

BARBADOS.

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Criminal Appeal No. 18 of 2001

BETWEEN:

ANDRE ORLANDO BEST

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Colin Williams, Justice of Appeal, and the Hon. Frederick Waterman, Justice of Appeal

2002: February 27 and March 27

Mr. Keith Simmons and with him Mr. Michael Lashley, Mrs. Angela Mitchell-Gittens and Ms. Nicole Kennedy for the Appellant

Mr. Douglas Fredericks for the Respondent

REASONS FOR DECISION

SIMMONS CJ: On February 27, 2002, we allowed the appellant's appeal, quashed the conviction, set aside sentence and ordered a retrial. We then promised to give our written reasons. This we now propose to do.

[2] For the purposes of this decision it is unnecessary to give any detailed recitation of the facts because we wish to confine our advice to a relatively narrow issue. That issue concerns the defence of accident in a criminal case.

[3] The appellant had been charged with the murder of Ryan Louis on January 9, 1999. On that charge he was acquitted by the jury but found guilty of manslaughter and he was accordingly sentenced to 10 years' imprisonment on February 21, 2001.[1]

[4] The short facts necessary for an understanding of this appeal were that on the night of January 8, 1999, the deceased man was in the very popular fishing district of Oistin where there was a fair amount of activity and festivity. The appellant was also at Oistin. There was an altercation between them and the deceased left only to return later in the early hours of January 9th.

[5] When the deceased returned, he was riding a bicycle. He and the appellant who was still at Oistin had a confrontation. Other persons were present. The prosecution case was that the appellant began to throw stones at the deceased and eventually, when they came close to each other, the appellant took a knife and fatally stabbed the deceased in his chest.

[6] Two days after the incident, the appellant went to the police station with his lawyer and in the presence of his lawyer, the appellant told Station Sergeant Bovell:

"He and I had a scuffle. He knife dropped. I pick it up and when he come at me, he butt up on the knife."

Under caution, the appellant maintained his position. He said to Station Sergeant Bovell: "I didn't stab Ryan. He butt up on the knife."

[7] At the trial, the appellant made an unsworn statement from the dock. He said that he went to buy some fish cakes at the fish cake stall and there he saw the deceased with an umbrella threatening him and the deceased advanced upon him. He put out his hand and the deceased collided with his hand.

[8] He continued:

"Then I went home and bathe and after I come back out I was going down Oistins to avoid getting into anything with him. I went back up the road to get something to eat and go home and on my way up the road Ryan came [2] down on a bicycle, jumped off and said, "I got you now." Then he started to throw rocks at me and I threw back rocks at he to scare him off. Then he came at me and we started scuffling. He draw something like a

knife from he waist and I push he off. I picked up the knife and was backing off from him. Then he came back drawing a sword from the other side of his waist and I defend my life.”

[9] In his unsworn statement, he later mentioned that he had told Dr. Ermine Belle, one of the prosecution’s witnesses and a medical practitioner, that the deceased’s death was accidental.

Issues arising from Appellant’s Statements

[10] The three issues which arose from the oral statements of the appellant made in court and out of court were clearly provocation, self-defence and accident. In court he was alleging provocation and self-defence; out of court, to Station Sergeant Bovell, he was alleging accident.

Counsel for the appellant did not complain of the judge’s directions on provocation and self-defence but he was dissatisfied with the directions on the issue of accident.

Grounds of Appeal

[11] Five grounds of appeal were filed but we required Counsel to address us on two only. These were grounds 4 and 1 respectively.

Ground 4

[12] It was submitted that the trial judge had failed to give adequate directions on the defence of accident in that:

(a) he failed to direct the jury that the onus was on the prosecution to negative the defence of accident; and

(b) he failed to direct them that it was a complete defence.

Mr. Keith Simmons drew attention to the summing up at p.133 of the transcript. There the judge had commented as follows:[3]

“Then when Station Sergeant Bovell made a reference to witnesses the accused maintained: ‘I didn’t stab Ryan, he butt up on the knife.’ So the picture that he was painting to the police two days later was one of accident, some accidental butting up on the knife and there was nothing said about Ryan drawing a sword from the other side of his waist.”

[13] Earlier in the summation the trial judge had given a general direction to the jury that –

‘You must be satisfied that the death was not accidental.’

We have carefully examined the summation and can find no further comment, direction or advice to the jury on the issue of accident.

[14] Clearly accident was raised. It was a live issue and the judge himself seemed alive to it when he referred to the oral statement of the appellant to Station Sergeant Bovell. A full direction on the issue of accident was therefore necessary for the jury as well as assistance with the facts.

[15] The law is not obscure. Indeed it is trite law that it is the duty of the trial judge to identify the possible defences on the evidence. Where such identification of the issues is made, the judge must go on to give the directions on the law and facts that apply.

[16] In *R. v. Kachikwu* 52 Cr. App. R. 538 at p.543 Winn LJ said:

“.....it is perfectly clear that this Court has always regarded it as the duty of the judge of trial to ensure that he himself looks for and sees any such possible answers and refers to them in summing up to the jury and takes care to ensure that the jury’s verdict rests upon their having in fact excluded any of those excusatory circumstances.”

