BARBADOS

[Unreported]

IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

Criminal Appeal No. 12 of 2002

BETWEEN:

KEMEL BLADES

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Hon. Errol DaC.Chase, The Hon. Colin A. Williams and The Hon. FrederickL.A. Waterman, Justices of Appeal.

2002: December 02, December 11 and December 13

2003: September 24

Mr. Hal Gollop inassociation with Mr. Steve Gollop for the Appellant

Mrs. DonnaBabb-Agard for the Respondent

DECISION

[1] WATERMAN,J.A.: The appellant Kemel Blades had beencharged with the murder of Jason Straughn on November 30, 1999. On that charge he was acquitted by the jurybut found guilty of manslaughter and he was sentenced to 4 years' imprisonmenton June 7, 2002.[1]

Grounds of Appeal

[2] The appellanthas appealed against his conviction on the following grounds:

"1. The conviction is unsafe and unsatisfactory given the natureof the evidence.

2. The learned trial Judge erred in that he failed and/oromitted to direct the jury on the issue of causation.

3. The learned trial Judge misdirected himself on the issue ofcausation.

4. The learned trial Judge erred in that he failed and/oromitted to direct the jury on the issue of circumstantial evidence and how thatevidence ought to be evaluated.

5. The learned trial Judge erred in that he failed and/oromitted to adequately direct the jury on how to treat the many instances ofprevious inconsistent statements occurring during the trial.

6. The learned trial Judge erred when he failed and/or omittedto adequately direct the jury how to treat the failure of the prosecution tocreate a link between the accused and the alleged murder weapon.

7. The learned trial Judge erred when he failed and/or omittedto adequately instruct the jury how to treat the self-serving statement ofDwayne Burgess.

8. The learned trial Judge erred when he failed and/or omittedto instruct the jury on the significant omission of the prosecution to call twopersons, namely Shawn Straughn and NoelJordan, who [2] had featured prominently inthe investigations, to testify at the trial.

9. The learned trial Judge erred when he failed and/or refusedto accord any or any due weight to the submissions of learned Counsel for the defence that the accused should not be called upon toanswer a case and allowed the case to go to the jury.

10. The learned trial Judge erred when he failed and/or omitted toanalyse the evidence which came before the Court forthe benefit of the jury.

11. The learned trial Judge erred when he failed and/or omitted toadequately put the defence's case.

12. The learned trial Judge erred when he disallowed the admissionof original evidence emanating from a conversation between two witnesses namelyDwayne Burgess and Ryan Reid.

13. The learned trial Judge erred when he refused to allow Counselfor the Defence to address the Court on a point oflaw.

14. The learned trial Judge erred when he failed and/or omitted tofollow the procedures for sentencing set out in the Penal System Reform Act.

15. The sentence taking all the circumstances of the case intoaccount was excessive."

TheFacts

[3] The facts are that on November 30, 1999 the St.Catherine's Social Club held its annual fair at its cricket grounds and it wasattended by many of the young people from the St. Catherine's district in St.[3]Philip. There were many events takingplace in several stalls on the grounds and lots of music being played. A stage was set up and that stage was lit. Among those who attended were the appellantwho was at the time 15 years old and the deceased who was also of tender age.

[4] During the course of the evening theappellant and a boy by the name of Shawn Maynard started to argue. The deceased intervened to stop them and as aresult the appellant and the deceased had an altercation and the appellantpushed the deceased in his face with his hand. The appellant then retreated and went to a friend Dwayne Burgess,borrowed a knife and returned to the area where the deceased man was standingwith his friends. Another altercationensued between them and as a result several civilian eye-witnesses includingNigel Marshall, Rawdon Grace, Samantha Skeete, Dwayne Burgess and RashidaCossey, who according to their evidence, saw theappellant with a knife in his hands making either stabbing, cuffing or swipingmotions in the region of the abdomen of the deceased. The deceased held his stomach, there was alot of blood in the vicinity of his stomach, part of his intestines wasprotruding and he ran towards a trailer and went under that trailer. Some witnesses to the incident who gaveevidence for the Crown came to the deceased's assistance. [4]

[5] The police were summoned and Sargeant Hunte, the first policeofficer on the scene, rendered assistance to the deceased man. He was thereafter taken to the Queen Elizabeth Hospital where hewas pronounced dead. Policeinvestigations began and officers took pictures of the scene of the crime andvarious items were collected. The knifewas retrieved by the officers from the home of a witness for the Crown, DwayneBurgess, and the evidence is that that knife had been returned to Burgess bythe appellant's cousin Noel Jordan.

