JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 165/90

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

REGINA

VS.

STEVE NICHOLAS

Michael Lorne for Applicant

Hugh Wildman for Crown

January 21 and February 3, 1992

ROWE P.

On the night of June 28, 1988 Trevor Cleary, 21 years of age, was shot and killed along Crescent Road, St. Andrew. At a trial on October 29, 1990 before Smith J. and a jury the applicant who was found to be 22 years and 11 months old was convicted of the murder of Trevor Cleary and the sentence of death was passed upon him.

Although a warrant was issued against the applicant in June 1988 he was not arrested until July 17, 1989. That accounted for the delay between the death and the trial.

Garfield Cleary, the brother of the deceased was the only eye-witness called by the Crown. He testified that he was at his way-side shop at 11:30 p.m. on June 28, 1988 when Trevor Cleary came on the scene and they had a conversation. Soon after the applicant known to him as Sinners and another man known as Bootie approached. They enquired of the deceased for the where-abouts of his friend. Trevor Cleary said he had no friend. Just

then the applicant and Bootie each drew a gun. The witness in alarm called out that Trevor Cleary was his brother, held on to Trevor and walked with him some distance from the men. The applicant called Trevor Cleary saying he wanted to talk to Cleary but when Trevor Cleary went to where the applicant and Bootie were they attacked him. Both men began to kick Trevor Cleary. Bootie searched him and removed a knife and wallet from his pockets, then they began to beat him in his head with the butts of their guns.

This done Bootie "kind of eased off" and the applicant pinned Trevor Cleary against a light post and the applicant standing at a distance of about 4½ feet from Trevor Cleary, pointed his gun at Trevor Cleary and fired a shot which entered his right cheek just above the right cheek bone, went through the bones of the face and lodged in the left side of the back of the neck. There were powder burns around the wound which indicated that the muzzle of the gun was held three to five inches from the face when the bullet was discharged. In the opinion of the doctor a person standing 3 feet away from another with outstretched arm could have fired the shot. A large calibre copper jacketed lead bullet was recovered by Dr. Clifford who performed the postmortem examination.

The applicant gave sworn evidence in his defence. He did not call any witness.

On his version of the events of June 28, 1988, he and Bootie were together on Crescent Road when he saw the deceased whom he addressed in this manner:

> "Trevor Cleary, you know that mi baby-mother soon have baby and I not working or doing anything, I would love yuh put down mi name on the work paper."

It appears that a contract for side-walk repairs had been awarded by a government agency and that Trevor Cleary had got a piece of the action. According to Garfield Cleary, his brother had no control over the work but had been employed to do a specific

job. The applicant and Bootie seemed to have had a different impression of the role of Trevor Cleary in respect of that contract.

Trevor Cleary replied to the applicant's entreaty by saying that he would talk to the manager for the work. Bootie seemed to have made a similar request and in the words of the applicant:

> "Him ask him about the work and him don't wan' talk seh him going to set down him name on the list. That is why him start licking him."

After Bootie started hitting the deceased, the applicant said he joined in and gave blows to the deceased also.

The applicant accounted for possession of a firearm by saying that when he and Bootie were approaching the deceased, Bootie handed to him an old rusty gun. He held this gun in his hand and used it to hit the deceased. To use his own words:

> "Meanwhile, I hold the handle ah the firearm and lick him with it, meanwhile licking him and licking him, I hear ah explosion."

The applicant said he did not know that the gun could be fired as it was old and rusty; he did not know that it was loaded and he did not ask any questions of Bootie about the gun.

Mr. Lorne asked the Court to consider four grounds of appeal. Firstly, he said that the trial judge erred in law by withdrawing from the jury's consideration the issue of provocation which arose from the defence. In support thereof he argued that the refusal by the deceased to put the applicant's name on the pay-roll could have infuriated the applicant who was unemployed and would be a father in the near future. He said that both the applicant and Bootie were desperate and could have concluded that their rough treatment could persuade the deceased to accommodate their demands. In fairness to Mr. Lorne he spent little time on this quite hopeless ground. If what Trevor Cleary said to this applicant could amount to an act of provocation no prospective employer would have any choice in relation to his workforce.

On behalf of the applicant it was urged that the trial judge only told the jury about the possible verdicts of murder and manslaughter and did not direct them in relation to an acquittal. Counsel's attention was drawn to the direction given at page 93 of the Record as the final direction in the case where he said:

> "I go on to say, too, that if you find that although the act was unlawful - hitting the man with the gun - but find that no sober or reasonable person would have realised that by doing so, they were putting the deceased at some risk of harm or danger, then it would be open to you to say that the accused is not guilty of any offence."

Indeed the trial judge had given a similar direction earlier in his summing-up but the significance of the above passage is that it contained the very last words the jury heard before their retirement.

Ground 3 complained that the judge erred in advising the jury that if they found that the applicant caused the death of the deceased by accident they were to bring in a verdict of manslaughter. The term "accident" was used throughout the trial as the opposite of "a voluntary and deliberate act" and the trial judge was at pains to explain what he meant by accident in that sense. This will be seen more clearly when we come to consider ground 4. We hold that it was not necessary for the trial judge to give any directions on degrees of negligence as would be appropriate in a charge for manslaughter arising in a running down case.

We turn now to ground 4 in which the complaint was that in applying the objective test the trial judge failed to explain to the jury that it is the state of mind of the accused which is important and not that of the abstract reasonable man.

