at the Sherwood's home. Neither do we find the evidence of items found on the applicant sufficient to establish that the murder was committed in the course or furtherance of robbery. In accordance with the provisions of the Offences against the Person (Amendment) Act 1992 we classify the murder as non-capital. The sentence imposed therefore is one of imprisonment for life. The applicant must serve a period of twenty (20) years in prison before being eligible for parole.

Cases referred to

- ① DPP v Smith (1960) 2 All ER 161
- ② Hyam v DPP (1974) 2 All ER 141
- ③ R v Cunningham (1981) 2 All ER 863
- ④ R v Loxley Griffiths SC Criminal Appeal 3/80 - 2010/81