[6] On December 1, 1999 SargeantBynoe went to the residence of the appellant in thecompany of police constable Crawford and other officers. They spoke to him and thereafter escorted himto District 'C' Police Station where he was further interviewed. He requested to speak to hisattorney-at-law. Subsequently, theofficers Bynoe and Crawford interviewed the appellantin the presence of his attorney-at-law and his mother.

[7] What transpired during the course ofthat interview is reflected in the record at pages 252, 253, 254 as follows:

Theaccused said:

"Shawn Maynard, Brandon friend, he and Andre had anoise so I went to Shawn to make peace and asked him why he wanted to fightwith Andre for. Shawn started carryingon. He said he was going home to [5] come back. Iwent to Brandon and asked him why he wanted to fight Shawn for andhe Brandon held me by my throat and started beating me. We were scuffling and I was pushing him offme. We were standing and … at that point intime attorney-at-law Hal Gollop interjected and said'tell him you have a whem.' The accused then continued, I got a whem on my head and I hold down my head. When I opened my eyes the crowd that wasthere was gone then I saw Brandon running towards thetrailer. Again the attorney-at-law interjected and said, 'Tell him you ain'thad no knife and you ain't stab nobody.' The accused then continued, 'I never had aknife, I ain't stab nobody.'

The record then discloses that when asked why he andBrandon (the deceased) were scuffling, he said:

"I don't know, sir."

And, later when asked if he and Brandon were involvedin any dispute before, he replied:

"No, sir."

Asked how often he andBrandon had gone to fetes together, he said:

"Never. I used to go and see him there and I wouldshout him."

And when asked what time did he go to the fun day,he replied:

"About 6 o'clock orminutes after."

When asked when was the first timehe saw the deceased, he said:

"When I was going down in the car."[6]

When asked where did he getthe whem, pointing to the left side of his forehead,he said:

“On this side of my head.”

Asked whether he wanted to give a written statementand cautioned, he said:

“No,I am standing by what I said.”

When told that the officers wanted him to point outthe areas that he mentioned where the deceased and himself were scuffling, hesaid:

“I don’t have a problem with that I will show you.”

Later, when taken to the scene, on arrival there,the appellant directed them to an area on the St. Catherine’s pasture nearwhere the trailer stood and said:

“We were scuffling here. I was facing Three Houses and everybody wasin that direction."

Then under caution the appellant pointed in thedirection of the said trailer and said:

“Jason run under thistrailer. I was going in that directionbut was diverted to Beverley’s house.”

[8] Sergeant Bynoethen told of arresting and formally charging the appellant on December 10, 1999 with themurder of Jason Straughn. According to him the appellant said nothing.[7]

[9] Dr. K. Sree Ramulu, Registered Medical Practitioner and GovernmentForensic Pathologist, testified that Jason Straughndied from hemorrhage and shock as a result of a stab wound somewhere below hisnavel.

The Case of the Crown

[10] In summarisingthe Crown’s case against the appellant the learned Judge (at p.356 of therecord) told the jury:

“The Crown’s case is or rests substantially on theevidence of the various witnesses who alleged that they saw the accused with aknife in his hands and that he made either stabbing or cuffing or swipingmotions in the region of the abdomen of the deceased and that shortly after,the deceased was seen with blood in the vicinity of his belly and that part ofhis intestines was protruding.”

The Defence

[11] At the close of the Crown’s case, theappellant when informed of his rights elected to give evidence on oath. He said he knew the deceased. When he was at the fair Shawn and Andre had aquarrel so he went to part the fight between them. As he was turning around to walk and wastalking to Andre the deceased jumped on him and they started to scuffle. He got hit in his face and as he was tryingto push the deceased off he, the appellant, held hishead down and when he looked up he saw the deceased running. He said that he did not kill [8] the deceased, that it was dark andconfusing where the struggle took place. Further, he said that Dwayne Burgess is no friend of his and that he didnot get any knife from Burgess. He saidthat the deceased man was not playing or sporting around while he wasfighting. In a nutshell, he was sayingthat everything said about him was really lies.

Grounds 1and 5

[12] Counsel complains that the verdict isunsafe and unsatisfactory given the nature of the evidence, that is to say, thenumber of inconsistencies, irregularities and lies which littered the evidencewhich was presented by the Crown.