At page 76 of the Record when the trial judge was explaining the several facets of the offence of murder he gave explicit directions on how a jury should approach the issue of intention and in so doing he expressly told them that it was the intention of the accused himself which had to be proved by the prosecution. He said:

> "If, on the Prosecution's case, you accept Garfield Cleary, that the accused pointed a gun, and you remember he pointed out the distance at about one and a half yard away from the deceased, he pointed the gun at the deceased and he heard an explosion and he, the deceased fell, now, it's for you to say what was the person's intention? A person who pointed a gun at somebody, then you heard an explosion, what was his intention, but you must remember the real intention, the actual intention of the man that you are looking at and although the accused is, or let me put it this way, in the absence of evidence to the contrary, then the accused is deemed to be a reasonable person, that is, a person capable of reasoning.
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> You have, however, to look at his actual intention and by so doing, you have to consider what the accused actually said, if you find that he said anything. If you find that, as a fact, he said he didn't know it was really - you remember he said he didn't know it was an old gun, he didn't know. Then you remember, too, that is if you accept that, it will be showing that he did not intend to kill him. But you remember what the police officer said he said? 'It is 'Bootie' who shot the man'."

When, however, the judge came to deal with the alternative issue of manslaughter he several times directed the jury that the so-called objective test should be applied in the circumstances of this case. It is the direction at pages 78 and 79 of which complaint is made. There the trial judge said:

> "So, Mr. Foreman and members, a killing - let me tell you this, a killing without intention to kill or cause grievous bodily harm, is manslaughter, if it is the result of the accused's unlawful act,

"where the unlawful act is one such as an assault, which all sober and reasonable people would inevitably realise, must subject the victim to the risk of some harm resulting therefrom, albeit not serious harm.

So, where the act which the person is charged, or where the act which the person is engaged in, is unlawful, and any or all sober and reasonable persons would realise that the victim would be subjected to harm; would be at some risk, then it is open to you, if you so find, you are sure that the - to find, I should say, the accused guilty of manslaughter.

The test here you will have to apply Mr. Foreman and members, would be, 'Would all sober and reasonable people recognize that the act was dangerous. Now, you would have to look at the evidence here, if you accept the accused's evidence now that he did not deliberately pull the trigger, but if you accept his evidence that he was, I think he used the word jucking; that he was hitting the deceased with the firearm, then clearly, Mr. Foreman and members, that would be an unlawful act. Using a firearm to hit the deceased would be an unlawful act.

So you would have to go now and ask yourselves, 'would any reasonable person; would any sober person not realise that it was dangerous?' Firearm given to him, he asked no questions as to whether it is loaded or not, although you remember he said he thought it was not loaded and could not fire because it was old and rusty, and Mr. Foreman and members, it would seem to me that .. well, remember you are the judges of the fact, but if you accept the accused's evidence, in other words, if you reject Garfield Cleary's evidence that it was deliberate, that he pointed the gun and fired, but you accept the accused's evidence that he was hitting this man with this gun, and you find as a fact that he did not check to find whether it was loaded, or not, then in my own view, Mr. Foreman and members, it would be open to you to say that he is guilty of manslaughter.

But it is entirely for you, if you find in your collective wisdom that the accused - that no reasonable person would have realised that he was exposing the deceased

> "to danger, or to some risk, then the accused would be not guilty of anything. So it is for you Mr. Foreman and members, to say what you make of it and really, it seems to me, as Mrs. McIntosh-Bryce said, the real issue here is, was the killing deliberate, or was it accidental?"

In our view this passage is unexceptionable. It follows and applies the principles enunciated by the House of Lords in D.P.P. v. Newbury; D.P.P. v. Jones [1976] 62 Cr. App. R. 291, which approved the decision in R. v. Larkin [1943] 29 Cr. App. R. 18 and the dictum of Humphreys J. at p. 23 that:

> " Perhaps it is as well once more to state the proposition of law which has been stated by judges for generations and, so far as we are aware, never disputed or doubted. If a person is engaged in doing a lawful act, and in the course of doing that lawful act behaves so negligently as to cause the death of some other person, then it is for the jury to say, upon a consideration of the whole of the facts of the case, whether the negligence proved against the accused person amounts to manslaughter, and it is the duty of the presiding judge to tell them that it will not amount to manslaughter unless the negligence is of a very high degree. ... Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter."

The House of Lords also approved of the dictum of Edmund Davies J in R. v. Church [1966] 1 Q.B. 59 at p. 70, when he said:

> " Stressing that we are here leaving entirely out of account those ingredients of homicide which might justify a verdict of manslaughter on the grounds of (a) criminal negligence, or (b) provocation or (c) diminished responsibility, the conclusion of this court is that an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter

> "verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

In referring to the test propounded by Edmund Davies J. above, Lord Salmon in D.P.P. v. Newbury; D.P.P v. Jones, (supra), said at p. 296:

> "The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recongise its danger."

In our view therefore there is no merit in ground 4.

We have demonstrated that the directions on intention both as they affect murder and manslaughter were unexceptionable. There was evidence from Garfield Cleary that the applicant pointed the gun at the deceased when the parties were some 4½ feet apart and then fired it. By their verdict the jury obviously accepted Garfield Cleary as a witness of truth.

The application for leave to appeal is refused.