C.A. CRIMINAL LAW – Conviction for Manslaughter on charge of murder whether directions inadequate – whether imbalance in summing up in favour of prosecution – Re: Conviction – Appeal dismissed – conviction affirmed Re Sentence – Reduced from 7 (seven) years h/e to (5) five years h/e

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 73/86

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

REGINA

VS.

TREVOR REECE

Messrs. H. G. Edwards, Q.C., N.O. Edwards, Q.C.,
W. K. Chin See, Q.C. and Earl DeLisser for appellant

Miss Heather Dawn Hylton for the Crown

February 19 and 20, November 18, 1987

KERR J.A.:

The hearing of this application for leave to appeal against conviction and sentence for Manslaughter in the Clarendon Circuit Court before Downer J. and a jury on 24th July, 1986 was treated as the appeal. The appeal against conviction was dismissed and the conviction affirmed. The appeal against sentence was allowed and the sentence of seven years imprisonment with hard labour varied to five years.

The appellant who was a police officer, had been indicted for the murder of Horace Carnegie. However, the jury acquitted the appellant of murder but unanimously found him guilty of manslaughter, that alternative verdict having been left to them by the learned trial judge in the event that the intent to kill or inflict grievous bodily harm had not been proved.

On January 15, 1985, public discontent at the recent increase in the price of petrol manifested itself in demonstrations which included road blocks on certain highways. One such road block was at or near the bridge at Paisley Avenue, Clarendon on the main road leading from May Pen

to Kingston. The road block was of wood, stones, parts of old motor cars and burning tyres, and at the scene was a crowd of curious unlookers or sympathisers. About 11:00 a.m., a motor van going towards Kingston and driven by one Levi Fender arrived and stopped near the road block. The appellant and Constable Owen Grant were passengers in that van; they were not in uniform. The appellant was in khaki and on his head was a yellow helmet and he was armed with a M-16 rifle.

The evidence of the four prosecution witnesses, Donovan Jackson, Ezra Palmer, Mayon Myles and Dalton Morgan was substantially the same. It was to the effect that after the appellant alighted from the van he fired a shot in the air and demanded that the road block be removed. Three men from the crowd came forward, and either started or were about to remove the road block, when the deceased shouted to them, advising not to remove the road block. Then followed a sharp verbal exchange between appellant and deceased. According to Jackson, the first of the eye-witnesses, the appellant said: "You a play hero, hero die young, A bet a mek you play three." The appellant went up to the deceased and using the rifle as a club hit at deceased several times. The deceased used his hands and "eased off" the rifle. The magazine fell from the rifle. The deceased then moved off and the appellant ordered him to stop and then he heard the explosion. The deceased took three steps backwards and fell on his bottom. He cried out to the crowd: "Oonu go mek the man kill me". The appellant called to Fender who brought up the van. His request for help to put the deceased in the van was reluctantly answered by one man. The deceased was placed in the van and driven off. He died shortly after. Doctor Hugh Allison who performed the post-mortem on January 17, said there was a bullet entry wound on the lateral aspect of the upper right thigh and an exit wound below the entry. In its passage, the bullet severed the femoral artery and vein and caused an abrasion to the scrotal sac. In his opinion, death was due to massive haemorrhage due to the laceration of these blood vessels. The firearm in his view was pointed at an angle of 45° when it was discharged. There were powder marks indicating that the firing was at close range about 1 - 2 feet. He also thought that a prompt application of a tourniquet would have stopped

the bleeding and death would not have occurred.

Self-defence was specifically raised by cross-examination of the witnesses for the prosecution, and in the sworn testimony from the appellant and his witnesses, Constable Owen Grant and Fender, the driver of the van. Suggestions that at the time the deceased was shot, he was armed with a knife and was attacking the appellant were emphatically denied by all four witnesses. Jackson said that after the shooting the appellant showed him a knife just before deceased was placed in the van and his response when appellant asked if he had seen the knife, was: "Go away, you are a liar". Jackson said Carnegie and himself were members of the Jamaica Defence Force. Cross-examination suggesting variations on the words used by appellant to the deceased seeking thereby a more innocuous interpretation were in the main ineffective.