[13] Complaint is also made that throughout thesummation as he reviewed the evidence the trial Judge failed to identify,evaluate, analyse and assess for the benefit of thejury, the material irregularities, inconsistencies, discrepancies and liesappearing in the evidence. In support ofhis submissions Counsel cited Fuller vState [1995] 52 WIR 422 and Springer v The Queen (Barbados Criminal AppealNo. 30/2001). Counsel conceded that thetrial Judge did remind the jury that Counsel had drawn their attention to thefact that the case was riddled with lies, irregularities and inconsistencies(see page 351). It was also Counsel’s complaint that thetrial Judge failed to deal [9] adequatelyor at all in his summation with the variations in the evidence of witnessesgiven at the preliminary enquiry and at the trial.

[14] Counsel has drawn to the Court’s attentionin particular the discrepancies, inconsistencies and lies in the evidence of Maresha Brathwaite (see pages20-28 of the record), Nigel Marshall (see pages 39-41), RawdonGrace (see pages 86-94, 382-384), Samantha Skeete(see pages 94-102) and Rashida Cossey(see pages 115-120).

[15] In these grounds Counsel also contendedthat there were material inconsistencies, variations and lies in the evidenceof Dwayne Burgess (see pages 45-57) where it was crucial that the trial Judgegive specific directions to the jury and the Judge failed to do so. Moreover, the defencewas particularly concerned about Burgess’ evidence and in fact the evidencediscloses that the defence regarded Burgess as asuspect in the case. It was thereforeincumbent, Counsel maintained, on the trial Judge, given the nature of Burgess’evidence and his alleged involvement in the offence, to link the generaldirection on inconsistencies, discrepancies and lies specifically with Burgess’evidence, and he failed to do so.

[16] The learned Judge told the jury (at pages351-352) how they should deal with inconsistencies, discrepancies and lies: [10]

“Sometimes, Madam Foreman and your members, certaindiscrepancies or inconsistencies may appear in the evidence of the

witnessestestifying in the case. You have heardcounsel for the accused tell you that this case is riddled with lies,irregularities and inconsistencies. Heis telling you that there are inconsistencies in the evidence and when you cometo consider the evidence, Madam Foreman and your members, you will find thatthere may be some discrepancies or there are some inconsistencies and I willnow instruct you how to deal with any inconsistencies or discrepancies whicharise in this evidence. You will payheed, Madam Foreman and your members, to any discrepancies or inconsistencieswhich arise in the evidence. As I reviewthe evidence I will draw your attention to some of these discrepancies orinconsistencies but even if I do not draw your attention to any particulardiscrepancy or inconsistency you, Madam Foreman and your members, must payattention to it and follow the directions which I give you in dealing withdiscrepancies and inconsistencies.

When there are discrepancies or inconsistencies youwill ask yourselves whether the witness is deliberately lying to you on oath,in which case you will reject the evidence of that witness in its entirety. The reason being that awitness who deliberately lies on any one matter is quite liable and quitelikely and capable of lying on another and therefore, would not be worthy ofyour belief. If on the otherhand, you consider a witness is confused or mistaken about the evidence or thatthe witness is unable to recall some detail or circumstance, then you will lookat the totality of the evidence and thus from your assessment based on thetotality of the evidence, you will determine wherein the truth of the matterlies. In other words, madamForeman and your members, if you believe that a witness comes on that witnessstand and lies to you deliberately that witness' evidence must be discardedentirely. But if you believe that awitness because of the passage of time or because two persons may see the sameincident and report it differently or [11] becausesomeone may be forgetful, that person is not to be discarded. You would then have to deal with thoseinconsistencies or those irregularities or those discrepancies and it is foryou, having looked at the evidence in its totality to determine the truth ofthe matter."

[17] The learned Judge returned specifically tothe topic of lies when he was reviewing the evidence of MareshaBrathwaite who had admitted under oath that she hadlied (at page 377):

"The second witness was MareshaBrathwaite who came and she testified and she toldyou many things. MareshaBrathwaite under oath told you that she hadlied. You recall my direction to youthat if a witness lies in one thing, you will reject the evidence of thatwitness one hundred per cent. You cannotweigh when she is lying from when she is telling the truth. I therefore shall not review the evidence of Maresha Brathwaite. I am directing you to ignore the evidence of Maresha Brathwaite one hundredper cent, because from her own lips she said she lied under oath and is notworthy of your belief.

