

HOWELL v. R.

[COURT OF APPEAL - CRIM. APPEAL NO. 19 OF 1990

(Williams, P., Husbands and Smith, JJ.A.) March 28, 30, 1994]

(1994) 30 Barb. L.R. 129

Practice and procedure - Directions to jury - Direction to jury could have led them to believe that a finding of an intention to kill or cause grievous bodily harm ruled out the defence of provocation - Law not correctly stated.

Facts: The appellant was convicted of the murder of D. P. and sentenced to death. D.P. died as a result of injuries which she received to her head. The prosecution's case was that the appellant killed D.P. and at the time intended to kill, or cause her serious bodily harm. The case against him in the main was his written statement which was admitted without objection. Other evidence against the appellant included, inter alia, an oral confession, evidence from a man who drove the appellant to the house where the killing occurred, evidence of at least 28 injuries on the body, and an unsworn statement from the dock. In his summation to the jury, the learned trial judge stated that the defence of provocation cannot succeed if there is an intention to kill. On appeal against conviction -

Held: The direction could have led the jury to believe that a finding of an intention to kill or to cause grievous bodily harm ruled out provocation and that clearly is not the law. The conviction for murder is quashed and the sentence of death is set aside. A conviction for manslaughter is substituted and a sentence of twelve (12) years imposed.

Cases referred to:

A.G for Ceylon v. Perera [1953] A.C. 200.

Baptiste v. The State (1983) 34 W.I.R. 253.

Lee Chun-Chuen v. The Queen [1963] 1 All E.R. 73.

R. v. Bunting (1965) 8 W.I.R. 276.

The State v. Mitchell (1977) 29 W.I.R. 381.

Miss Mia Mottley for the appellant.

Mr. Charles Leacock for the respondent.

WILLIAMS. C.J.: On May 16, 1990 the appellant Courtney Howell was convicted of the murder of Diana Pinder and sentenced to death. Pinder died on September 12, 1989 from shock and haemorrhage as a result of injuries to her head. The case for the prosecution was that the appellant killed Pinder and at the time intended to kill her or cause her really serious bodily harm. The defence relied on provocation and self defence. [129]

On Tuesday September 12, Pinder's body was found lying on the floor of the appellant's bedroom in a house at Collymore Rock, St. Michael. The corner stone of the case against the appellant was his written statement (Exhibit K) which was admitted without objection. The statement reads:

"Tuesday morning this week I left out by my children mother Tracey in My Lord's Hill and went home. Sometime after 9 o'clock I was lying down in the bed when my girl friend Diana Pinder come in the room. She started quarrelling saying I want killing and she was going to the man in she life that going to marry she. I ask she who man she mean and she say Vernon. I then tell she that I bring she from scratch and now she got something she looking for a man. She say she ain't pleasing me no more, that she father like Vernon and she pleasing she father. She then take up the knife that was on the bed head and stab at me. I grab she hand and we fall down on the bed and while holding she hand I tell she I going make she kill she self and push the knife at she. I hear she holler out she get cut and I see blood on she chest. I then take up my collins from by the bed head and start lashing at Diana. She then fall down on the ground from off the bed and wasn't saying nothing and I get frighten and left the house and walk and went down the Pine Road to go to the Police Station but when I get down by the park I see a man who does drive truck that I did know for a long time and beg he for a drop in Collymore Rock. When I get up there I went in the house and take up the collins and knife and wrap them in newspaper. Diana did still laying down the same place I left she. I went and get back in the truck cause I did tell him wait for me and he drop me off near Springer School. When I did walking cross the road to go by Tracey I pelt the knife and collins in some bush."

The other evidence led by the Crown in support of the charge can be summarized in this way -

(1) that of police officers who testified that the appellant made oral statements to them before (Exhibit K) was recorded -

(a) "when I hear that my girlfriend Diana did dead I did not know where to turn but I did looking for the police to come to me but I could afford to go along with you cause I went down by my house in Collymore Rock since Sunday and I did not see Diana since Friday".