The appellant gave evidence to the effect that he was attached to the Special Operations Division of the Force and on that day he was on special duty with Constable Grant and in the van driven by Fender. It stopped by the road block, where there was a noisy crowd of over a hundred persons, some of whom were "fuelling" the fire at the road block with old tyres. He asked for assistance to remove the road block and three men came forward. Persons in the crowd shouted: "Mash up the van if they try to pass", and so he fired a shot in the air. As the three men were about to clear the road block, he heard a voice (which turned out to be the deceased), obscenely shouting that they should not move the road block. The deceased came forward and he said that he should "be a hero and come help move the road block". The deceased pointed in his face and cursed bad words. He used the rifle to brace him back into the crowd. In so doing the magazine fell from the rifle and was kicked away. The deceased then flashed out a ratchet knife and said: "You can't shoot me with empty gun", and then slashed at him. He stepped back, and shouted: "Stop, drop the knife", but the deceased kept coming at him and he fired at his legs to stop him.

The deceased was shot and he fell to the ground; he picked up the knife which had fallen to the ground and showed it to the crowd. He then closed and placed it in his pocket. The deceased was placed in the van and driven to the May Pen Hospital. On the way, three or four road blocks had to be removed. As no doctor was at the hospital, the deceased was taken to the surgery of Doctor Allison. By then, the deceased was dead. He made a report to Detective Sergeant Cowan at the May Pen Police Station and handed over the ratchet knife to him. In cross-examination, he said the crowd was hostile, and that about twenty persons were in a semi-circle close to him. The deceased took the knife from his pocket. It was on the way to the hospital that he showed the knife to Fender and Constable Grant. He had shown the knife to the crowd because they were pretending it was not there and had not seen it and kept saying: "You shoot the man". To the Court, he said that he did not declare his identity, because he had been working and living in the immediate area for almost a year.

Constable Owen Grant corroborated the appellant as to the mood of the crowd, which he puts at about one hundred and fifty persons, and of words and actions of the appellant and deceased. He said he was shown the ratchet knife on the way to the station. He did not recall the appellant showing the knife to the crowd. Fender, the driver, also gave corroborative evidence of the appellant firing a shot in the air; of the deceased telling the three men not to remove the road block; and the sequence of the action between the appellant and the deceased. He said the deceased pulled the knife from his trousers pocket, flashed it open, and slashed at the appellant about three times, when he heard the shot. After the deceased fell, someone shouted: "You kill the man .... we gwine send you go prison". He saw when Constable Reece held up the knife to the crowd.

The many prolix and earnestly argued grounds of appeal were all complaints against the summing-up of the learned trial judge. Understandably so, as the important contested issues were clear cut and eminently matters for the jury. The complaints fall under two main categories:

(1) That there were inadequate directions on certain specific issues.

(2) That there was general imbalance in the summing-up in favour of the prosecution.

In relation to (1) above, Mr. Chin See drew attention to certain passages in the summing-up dealing with the following:

First, the significance of the position of the wound as described by the doctor, which in his opinion, supported the case for the defence that the appellant and deceased were facing each other when the shot was fired, and which contradicted the evidence of the prosecution witnesses that the deceased's back was then turned to the appellant.

Now, at the time the shot was fired, according to all the prosecution witnesses, the deceased was moving. Jackson gave demonstrations to the jury and in cross-examination said: "He had his side. He was at an angle. ...... I cannot say where he was shot". Palmer also gave demonstrations, and in cross-examination said: "I don't know directly where the shot ketch him - but him get shot and mi see when him hold up him foot", and later: "No him never turn him full back - him turn sideway". The other two eye-witnesses, Myles and Morgan, gave evidence to the same effect. There, therefore, was no real conflict between their evidence and the position of the wounds as described by the doctor. Accordingly, there was no evidential basis for this complaint.