Having discarded the evidence of MareshaBrathwaite, it is not to say that the prosecution hada case and had to discard a witness and therefore the prosecution's case hasfallen to the ground, because you have to assess all of the evidence of all ofthe witnesses to determine where the truth lies. Having discarded young Miss Brathwaite, you have to go on and look at all of theevidence of the other witnesses to see if the prosecution has proven itscase. I will suggest that you do not tryto recall any of the evidence of Miss Brathwaite tocompare it with any other person's evidence, because she is a self proclaimedliar."[12]

[18] The learned Judge also returned to thetopic of inconsistencies and irregularities when he was reviewing the evidenceof Rawdon Grace (at pages 383-384):

"Now, this is the first time, Madam Foreman and yourmembers, that we are hearing about a bottle cominginto play. This witness said he saw a bottle. Another conflict apparently, we have that some witnesses say there weretwo fights, some of them said there was only one fight. You will remember what I told you when youhave these kind of discrepancies, and these kinds ofinconsistencies. You have to look at allof the evidence and weigh them to see if somebody just was mistaken, if twopeople see things a bit differently or if, based on how you see the evidence,if these witnesses were just deliberately lying before you under oath."

[19] Earlier in his summation the learned trialJudge directed the jury's attention to conflicts in the evidence as follows:

"You, Madam Foreman and your members, youhave heard the evidence, you've seen the witnesses. I will go a bit further and tell you that youmust consider not only they are lying but you must consider if they could havebeen mistaken. That they might not be lying but they might be mistaken. You have, based on the evidence before you,to weigh their evidence and come to a conclusion.

Thevarious witnesses, including Dwayne Burgess, Nigel Marshall, Samantha Skeete, RashidiCossey, all of them knew the accused man forsometime. Nigel Marshall demonstratedhow the accused did with the knife in his right hand and that he saw Jason holdhis belly. Dwayne Burgess also known asPet Monkey, told you that the accused man came to him and said that someonewanted to fight with him and he wanted to [13] borrow his knife and that he Pet Monkey gave the accused man the knife. He went away, herested the knife at his side. He wentaway, he danced and sometime later he was swiping with the knife.

SamanthaSkeete did not say she saw a knife, she said she sawthe accused man returned and she saw something shining and she saw the accusedhand like he was cuffing Jason in the region of his stomach. Cossey said that Kemel and Butter, that is the accused and the deceased,were fighting and that the accused man went by his hips and then started tomake cuffing motions in the stomach region of the deceased. He did not see anything in the hands of theaccused. Of course, the accused man saysall this is lies. It is for you and youalone, Madam Foreman and your members, having heard all the evidence todetermine wherein lies the truth."

[20] Against the background of the summationtaken as a whole, in our view, even though the trial Judge in reviewing theevidence did not identify specifically all the discrepancies, inconsistenciesand lies therein for the benefit of the jury, he dealt accurately and fullywith the manner in which they should approach the evaluation of discrepancies,inconsistencies and lies appearing in the evidence and as we see it theappellant would not have been disadvantaged or prejudiced in any way. [14]

Grounds 2 and 3

[21] These grounds are that the learned Judge(a) failed or omitted to direct the jury on the issue of causation; and (b)misdirected himself on the issue of causation.

[22] Dr. Ramulu whoconducted the post-mortem expressed the opinion that Jason Straughn'sdeath was due to haemorrhage and shock as a result ofinjury number 2, a stab injury 1 cm right of the mid plane, 1.6 cms below the navel, 36 cms belowthe inner end of the right collar bone directed below upwards before backwardsand right to left.

[23] The Judge gave the following directions(p.356):

"The Crown's case, Madam Foreman and your members,and when I use the expression 'the Crown'I use it interchangeably with Prosecution, rests substantially on theevidence of various witnesses who alleged that they saw the accused with aknife in his hands and that he made either stabbing or cuffing or swipingmotions in the region of the abdomen of the deceased and that shortly after,the deceased was seen with blood in the vicinity of his belly and that part ofhis intestines was protruding. Accordingto Dr. Ramulu, the Pathologist who gave evidence, wewill get back to him later on, the cause of death washemorrhage and shock as a result of a stab injury which was described by Dr. Ramulu as he was speaking of injury number 2. That is the stab wound somewhere below thenavel of the deceased.

[24] Atpages 375 and 376 he told the jury:[15]

You heard counsel for the defencecross-examine Dr. Ramulu extensively with respect tothe cause of death, and Dr. Ramulu told you that hewas sure that it was injury number two as outlined to you, that is, the injuryin the abdomen area of the deceased that caused the death of Jason Straughn.

There is no other expert evidence in this case todisplace the opinion of Dr. Ramulu's evidence withrespect to the cause of death. However,as I said before in the final analysis, it is for you to determine what weightyou will give to that evidence.

