[2010] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 20/2008

BEFORE: THE HON. MR JUSTICE HARRISON J.A.
THE HON. MRS JUSTICE HARRIS J.A.
THE HON. MR JUSTICE MORRISON J.A.

DWIGHT FOWLER v R

Miss Jacqueline Cummings and Lloyd Sheckleford for the appellant

Dirk Harrison, Nigel Parke and Miss Keisha Prince for the Crown

28 June and 30 July 2010

HARRISON J.A.

[1] The appellant was convicted in the St. Ann Circuit Court before Paulette Williams, J., sitting with a jury, for the murder of Kemar Reid on 15 March 2006. On 28 June 2010, having heard arguments from both the defence and prosecution, we reserved our decision. We now set out our judgment.

The case for the prosecution

[2] Having regard to our decision on the outcome of the appeal, there is no need for us to set out in detail, the facts surrounding the fatal stabbing of the deceased. In proof of its case, the prosecution

depended on the evidence of three eyewitnesses who purported to have witnessed the killing.

[3] Maurice Robb, who is also known as "Little D", was on the verandah of his workplace when he saw Dwight Fowler (the appellant), 'Gypsy', 'Toto' and Dwight's brother coming from the bottom gate of the Bob Marley Foundation at Nine Miles, St. Ann. The appellant had an opened knife in his hand which was hanging from a ring around one of his fingers. Other witnesses spoke of all three men carrying knives. Sherroy Brown and the appellant had an argument and Exdoll Johnson came up to the appellant and told him to "relax". Kemar Reid ("Penkie"), who was also present, held on to Sherroy's hand and moved him away. The appellant then said, "yow 'Penkie', what you a do". Penkie did not respond and the appellant said to him, "Yuh nuh know mi nuh have fi use a gun or a knife or anything to kill you. Mi can just hold and wring off yuh neck." "Penkie" still did not respond. The appellant then moved towards "Penkie", held him "around his neck", and according to Robb he used his knife to stab "Penkie" two times "in his heart". The appellant, he said, "reversed, walked backway, back up the hill" and ran towards Eight Mile direction. "Gypsy", "Toto" and Dwight's brother also ran off. "Penkie" was assisted by Robb and he was placed in a car and taken away. Robb also testified that when Penkie held on to Sherroy, "Penkie" did not have anything in his

hands. He disagreed under cross-examination that "Penkie" was armed with a baseball bat and that "Penkie" had attacked the appellant with the baseball bat from behind. He further disagreed that "Penkie" and the appellant were wrestling for the bat and that while wrestling the appellant was kicked by Exdoll. He also disagreed with the suggestion that it was Sherroy who had a knife which he used to stab at the appellant about four times and that it was Sherroy who had stabbed and killed "Penkie" when he tried to stab at the appellant.

[4] Exdoll Johnson also testified that the appellant had told him that the "youths" were dissing him about his mother and that the appellant said to him, "Yuh nuh tell dem say mi wi kill dem". The appellant, he said, referred to "Penkie" as a fool and "Penkie" replied, "If me a fool, unoo a punk". After those words were used by "Penkie", the appellant stepped up to him swiftly, held him and stabbed him two times in his left breast, walked away and then ran off. It was suggested to Exdoll during cross-examination that "Penkie" was armed with a baseball bat but he denied the suggestion and maintained that "Penkie" and the appellant were not wrestling for any bat.

[5] Sherroy Brown, said he saw when the appellant held "Penkie" with his left hand and stabbed him two times. He denied that "Penkie" had attacked the appellant but at one stage he did see "Penkie" with a

baseball bat in his hand but he had left it by a gate. He said he did not see "Penkie" with the baseball bat when the appellant approached "Penkie". It was suggested to Sherroy that "Penkie" had attacked the appellant with a baseball bat but he said that was not true. He also disagreed with counsel that "Penkie" had hit the appellant from behind with the bat. It was further suggested to him that the appellant had spun around after he was hit and that he had struggled with "Penkie" for the bat but Sherroy said that was a lie. Sherroy denied that he had a ratchet knife which he used to stab at appellant three to four times and that the knife had caught the appellant on the wrist. He also denied that it was he who killed "Penkie".