Secondly, that having regard to the evidence, the trial judge ought not to have left to the jury the determination of whether or not a knife was present at the scene in the manner he did, as his directions could create confusion in the minds of the jury as to whether the issue was: "Was there a knife on the scene", or "Was the knife in the hands of the deceased".

In that regard he referred to the following amongst other passages at page 8:

> "So if you ask how do they go about this, you would have to accept the Crown's evidence, that is, all the witnesses who came up here for the Crown and told you that they saw no knife, they saw no slashing. If

> "you really accept that to the extent that you feel sure, then it would have knocked out the Defence and that is the way the Crown would have rebutted, as lawyers say, the defence of self-defence, because once you have reasonable doubts about whether in fact Carnegie used the knife or if you find that Carnegie did use the knife, then in fact you have to acquit the accused."

On page 12:

> "Now, let us take the knife, and it is a central feature of the case. Now, the witness Jackson, that is the soldier, he gave evidence in this court that in fact he saw no knife in Carnegie's hand that day, and that's the evidence in the case."

There really is no merit on this hair-splitting submission. The learned trial judge could do no more than advert the attention of the jury to the evidence on this issue and leave it to their determination. There were two questions on this issue - a preliminary one: "Was there a knife on the scene?" and the pivotal one: "If there was, was it in the hand of the deceased at the material time?" These questions were for the jury and were properly left to them by the learned trial judge.

Thirdly, the directions on the inconsistencies in the evidence of the witness Jackson were inadequate.

Now in the grounds of appeal, this witness was styled, "The Chief Crown witness". Apart from being the first eye-witness called by the prosecution, there seems no other basis for conferring on him that title. He was but one of four eye-witnesses. The inconsistency was to the effect that previously in his statement to the police, he had said he knew the deceased, Carnegie was the owner of a "ratchet" knife; at the trial, he denied describing Carnegie's knife as a "ratchet" knife or that he had seen appellant take the ratchet knife from the ground. Detective Sergeant Cowan gave evidence tending to prove the inconsistencies. In our view, the existence of the inconsistencies was an issue for the jury. The learned trial judge left that issue to them and gave them appropriate directions. In any event, there was evidence on this point from the other eye-witnesses and their credibility has not been directly challenged. We find no merit in this complaint.

Finally, that the learned trial judge erred in telling the jury that the falling of the rifle was not "terribly important". The importance of this evidence, argued Mr. Chin See, lay in the fact that it supported the appellant's evidence that it was after the magazine fell that the deceased said: "You can't shoot with empty gun", and attacked the appellant.

But the force of the evidence of the appellant on this point was considerably blunted by the opinion of Jackson to the effect that the deceased Carnegie was a soldier of experience with weapons like a M-16 and would have known that despite the falling of the magazine there would still be a cartridge in the chamber. This evidence the learned trial judge brought to the attention of the jury in the following passage at p. 17:

> "He told you about in fact he fired the shot in the air first. I don't think that it is terribly important that a magazine fell; and you got evidence from him that he has been accustomed to using firearms. It is an automatic weapon. That is Jackson and he also told you that Carnegie was in the Defence Force for some time and he was accustomed to using automatic weapon too; and he gave you this bit of information, based on his use of firearms, about the bullet, that it would have a bullet inside once it remained cocked. It doesn't really matter terribly, because nobody is denying he was shot. The really important question is how. Was he shot deliberately and intentionally, or just to cause some injury, or acting under conditions of lawful self-defence?"

There was no challenge to the opinion expressed by Jackson. It is against this background that the learned trial judge so described and commented on the evidence relating to the falling of the magazine.