(b) "Looka what I gone and put myself in. Lord knows when I let go the lash at Diana I went to kill she. Skipper, I bring she from scratch giving she (one officer testified \$40.00, the other \$140) every week when I did working at the Board and now she telling [130] me that she leaving me for the man of she life and I could not take that;"

(2) that of police officers who testified that the appellant offered to show them everything, that under his guidance they recovered a collins

(Exhibit B) and a knife blade (Exhibit F), which the appellant said he cut Pinder up with, from some bush behind a wall in the Ivy, St. Michael, and that he pointed to the house in Collymore Rock where Pinder's body was found and to a room in the house as the place where it had happened;

(3) that of one Grafton Belle who testified that at about 11.45 a.m on September 12 he gave the appellant a lift in his truck from Fort Royal Garage to a house in Collymore Rock, waited for him for about five minutes and took him, with 6 to 8 large envelopes under his arms, to a house near the Telephone Company. This witness testified that when the appellant was in the truck, he saw the handle of a Collins inside one of the envelopes and asked the appellant why he was walking about with a Collins. The appellant told him that he was going to cut some bush in My Lord's Hill;

(4) that of Dr. Ramulu who did the autopsy on Pinder's body. He listed at least 28 injuries and in his opinion -

(i) death was due to shock and haemorrhage as a result of injuries to the head;

(ii) a heavy cutting weapon, like a Collins or cutlass, and great force, would have been used; and

(iii) the Collins (Exhibit B) could have been the weapon.

The appellant, when told of his rights, elected to make an unsworn statement and said:

I formerly lived at Collymore Rock. Three weeks before the incident the deceased used to come by me and give me constant annoyance. On Thursday, 7th September 1989 I was at home and she came there making a big set of noise. I gently left the house leaving her there, I went to Mayers Road, My Lord's Hill where I have five children. I spoke with them and I told my biggest boy David that I was having trouble with Diana and that I thought that the best thing for me was to return to live with them. I remained out there the whole Thursday night and went home the Friday morning about 7.30 to 7.45 and I started to pack some things. I left and I went into town [131] looking for a friend so that I could borrow his pick-up. I did not find him. I came back home and the night time I moved out a standing fan, bedroom table and three quarters of my clothes to My Lord's Hill. I was a bit depressed after I got to My Lord's Hill. I went by Inez Outram's Rum Shop in the Ivy and I drink there from the Friday back down to the Monday. I leave Mayers Road Tuesday morning about 7.30 and I went over to Collymore Rock. When I got there I picked up the newspaper as the house was closed up all around. I went into the bedroom and lie down. I had a drink in there and I took two shots of it and some Lucozade.

I took off my clothes and locked back the door and I lie down and started to read the paper, eventually I dozed off to sleep. I was awakened some time after by the deceased who came there and she started to make a lot of foolish noise. She told me that she was looking for me since Saturday and she now come from carrying school Michelle and she come for my backside one way or the other. She then started to quarrel and then she said there is a man in her life who was going to marry her. She said I am not pleasing you anymore I am pleasing my father. I asked her who was the man and she told me that the man was Vernon Jordan. She then told me that her father had told her that if she was going to get married, that she should not marry me. She told me that her father was in a lodge and Vernon was in a lodge and that they were brothers. She said that Sheila Wells told her that her father told her that she Diana knows how he feels about me and if she does not leave me sooner or later she would have to leave his place. I told Diana to go away and leave me. I got up off the bed to go to the latrine and when I turn the door, I observed that she had both my keys and her keys. I turn to open the door and I told her that I wanted to go to the bathroom, she told me that I should do it in the room on the topsy whatever I wanted to do.

I discovered that she was getting on strange from the time that I obtained a Barbados Passport and a Visa for the United States of America. She took up my passport and took it away unknown to me. On numerous occasions I asked her to bring it back and she refused to do so. I saw the passport at the Criminal Investigation Department on the 15th September, 1989 in the possession of the police. I don't know how the police got it.

After she would not let me out of the room I made a grab at her and she and I had a scuffle and she and I fall down. I managed one of the keys from her and just as I was going to unlock the door to go out I saw Diana take up a knife and she started stabbing at me. I managed to grab one of the pillows from the bed and I blocked off a few stabs. She let go a stab which knocked the pillow out of my hand and I stumbled down in the corner and my head hit the Collins and knocked it down. After I see her coming again to stab me [132] I picked up the Collins to bar her off and she and I catch hold again. That is the end of my statement."

The main defence at the trial was provocation, but counsel for the appellant also addressed the jury on self defence and the judge, ex abundanti cautela, directed the jury on that defence. It is the view of this court that the evidence did not raise self defence: it did not arise out of the appellant's written statement (Exhibit "K") in which the appellant said that he took up his Collins from by the bed head and started lashing at Diana who fell to the ground and was not saying anything, and it did not arise from his unsworn statement in which he ended his account of what had transpired at the point when he and Diana had "caught hold again". Moreover, the number, and severity of many, of the injuries found on Pinder's body were inconsistent with a scenario in which the appellant was defending himself.