[6] Corporal Manley Silvera, who was the investigating officer, had visited the scene where the stabbing had taken place and had seen bloodstains on the roadway. He went to Alexandria Hospital where he saw the body of the deceased. He was present he said, when a postmortem examination was done on the body. He collected statements from witnesses and obtained a warrant for the arrest of Dwight Fowler. On 24 March 2006 Fowler was arrested. When he was cautioned and was asked if he knew about the murder, the appellant said to him, "Boss, me no know what you talking bout." Corporal Silvera asked him if he was present at the scene of the stabbing and he told him that he was not there when it took place. The warrant was executed on the appellant

and he was charged with the offence of murder. When he was cautioned he told the Corporal, "Me no know what you a talk bout." In cross-examination Corporal Silvera told the court that there was no note in his statement about the accused telling him that he was not present at the incident.

[7] The post-mortem examination revealed that the deceased had sustained an incised wound on the left side of his chest, between the 7th and 8th ribs which went inward and upward, passing through the lower lobe of the lung and entering the heart. In Dr. Noel Black's opinion, death was due to shock and haemorrhage from the stab wound to the heart.

The defence

[8] The appellant made an un-sworn statement from the dock. He said that on 15 March 2006, he was standing at the Bob Marley Foundation car park when he felt something hit him across his back. He spun around and saw "Penkie" with a bat in his hand. He was about to hit him again so he held on to the bat and they started to wrestle. Exdoll came over and kicked him and Sherroy told him to let go off his friend bat. He asked them what this was all about and he was told that he was a wanted man coming from town and "mi fi dead long time." Sherroy then pulled a ratchet knife and "pushed" it at him three to four times and he was stabbed on his wrist. He then let go off the "baton" and ran because he

was outnumbered. He said he was not in possession of any knife or any form of cutting implement.

The submissions

[9] Miss Jacqueline Cummings for the appellant directed her complaint to what she perceived to have been several errors made by the learned trial judge in her summing-up to the jury. These were comprised in five (5) grounds of appeal, but having regard to our conclusion in respect of the ground dealing with self-defence (ground D), it will not be necessary to address all of the other grounds save for the issue of provocation (Ground C).

[10] Miss Cummings contends that the evidence did disclose self-defence and that even though it was not raised specifically by the defence, it did arise on the Crown's case. She argued that in the circumstances of the case the learned trial judge had a responsibility to leave self defence as an issue for the consideration of the jury. That the learned trial judge withdrew this issue from the jury is clear, for she stated at page 178 (lines 6-11):

> "The accused is saying, "I did not have a cutting instrument either. I did not do what the Crown is saying I did." So in law the issue of self defense (sic) would not arise and neither was (sic) the issue of provocation, so I will not go into them in details with you."

However, at a later stage of the summing-up to the jury, the learned judge, having had second thoughts about the defence of provocation, left that issue for the jury to consider. Extensive directions were given to the jury as to how they should consider this defence.

[11] Mr Harrison, for the Crown, argued on the other hand, that on the evidence presented, the appellant was the aggressor and that in the circumstances the learned trial judge had correctly withdrawn self-defence for consideration of the jury. He referred to and relied on the case of **Bayne Simms v Regina** SCCA No. 109/2006 delivered by this court on 24 April 2009.

The authorities

[12] The issue in this case is whether there was on the evidence any material which made it incumbent on the learned judge to leave the issue of self defence for the jury to consider. The learned trial judge based her reasons for not leaving that defence on the appellant having said, "I did not have a cutting instrument either. I did not do what the Crown is saying I did."

[13] In **R v. Lobell** [1957] Q.B. 547, Goddard C.J., in delivering the judgment of the Court said:

> ". . . If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily no doubt such evidence would be given by the defence…"

[14] And later he said:

> ". . . It is perhaps a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but none the less the onus remains on the prosecution; what it really amounts to is that if in the result the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation…"

[15] In **D.P.P. v. Leary Walker** (1974) 12 J.L.R. 1369, at page 1371 Lord Salmon in delivering the judgment of the Board, recognized and affirmed that in cases where self-defence is raised as a defence, but the evidence is such that provocation could have arisen, the trial judge had a duty to leave that issue for the jury. He nevertheless continued:

> "There might be a case in which provocation is relied upon but not self-defence although there is evidence from which self-defence could possibly be inferred. This, however, is hardly more than a theoretical possibility because if there were even only the slimmest chance of self-defence succeeding, it is difficult to imagine any reason why counsel for the accused should fail to raise it and elect to rely solely on provocation..."