You will recall that counsel for the defence suggested to Dr. Ramulu,that he acted in an unprofessional manner in the way he dealt with theevidence. Your question here is not toquestion, sitting in a disciplinary capacity against the doctor, or anything ofthe sort. Your interest here, is to listen to his evidence and bearing in mind hisqualifications and experience, to see if you agree that his evidence is suchthat you could believe, the cause of death was due to the injury to the stomachof young Jason Straughn.

There was some evidence about Dr. Ramulu not waiting for the results of a sample of bloodwhich he sent off. You will recall thedoctor said that that sample he sent off would not affect his decision indetermining the cause of death. He said,that sample, the results could rule out the state of the deceased at the timeof death, if he had any drugs in his system or any alcohol in his system. But the expert evidence of Dr. Ramulu is that, based on his experience, he said he is ahundred per cent sure that the cause of death is that injury to theabdomen. He recalled those otherwounds. He said those were superficial,those didn't kill him. The wound thatkilled the youngster was the stab wound to his abdomen.

[25] Laterat pages 390-393 he told the jury: [16]

Then we got to Dr. Ramuluwho told you that he is a Registered Medical Practitioner and the GovernmentForensic Pathologist and he is attached to the Attorney General's Office. He told you of his qualifications. He said on the 3rd of December 1999 about 1.15 p.m. he performed a post-mortemon the body of Brandon Jason Straughn, 15 yearsold. He was given permission to look athis notes and he said there were three injuries but the significant injury hepointed out was the stab injury 1 cm right of midplane,1.6 cms below the navel, 36 cmsbelow the inner end of the right collar-bone directed below upwards and heshowed you what he meant, before backwards and right to left and hedemonstrated.

He said that on exploration of the pancreas – so onexploration he found the pancreas was punctured after a weapon passed throughall the structures in the region including the first part of the duodenum whichis a part of the small intestines after the stomach. He said that the loop of the intestinesseemed outside of the abdominal wall and he showed you. He told you that the upper angle deficiencyon the front of the abdominal wall was 3 cms x 1.6 cms and the upper angle was sharp and the lower angle wasnot sharp and in his opinion that indicates the weapon which was used was asharp-cutting weapon and one edge of the weapon was sharp. The sharp weapon angle was caused by a verysharp edge of the weapon and he said that one was a fatal injury. He then went on to give you two otherinjuries but the fatal injury was that one to the stomach.

He said all the injuries were ante-mortem, meaningthat all the injuries were before the person had died. And he said the cause of death was haemorrhage and shock as a result of stab injury number twowhich I referred to not long ago, because of loss of blood there was shock, thedeceased went to a state of shock and he died and that was due to injury numbertwo, the one to the stomach. He said amoderate amount of force would have to be used to cause that and any sharp-cuttingweapon where [17] one end of the weapon issharp just like a knife, would have been used to cause that injury.

He was then cross-examined by Mr. Gollop. He said hehanded over to Sergeant Bynoe a quantity of bloodwhich he submitted to the Government Analyst for testing for the determinationof alcohol and drugs and he said he did not receive the report from theGovernment Analyst. He said that at thetime he spoke that then he knew the report because he had -- he knew theresult, sorry, because he had heard only the same morning in the vicinity ofthe court.

Counsel suggested to him that his approach wastotally unprofessional and he said, maybe. He was asked if he agreed that the sample of blood was an importantsample. He said it depends upon whetherhe saw any smell in the content of the stomach at the time of thepost-mortem. In this case there was nosmell. He further went on to say that hesent the sample to rule out whether alcohol or drugs intake was there. He said that he did not see any smell in thecontent of the stomach and in any event, in respect of the result of the merecause of death it would be the same whatever the results were. He is saying that he was not relying on theresults to tell you what was the cause of death.

Basically, what he told you is that he has been inthis profession for the last 30 years and he knows whether a person tookalcohol by smelling the content of the stomach. He is saying that he has been doing this for 30 years and he doesn'thave to rely on the test to prove this but in any event that test was not toprove the cause of death, that test would only show what was the state of thedeceased at the time whether he had any drugs or alcohol in his stomach.

What he said is that he gave a conclusive opinion asto the cause of death before getting the Analyst's report. If he had suspected something, he said, hewould have [18] given a preliminary opinionas to the cause of death but he said in his evidence he was a hundred per centsure of the cause of death in this case. In a nutshell, Madam Foreman and your members, that is the evidence ofDr. Ramulu."