[17] The judge has a duty to leave all issues to the jury upon which there is evidence fit for their consideration and such a duty is particularly essential on a charge of murder. See, for example, *Joseph Bullard v. R.* [1957] at 635; *Kwaku Mensah v. R.* [1946] A.C. 83; *R. v. Porritt* [1961] 3 AER 463.[4]

Watkins LJ set out the correct approach to be taken by a trial judge in *R. v. Bashir* (1983) 77 Cr.App.R. 60 at p.62:

“There can be, and there is, no doubt firstly that a defence can be said to be raised whenever there is evidence, no matter from what source, of a kind which calls upon a judge to conclude that this defence should be left to the jury, and secondly, that his decision as to whether or not that defence should be left to the jury is open to review in this Court. If the conclusion here is that he was called upon to leave that defence to the jury and did not, then his failure to do so can amount to such a non-direction as will destroy the conviction.”

[18] With regard to the specific issue of accident, we are of opinion that authority in the Commonwealth Caribbean provides a useful guide to the approach that should be followed by judges. The Court of Appeal of Guyana has pronounced upon this issue more than once – See for example, *The State v. Jaigobin Bissessar* (Criminal Appeal of Guyana No.19 of 1975 unreported), *The State v. Guy Simmons* (1976) 24 WIR 149. Recently, the Court of Appeal of Trinidad and Tobago has provided illuminating guidance in the case of *Ramlogan v. The State* [2000] 58 W.I.R. 374.

At p.384 Michael de la Bastide CJ said:

"When a defence of accident whether caused by the accused or by someone else is raised, the judge should identify the issue which arises on the evidence for the jury and remind them in substance of the evidence on both sides which bears on that issue, and make sure they understand that the burden of proof lies on the prosecution in relation to it. But he may do so without ever using the word 'accident' although in this, as in other aspects of a summing up, it may be both safer and more convenient for him to adopt a tried and tested formula of words."

[19] Analysis of the decisions of those Courts facilitates a distillation of the following principles.

(i) A definition of accident should be offered to the jury. In the case of *The State v. Jaigobin Bissessar*, Haynes C defined [5] the concept of accident as "a sudden mischance befalling" the accused.

In Barbados, judges have traditionally defined the concept as something which is fortuitous.

Recently, in *Leonard Mascoll v. The Queen* (Criminal Appeal No.24 of 1999), the Court of Appeal found no fault with the following definition of accident left to a jury by Madam Justice MacCormack:

"An accident is something which is fortuitous, that is not deliberate and is not intended. An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when it occurs as a consequence of such act, is not so probable that a person of ordinary prudence or under the circumstances in which it was done could take reasonable precaution against it."

We do not believe that the concept of accident is esoteric and, provided some words are used to explain that it is an unintended act arising by happenstance, a jury will almost certainly understand it.

(ii) Next, it must be explained to the jury in clear and simple terms that the burden is upon the prosecution to negative the defence of accident. The defendant has no burden of proof.

In *The State v. Guy Simmons* (1976) 24 WIR 149 at 155, R.H. Luckhoo JA pointed out that a judge must direct the jury "that the onus was on the State to negative the issue or answer of accident."

(iii) A judge should explain that accident provides a complete defence in law and therefore, if a jury accepted that defence, they would have to acquit.

(iv) It will also be absolutely essential where accident is raised to direct the jury that if they have a reasonable doubt about the [6] issue of accident, then the defendant is in law entitled to the benefit of that doubt.

(v) In accordance with the well established obligation on the part of a trial judge to assist the jury with resolving issues of fact and, indeed assisting them with the facts, the judge should ensure that he relates the issues of fact giving rise to the defence of accident to the legal principles of the defence. – See *R. v. Kachikwu* (1968) 52 Cr. App. R. 538; *Mohamed Omar v. The State* (1987) 40 WIR 207; *The State v. Singh* (1995) 51 WIR 128; *Ramlogan v. The State* (supra).

[20] We shall not venture any set formula of words to be used in directions on accident. A summing up is so much an individualistic exercise. It is not to be a dissertation on the law. So long as the trial judge directs in accordance with the principles enunciated at (i) to (v) above, in his own style, he will not be in error.

[21] The learned trial judge nowhere in his summation directed the jury along the lines we suggest. He merely spoke of painting a picture of "some accidental butting up on the knife", without more. To the extent that the trial judge failed to leave the issue of accident to the jury with proper directions, he was in grave error. It may be said that he withdrew the defence from the jury. On a capital charge, this is fatal to any subsequent conviction. A person facing a capital charge must expect to have every reasonable defence raised on the evidence left for the jury's consideration. The appellant was entitled as of right to have his defence considered but he was not accorded this right and the jury were left without a direction on an essential matter.[7]

[22] In *R. v. Badjan* 50 Cr. App. R. 141 it was held that where a cardinal line of defence is placed before the jury and that defence finds no reflection at any stage in the summing up, it is generally impossible to say that the conviction is safe.

[23] There, the appellant had raised the defence of self-defence. It was a tenuous defence on the evidence. Edmund Davies J could find no reference to that defence in the summation and, consequently, he held that the appeal against conviction had to be allowed.

[24] In this case, the failure of the trial judge to deal with the defence of accident constituted a misdirection and could have resulted in a miscarriage of justice.

[25] Finally, the guidance of Simon Brown LJ in *R. v. Nelson* [1997] Crim.L.R. 234 should be kept in mind by trial judges.

"Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities...there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned

conclusion on the evidence.”

[26] For the reasons stated herein and since our decision on ground 4 disposes of the appeal in favour of the appellant, it is unnecessary to [8] deal with ground 1. We only desire to add that the retrial ordered should, as far as practicable, take place at the next Assizes.[9]

Chief Justice

Justice of Appeal Justice of Appeal