[16] He however added:

> ". . . In this unlikely event, it would, no doubt, be the duty of the trial judge to leave self-defence to the jury and to give a careful direction on that defence."

[17] In **R v. Michael Bailey** S.C.C.A. No. 141/89 (unreported) dated 31 January 1991 this Court per Carey, J.A., again reiterated the duty of the trial judge and at page 3 he stated:

> "There can be no doubt that a duty which is placed on a trial judge is to leave any issue, i.e., defence which fairly arises on the facts of a case, to the jury irrespective of such issue being raised by the defence: **R. v. Porritt** 45 Cr. App. R.; **R. v. Albert Thorpe** S.C.C.A. 7/84 (unreported) dated 4th June, 1987."

[18] **R v. Albert Thorpe** S.C.C.A. No. 7/84 (unreported) delivered 4 June 1987 was a case in which the defence was an alibi, and on appeal against the conviction for murder, after a thorough examination of the cases, White, J.A., stated at page 18:

> "By their verdict it is undeniable that the jury found that the applicant was present on Quasi Road, on that morning. But the mere fact of his presence did not conclude the question that the jury had to decide: 'In what circumstances did Duhaney meet his death? The jury should have been told that if they found the applicant had lied when he said he was elsewhere, it would be inescapable that he was present on the scene. They should then go on to examine the facts disclosed by the evidence and to determine therefrom whether the appellant acted in self-defence or reacted as he did by reason of

> provocation. There was just enough evidence to raise these questions."

[19] It is therefore plainly settled on the basis of the authorities referred to above that where, on the evidence in a particular case, a particular defence arises, even though not relied on by the defence, the trial judge has a duty to leave that issue for the consideration of the jury.

Did self-defence arise on the evidence?

[20] We now come to consider whether the issue of self-defence arose on the evidence. During his evidence in chief, Sherroy Brown told the court that he did not see 'Penkie' attack the appellant. He had seen "Penkie" however at one stage with a baton in his hand at the "top gate". He said that when the appellant came down the hill to where Exdoll was, "Penkie" never brought the baton with him and that he had left it leaning "upon the wall". However, during cross-examination of Brown, it was brought out that Brown had previously given quite different evidence about the bat. This is what transpired at page 149 (lines 11 – 15) of the transcript:

> "Q. Well, did you, sir, when you were giving evidence, tell the court that 'Penkie' had a bat in his hand while he was talking to Dwight?
>
> A. By mistake, sir. If I say that, that is mistake."

And at page 151:

"Q. Did you tell the court on that occasion that when 'Penkie' got stab the bat drop on the ground?

A. Well, a mistake, sir."

In effect, what Mr. Brown is saying is that he has admitted saying on a previous occasion in court that the deceased had a bat in his hand but after he received the stab, the bat fell on the ground.

[21] Also at pages 159 – 161 a number of suggestions were put to Sherroy Brown which we have reproduced:

"Q. And I am suggesting to you, sir, that 'Penkie' attacked Dwight with the base ball bat?

A. No, sir.

Q. And he attacked him from behind.

A. What you said, sir?

Q. That he attacked Dwight with the baseball bat and he attacked him from behind. 'Penkie' did that?

A. No, sir, 'Penkie', when 'Penkie' get stab he never got nothing. 'Penkie leave the baseball bat up the top of the hill.

Q: I see. I am now suggesting that when he hit Dwight with the baseball bat, Dwight spun around and there was a struggling for the bat.

A. Repeat again, sir.

Q. There was a struggling, man, wrestling for the bat between 'Penkie' and Dwight.

A. That lie, sir.

Q. I suggest that you (sic) friend, Exdoll, kicked him.

A. That lie, sir.

Q. Suggest that you, Mr. Brown, had a knife t here that day.

A. No, sir. Don't got no knife.

Q. You had a ratchet knife there that day?

A. No, sir.

Q. And that you stabbed at Dwight three to four times with the ratchet knife.

A. That is a lie, sir.

Q. And it cut him on the wrist.

A. That is a lie, sir.

Q. And that you killed you friend.

A. That lie, sir.

Q. That is why you turn fool.

A. That lie, sir."

[22] On the defence side, the appellant spoke of feeling something hitting him across his back and that when he spun around he saw "Penkie" with a bat in his hand. He said that "Penkie" was about to hit him again so he held on to the bat and that they started to wrestle. It was

then that Exdoll came over to them and kicked him. He also said that Sherroy told him to let go of his friend's bat and that Sherroy then pulled a ratchet knife and began to push it at him. In doing this he received a cut on his wrist. He further said that because he was outnumbered he released his hold on the bat and ran off.