These comments clearly do not merit the importance Mr. Chin See now seeks to place on them and could have no real bearing on the jury's consideration of the important issues. In support of his general complaint that there was such an imbalance in favour of the prosecution in the learned trial judge's summing-up as would amount to an injustice to the appellant, Mr. Chin See referred to the following passages as illustrative: - the learned trial judge said at p. 4:

> "For manslaughter it is a lesser intent, that is to cause some injury, but not in fact to cause death or serious bodily harm, so you will have to decide if you are to return a verdict of guilty, in this case, whether in fact, when the accused man shot the deceased, that is when Trevor Reece shot Horace Carnegie, bearing in mind that he used that weapon of ferocious power, a M-16, whether he intended to kill or cause serious bodily harm, and you will have to infer that from the circumstances of the case.
>
> Now, if you decide that this is a weapon of ferocious power, that he shot him at very close quarters, albeit he shot him in the region of his thigh, and with that awful power, then you can infer that he intended to cause either death or serious injury.

Learned Counsel submitted that therein the learned trial judge over-stressed the nature of the weapon and its ferocity. Having regard to the nature of the defence, the learned trial judge should have left the jury to decide whether the applicant felt that he was in imminent danger requiring instant reaction in which circumstances he could not weigh to a nicetv the exact measure of his necessary defensive action. For this Mr. Chin See referred to R. v. Shannon (1980) 71 Cr. App. R. at page 195, where Lord Morris' statement on the concept of self-defence in Palmer v. R. (1971) A.C. 831-2, was quoted with evident approval.

Now in this passage the learned trial judge was clearly dealing with the specific intent in murder and that proof of this mental element is by inference. In that regard he continued thus at p. 5:

> "On the other hand you can say well, the fact that he pointed it at an angle - that is the doctor's opinion - and it was not above his waist, that what he really intended to do was to cause some injury, but not serious bodily harm or death. Then you would say that is manslaughter and bearing in mind that because in fact you must always give the accused the benefit of your doubts, if you are in doubt as to whether he intended to cause death or serious bodily harm or some lesser sort of injury, then you give him the benefit of the doubt and go to manslaughter."

and later at p. 5:

> "But I was really illustrating this murder or manslaughter at this point to illustrate to you that you have to draw inferences in this case other than the direct facts and since inferences are as much facts as direct facts, then you can only in fact draw inferences in favour of the Crown if you are satisfied that you feel sure about them."

The jury's verdict is indicative that they were not unduly influenced by the learned trial judge's description of the firearm and that they appreciated the alternative inferences presented by the evidence.

The learned trial judge then put the nature of the defence with lucid simplicity thus at p. 7:

> "Now remember I defined murder to you that it is the intentional killing of another without lawful excuse or justification. Now there is a justification in this case coming from the Defence. The Defence is saying we killed in self-defence; and if you find this or you are in doubt about it, then you must in fact acquit. Now what is self-defence? What the law says is this: If a person is in fear or apprehension of his life and limb because of an imminent attack, he is entitled to use such force as is necessary for his self-defence and if he kills in defending himself under those circumstances it is neither murder nor manslaughter. You see, that is why counsel for the Crown and counsel for the Defence say the knife is crucial in this case, because what the Crown is saying is that there was no knife, it's a lie. The Defence is saying there was a knife and it was used. It was used in the slashing attack and it was in the use of this slashing attack that the Defence is saying that Reece, fearing for his life and limb, used the gun to shoot Carnegie; and in fact what the Defence is saying is that the use of such necessary force is lawful self-defence."

He then reminded them of the burden which lay on the Crown "to prove that there is no self-defence .... because once you have a reasonable doubt about whether in fact Carnegie used the knife or if you find that Carnegie did use the knife, then in fact you have to acquit the accused."

In Palmer's case, the question for the Board was whether in cases of murder where an issue of self-defence was left to the jury, it was in all cases obligatory for the trial judge to direct the jury that if they found that the defendant, while intending to defend himself had used more force than was necessary in the circumstances, they should return a verdict of guilty of manslaughter. In answering the question in the negative, Lord Morris gave his excellent exposition at page 831. But his

Lordship was clearly not laying down any formula for directions on self-defence. As he said: "But everything will depend upon the particular facts and circumstances. Of these a jury can decide. .... All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence".