[26] Mr. Hal Gollop,Counsel for the appellant, devoted much time to these grounds but his argumentsand submissions did nothing to invalidate or weaken Dr. Ramulu'sopinion as to the cause of death

Ground 4

[27] This ground of appeal alleges that thetrial Judge was in error in failing or omitting to direct the jury oncircumstantial evidence and how that evidence ought to be evaluated.

[28] In McGreevy v DPP [1973] 1 A.E.R. 503it was held that no duty rests upon a Judge, in addition to giving the usualdirection that the prosecution must prove the case beyond reasonable doubt, togive a further direction in express terms that the jury must not convict unlessthey are satisfied that the facts proved are not only consistent with the guiltof the accused but also such as to be inconsistent with any other reasonableconclusion.[19]

Conclusion

[29] In light of McGreevy we do not thinkin the instant case that the learned Judge fell into error in not directing thejury on circumstantial evidence. We donot see any merit in this ground.

Ground6

[30] This ground relates to the failure of thetrial Judge to direct the jury adequately how to treat the failure of theprosecution to create a link between the appellant and the alleged murderweapon.

[31] The thrust of Mr. Hal Gollop'ssubmission is that the investigating officers never showed the alleged murderweapon to the appellant and that the trial Judge never dealt specifically withthe failure to do so on the part of the police officers in his summation and inthe absence of a direction thereon the appellant would not have had a fairtrial. The case for the defence, he concluded, was that the appellant never hadpossession of a knife on November 30, 1999, that he did not stab Straughn nor was he in any way responsible for Straughn's death; that there was simply a struggle betweenthe two young men and after that struggle the appellant asked one of thewitnesses what had happened. Theappellant had no idea as to how Straughn sustainedhis injuries. [20]

[32] On the other hand, the Crown contends thatSargeant Bynoe's omissionto show the knife to the appellant did not constitute improper police investigationand further the failure of the trial Judge to deal specifically with thatomission on the part of the officers does not affect the charge nor the subsequent conviction. The evidence for the Crown, she maintained,was that Dwayne Burgess handed the knife to the appellant and that NigelMarshall saw the knife in the appellant's hand just before the deceased ranunder the trailer with part of his intestines protruding, that the Crown hadestablished a link between the knife and the appellant.

[33] There was ample evidence on which the jurycould find that there was a link between the appellant and the alleged murderweapon. There is no direction to thejury on how to treat the failure of the police officers to show the allegedmurder weapon to the appellant but this non-direction, in our view, did notdisadvantage or prejudice the appellant. The failure was more in the nature of an irregularity in police practicethat did not constitute a material irregularity.[21]

Ground 7 – Section 136 of the Evidence Act

[34] Under this ground it is contended that thetrial Judge erred when he failed or omitted to adequately instruct the jury howto treat the self-serving statement of Dwayne Burgess.

[35] The relevant parts of section 136 read asfollows:

"136(1) The section applies in relation to the following kinds ofevidence:

(a) …

(b) …

(c) …

(d) in criminal proceedings

(i) evidence givenby a witness called by the prosecutor,being a person who might reasonably be supposed to have been concerned in theevents giving rise to the proceeding; or

(ii) …

(e) …

(2) Where there is a jury the Judge shall,unless there are good reasons for not doing so,

(a) warn the jury that the evidence may be unreliable;

(b) inform the jury of matters that may cause it to beunreliable; and [22]

(c) warn the jury of the need for caution in determining whetherto accept the evidence and the weight to be given to it.

(3) It isnot necessary that a particular form of words be used in giving the warning orinformation.

(4) This section does not affect any otherpower of the Judge to give a warning to, or to inform the jury."

[36] It wassubmitted that no statutory warning was given to the jury by the trial Judgethat the evidence given by a witness for the prosecution, Dwayne Burgess mayhave been unreliable insofar as he was a person who might reasonably besupposed to have been concerned in the events giving rise to the criminalproceedings. The failure to give such awarning in the instant case, Counsel contends, constitutes a materialirregularity and is sufficient to overturn the conviction.

[37] Insupport of his submission Counsel cites the Privy Council case Tillet (Dean) v Regina [1999] 55 W.I.R. 104where it was held that although it was desirable that a prosecution witnessshould not have an interest of his own to serve, the existence of such aninterest did not in itself preclude the witness from giving evidence, providedthat the trial Judge gave due warning to the jury that, in view of suchinterest, the evidence of the witness should be viewed with particularcare. The Judge should have warned thejury that the witness had an [23]interestto serve and that they should exercise caution before accepting his evidence,that the failure to give such warning constituted a material irregularity inthe trial.

[38] ThisCourt revisited section 136 of the Evidence Act recently in IanGill v R (Barbados Criminal Appeal No. 18 of 1998) and decided that therequirement for a warning is directory rather than mandatory.