[23] In our view, the evidence of Sherroy Brown clearly left the issue of self-defence open for consideration by the jury. Though the appellant said that he was not in possession of any knife or any form of "cutting implement", he nevertheless described circumstances which, if believed, could indicate that he was acting in defence of himself. See **R v. Albert Thorpe** (supra) where the defence of an alibi was raised but this court was firmly of the view that based on the evidence self defence should have been left for consideration of the jury.

[24] It seems to us somewhat unusual that the judge left to the jury the issue of provocation, which has all the ingredients of self-defence in a murder case, but omitted to leave self-defence. The actus reus remains the same in both situations. The fact that self-defence arose in the evidence of the prosecution assumes greater significance as at the close of the Crown's case there was before the jury the evidence of Sherroy Brown which was at variance with the other two eye-witnesses who maintained that the deceased was never armed with the baseball bat.

The learned trial judge spoke briefly of what the appellant had said about an attack by the deceased man and this is what she had to say at page 224 (lines 21-25) of the transcript:

> "…he spoke about being attacked by 'Penkie'. He spoke about Sherroy coming over to him and telling him to let go of his friend's bat, and he said Sherroy accused him of being a wanted man from town…."

[25] The appellant had also said in his un-sworn statement that he was injured on the wrist with the knife used by Sherroy Brown during the incident but this statement was only left by the learned judge for the jury to give it such weight as they think it deserves.

[26] It is our view, that the totality of the evidence briefly summarised herein, plainly indicates that the issue of self-defence was raised. The facts presented called for a careful presentation by the Judge as well as a painstaking examination of the details in assisting the jury. In our judgment, there was a non-direction by the learned trial judge on the issue of self-defence.

Misdirection on provocation

[27] We do wish to say a few words on the issue of provocation which was raised in ground C. The learned trial Judge as we have said, left provocation based on words spoken by "Penkie" to wit: "If me a fool,

unoo a punk" for consideration by the jury. Based on the Crown's case, it was immediately after those words were spoken that the appellant moved swiftly towards "Penkie" and stabbed him. So in her final charge to the jury the learned trial judge directed the jury as follows:

> "If you believe that the words were not spoken or even if words were spoken, they did not amount to provocation, then you would have to - - and all the other ingredients are present - - you would find him guilty of murder. If, at the end of the day you are not satisfied, there are doubts, you are not sure whether you believe these witnesses, then your verdict must be not guilty of either murder or manslaughter because it is the Crown's case that needs to be satisfied."

[28] We are of the view that the learned trial judge had misdirected the jury on the defence provocation where doubt arises. There are several judgments of this court where we have emphasized that trial judges, when directing a jury on a case in which provocation arises, ought to inform them that if they are not sure as to whether the accused was provoked, they must return a verdict of 'Guilty of manslaughter'. See **R v Richards** (1967) 10 JLR 102; **R v Stewart** SCCA No. 36/95 (un-reported) delivered 20 May 1996; **R v Grant (Dave)** (1996) 54 WIR 328; **R v Lumumbo Rankine** SCCA No. 61/00 (unreported) delivered 31 May 2001; **R v Kirk Manning** SCCA No. 112/99 (un-reported) delivered 18 June 2001 and **R v Damion Thomas** SCCA No. 192/00 (un-reported) delivered 21 May 2003.

The Outcome

[29] Mr Harrison argued very strongly that in the interests of justice, the court should by virtue of section 14(1) of the Judicature (Appellate

Jurisdiction) Act apply the proviso, and dismiss the appeal. He maintained that the evidence against the appellant was strong and that a jury properly directed would still have convicted.

[30] We respectfully do not agree with Mr Harrison. We have given long and serious consideration as to the outcome of this appeal and have concluded that the conviction cannot in the circumstances be allowed to stand. The appeal is therefore allowed; the conviction quashed and sentence set aside. We have determined, however, that having regard to the evidence disclosed in the transcript, that in the interests of justice, a new trial should be ordered. This we now do. Such trial should take place in the next session of the St. Ann Circuit Court.