In the instant case having reviewed the evidence the learned trial judge said at p. 24:

> "And let me repeat it for you, that basically what the Defence, that is, the accused and the two witnesses who support him are saying, is that Carnegie had a knife in his hand that day; that instead of Carnegie backing away, walking sideways, Carnegie approached Reece in an aggressive manner and slashed at Reece and Reece acting with necessary self-defence as I defined it and I will remind you at this point that if a man is in fear of his life and limb then he can use such force as is reasonably necessary or just as is necessary for the defence of himself and if in the use of such necessary force he kills, it is neither murder nor manslaughter. What the Defence are putting forward to you is that given the circumstances of this aggressive attack by Carnegie and given the way the Defence is saying, rather look how he was shot down by his leg, this is to show you that it is in necessary self-defence and the Defence is saying, 'look at all the circumstances. Either you accept what we are saying or you must have reasonable doubts about the Crown's case'. In either case you acquit."

In our view, having regard to the nature and conduct of the defence, any reference to excessive force would be unnecessary and undesirable. The appellant's case was that the deceased was armed with a lethal weapon and was attacking him when he fired the shot in self-defence. Any reference to excessive force might have led the jury to indulge in a comparative assessment of the lethal potential of a M-16 with a knife, to the detriment of the appellant.

In our view it was prudent and proper to leave the issue in the manner the trial judge did, as a simple straight-forward issue raised by two diametrically different accounts- that of the prosecution, to the effect that the appellant shot an unarmed man and that of the defence that the deceased, armed with a knife, was attacking the appellant who shot in self-defence.

In our view, the criticisms of these directions are unmerited.

Mr. Chin See further submitted that the learned trial judge's comments on the credibility of the evidence of the witness Palmer implied that the witness was a truthful witness and this was essentially a matter for the jury. On this the learned trial judge said at p. 18:

> "... Ezra Palmer, you remember, a dramatic witness; when I say dramatic, don't believe that I am being derogatory or unfair to him. What I mean he moves a lot, he showed you. To me he was a clear witness; he spoke to you in a clear common-sense - remember he said, 'I was there'. It's for you to decide whether those assertions were genuine or they were meant to fool you."

We do not share counsel's view of these comments. They clearly left the credibility of the witness for the jury's determination.

As a final sally, Mr. Chin See submitted that the learned trial judge did not review the evidence of the defence in the same detailed manner as he did the evidence of the Crown witnesses. He dealt with the defence cursorily in two pages although the evidence was contained in about one hundred pages of transcript.

It was the style of the learned trial judge when reviewing the evidence of the prosecution witnesses in relation to any important issue to juxtapose the evidence from the defence dealing with that particular issue. In so collating the evidence, the jury were animadverted to the alternatives in inferences and conclusions that were being put to them by the defence. He reminded the jury of this, thus at p. 24:

> "Now as I say, I will be spending less time because I have been going over the Defence with you while I had been doing the Crown's case."

He then went on to summarise the evidence of the defence. In our view it would be unduly repetitive to go over the evidence again.

Notwithstanding Mr. Chin See's earnest endeavours, we are of the view that the summing-up on the whole as well as on the specific issues was fair, clear and adequate.

For these reasons the appeal against conviction was dismissed and the conviction affirmed.

In the appeal against sentence we considered that the appellant was a police officer on special duty and that his efforts to obtain assistance to clear the road block were frustrated by an unfriendly crowd, and that the deceased was foremost in dissuading the three men who were about to remove the road block from so doing. As Mr. Chin See put it, the appellant "reacted in a scenario where it cannot be gainsaid emotions were running high".

For these reasons we allowed the appeal against sentence as set above.