[39] It isindeed a fact that in the instant case the trial Judge give no warning inaccordance with section 136(2)(a)(b) and (c) of theEvidence Act. Since a Judge is notobliged to give a warning if he has good reasons it seems to this Court that awarning may not be fatal in every case. It all depends upon the totality of the evidence and the circumstances.

[40] Thereis in the instant case evidence, other than the evidence of Dwayne Burgess,which if the jury accepted would have entitled them to find the appellantguilty. There was the evidence of theeye-witnesses Nigel Marshall, Rawdon Grace, Samantha Skeete and Rashida Cossey who say they saw the appellant with a knife in hishands making either stabbing, cuffing or swiping motions in the region of theabdomen of the deceased.[24]

[41] In thecircumstances we hold that the trial Judge's failure to give the warning undersection 136(2) is insufficient for us to quash the conviction.

Ground8

[42] Onground 8, Counsel alleges that the trial Judge erred when he failedor omitted to instruct the jury on the significant omission of theprosecution to call two persons, namely, Shawn Straughnand Noel Jordan, who had featured prominently in the investigations, to testifyat the trial.

[43] Therecord shows that neither Burgess nor Jordan was called by the prosecution atthe trial. They were also not called forthe defence. It is admitted that the names of Straughn andJordan did not appear at the back of the indictment. It is also admitted that the prosecutionsupplied copies of the statements which the police had taken from Straughn and Jordan to the defence. The defence knew,after the close of the Crown's case, that Straughnand Jordan were not being called by the prosecution. So, the defencecould have called either of them if they so wished, although there is noobligation on the defence to call any witness. It is agreed that Straughnand Jordan featured [25] prominentlyin the police investigations although they were not called to testify at thetrial for various reasons.

[44] Counselargues that both Straughn and Jordan should have beencalled by the prosecution to testify as the appellant has a fundamental rightto a fair trial guaranteed by the Constitution. As a result of that failure, he continues,the conviction is unsafe and unsatisfactory.

[45] Thequestion therefore arises as to whether in a criminal case the prosecution has a discretion as to what witnesses they should call. In Kenneth Russell-Jones v The Queen [1995] 1Criminal Appeal R. 538, it washeld that the following principles apply relating to prosecution witnesses atthe trial of a defendant:

(1) Witnesses who are on the back of theindictment ought to be at court, if the defence want those witnesses to attend;

(2) The prosecutor has adiscretion whether or not to call them to testify, depending on theparticular circumstances of the case;

(3) The discretion is not unfettered, and must beexercised in the interests of justice;

(4) It is for the prosecution to decide whichwitnesses give direct evidence of the primary facts of the case, althoughnormally all such witnesses should be called or offered to be called;

(5) The prosecutor is the primary judge ofwhether or not a witness to the material events is credible, or [26] unworthy of belief. Thus, a prosecutor properly exercising his discretion will not beobliged to proffer a witness merely in order to give the defencematerial with which to attack the credit of other witnesses on whom the Crownrelies.

[46] Weaccept and adopt the principles set out above. Counsel also cites Horace Henry Bryant and Victor RichardDickson v The Queen [1946] May 13 Court of Criminal Appeal Reports 146, FrankBanks v The Queen [1916] July 4 Court of Criminal Appeal Reports 74 and WinstonBrown [1995] 1 Criminal Appeal Reports 191.

[47] Counsel'sfurther submission on this ground is that having made the failure of theprosecution to call Straughn and Jordan to testify anissue in his no-case submission and in his address to the jury, clearly thatissue loomed large in the jury's mind; therefore, it was incumbent on the trialJudge to allude to it in his summation and help the jury to evaluate and assessthe issue. The trial Judge simply failedor omitted to do so.

[48] Insupport of his submission Counsel cites the guidelines set out by the Court ofAppeal in the recent case of Wayne Springer v The Queen (supra).

[49] It isclear from the record that Counsel for the appellant alluded to Shawn Straughn and Noel Jordan whom the police had interviewed [27] during the investigations into thealleged offence, and whose names were not included on the back of theindictment as witnesses for the prosecution.

[50] Therecord further indicates that the trial Judge in his summation made no commenton the concerns of defence Counsel in respect of theabsence of these two persons from among the witnesses for the prosecution. Inasmuch as the discretion whether or not tocall witnesses to testify, depending on the circumstances, resides in theprosecution, we are of the view that in the circumstances of this case, novalid claim can be made that there was a trial by ambush such as would make theverdict unsafe or unsatisfactory. Indeed, we find that there was ample evidence to support the jury'sverdict.

[51] It isto be observed that, in any event, in the course of the trial, the prosecutionadduced evidence from Carolyn Gittens (p.131) andfrom the appellant under cross-examination (p.335), to the effect that NoelJordan was the appellant's cousin. Itwas entirely a matter for the prosecution to determine whether he should havebeen called to testify for the prosecution. Had the trial Judge been minded to comment on the matter, we are unableto find that any comment put at its highest could have strengthened the casefor the appellant. [28]

Ground9

[52] Thereis no merit in this ground which relates to the failure of the trial Judge toaccord any due weight to the submission of Counsel that the appellant shall nothave been called upon to answer a case and allowed the case to go to the jury.

Ground10

[53] On thisground the appellant claims that the trial Judge failed or omitted to analyse the evidence which came before the Court for thebenefit of the jury.

[54] Thesubmission is that the trial Judge for the most part faithfully repeated to thejury the evidence given during the trial while offering no help to the jury inevaluating and analysing the evidence. In support of his submission Counsel cites WayneSpringer (supra) and Fuller v The State (supra).

[55] Counselfor the Crown in support of her submission that the trial Judge did in factassist the jury in analysing the evidence which wasbefore the jury cited Dennis Collins and TheQueen (Criminal Appeal No. 32 of 1987) where the Court of Appeal said:

"A Judge's summation should bestructured so as to assist the jury with an analysis of the evidence and of thearguments on both sides. It shouldassist them by identifying the issues that arise for their determination. [29] In R v Stoddart(1909) 2 Criminal Appeal R 217 at 246 Lord AlverstonC.J. put it this way –

"Every summing-up must be regardedin the light of the conduct of the trial and the questions which have beenraised by the Counsel for the prosecution and for the defencerespectively."

In R v Lawrence (1981) 73 Criminal Appeal R1 at 5 Lord Hailsham L.C. observed –

"The purpose of a direction to ajury is not best achieved by a disquisition on jurisprudence or philosophy or auniversally applicable circular tour round the area of law affected by thecase… A direction to a jury should becustom-built to make the jury understand their task in relation to a particularcase…."

[56] In theinstant case, as we see it, against the background of the summation taken as awhole, the trial Judge did analyse the evidenceadequately for the benefit of the jury. There is no merit in this ground.

Ground11

[57] On thisground the appellant claims that the trial Judge did not put his caseadequately.

[58] In ourview, this ground of appeal is not sustainable. At page 351 the trial Judge did tell the jury that the defence is saying that the Crown's case is riddled withdiscrepancies, inconsistencies and lies. At page 356 he told them that the defence issaying that there is no forensic [30]evidenceto support the case, that the case of the defence isthat he never had a knife, that he was in no way responsible for any stab woundsor any type of injury to the deceased and that the Crown's case is really madeup of a number of lies and that all the prosecution witnesses are liars. He then told them at page 357 that theappellant gave evidence on oath in a very straightforward manner and that hesaid all the prosecution witnesses are liars and that the case for the defence was that he did not stab anyone. He was not responsible for the killing. And

at page 359 the trial Judge dealt fullywith the issue of self-defence and related it to thefacts of the case. At page 361 the trialJudge told the jury "ofcourse, what the defence is saying is, that somemischievous person who was not involved in the scuffle between the accused andthe deceased took advantage of the opportunity and the defencesuggested Pet Monkey himself and two other persons used that knife on thedeceased". At pages 360 and 361the trial Judge dealt with the oral statements allegedly made by the appellantto the police which indicated that the deceased hadcome from behind him and held him. Andat page 365 the trial Judge again recalled the sworn evidence of theappellant. Again at pages 366 and 369the trial Judge referred to the defence's case. [31]

[59] At page370 the trial Judge told the jury: "Whatthe defence is telling you isthat there was sheer confusion at St. Catherine that night. Yes, Kemel wasthere. Yes he was involved in analtercation with the deceased, but the persons who came here and said he is theone who inflicted the wound are liars. The defence is not saying they are mistaken,they are saying, no, no, they are lying." At pages 374 and 398 the trial Judge again dealt with the defence's case and recapped the sworn testimony of theaccused.

Grounds12 – 15

[60] Thesegrounds were abandoned.

Conclusion

[61] Accordingly,the appeal is dismissed. The convictionand sentence are affirmed. The sentencewill run from July 11, 2002. [32]

Justiceof Appeal

Justice ofAppeal Justice of Appeal