In this court, counsel for the appellant raised grounds in which she questions the adequacy of the summing up with respect to -

(a) lies told by the appellant; and

(b) provocation

and submitted that there was misdirection in law in directing the jury that the defence of provocation cannot succeed if there is an intention to kill.

With respect to the question of lies, the testimony of the police officers is that the appellant told them on Thursday September 14, that he had not been to his house since Sunday (September 10) and had not seen Pinder since Friday (September 8) and that when he heard that she had died he did not know where to turn. This is clearly inconsistent with his second oral statement, his written statement (Exhibit K) and his unsworn statement. The judge dealt with this at page 15 where after referring to the appellant's initial denial of his involvement when confronted by the

police, he continued:

"But I should charge you, Mr. Foreman and Your Members, that a man may lie for a multiplicity of reasons. A man might lie because he was in panic, because his mind was confused. A man might lie because he hasn't got the capacity to explain himself, or a man might lie because of a guilty conscience. And I will warn you further, that if from a given set of circumstances, or a given number of facts, more than one inference can be drawn, and one of the inferences which can be drawn is consistent with innocence, and the other inference which can be drawn is consistent with guilt, then the rule of law is, that you draw the inference, which is most favourable to the accused. That is to say, you give the accused the benefit of the doubt." [133]

The judge again referred to this at page 30 -

"Now, the first statement, if made by the accused, was obviously an untrue statement, and you will have to ask yourselves as indicated to you earlier whether he was lying, and I told you that fear can cause a man to lie, or confusion or panic, or he could lie because he wanted to evade his responsibilities for his actions. You must remember, that in drawing the inferences, where more than one inference can be drawn from facts which you find to exist, you must draw the one most favourable to the accused."

We do not think that this ground has any merit, especially in circumstances in which the appellant, in his own subsequent unchallenged statement to the police and his unsworn statement at his trial, admitted that he was involved in Pinder's killing.

On the other hand the submissions on provocation do have some substance. The judge discussed provocation very fully at pages 5 to 10 of the summing up and it is unnecessary to reproduce those directions.

Miss Mottley argued with cogency that the directions were deficient in that there was no sufficient marshalling of the evidence that supported the defence and no direction on or reference to cumulative provocation. It is unnecessary for the court to enter into this area of her submissions because of the view we have formed on her submissions that the jury would have been misled by the direction reproduced below given minutes before they retired. That direction is this:

"The case for the Crown is that in all the circumstances including the statement of the accused, you can reach a sure conclusion that the accused committed the crime of murder. I must tell you that as a matter of law, you can only reach a verdict of guilty of murder in this case, if the circumstances lead you to a certain and sure conclusion, that he is guilty of the offence of murder, because any reasonable doubt in the matter must be resolved in favour of the accused.

If from the evidence as a whole you reach a sure conclusion that the act (or acts) of the accused caused Pinder's death and you do not believe that he was defending himself and you believe that the intention to kill or cause really serious bodily harm was not present, as I told you before, then you will find him not guilty. If you feel he intended to kill or to cause grievous bodily harm, then the verdict must be murder. The intent must be proved like all the other ingredients. If you find that he did the injuries to the woman and he had no intention to kill or cause grievous bodily harm, but the harm which was caused, would have been capable of causing her some injury, then, you will have to find him guilty of manslaughter."

In our view, this direction could have led the jury to believe that a finding of an intention to kill or to cause grievous bodily harm ruled out provocation and that [134] clearly is not the law as is demonstrated by the cases of *The State v. Mitchell* (1977) 29 W.I.R. 381 and *Baptiste v. The State* (1983) 34 W.I.R. 253 both decisions of the Court of Appeal of Trinidad and Tobago. In the former case, the court relied on the Privy Council decision in *Attorney General for Ceylon v. Perera* [1953] A.C. 200 in which Lord Goddard said at p. 206:

"The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm, but his intention to do so arises from sudden passion involving loss of control by reason of provocation."

Lord Devlin in the Privy Council case of *Lee Chun-Chuen v. The Queen* [1963] 1 All E.R. 73 re-affirmed this dictum as a correct statement of the law and Lewis, J.S. in *R. v. Bunting* (1965) 8 W.I.R. 276 at 278 stated the principle in this way:

"Murder is not established unless an intention to kill or cause grievous bodily harm is proved, but the converse proposition, namely, that the accused is guilty of murder if such an intention is proved is not necessarily correct. For where the intention to kill or to cause grievous bodily harm results not from pre-meditation, but solely from the loss of self control induced by provocation, the accused is guilty not of murder, but of manslaughter."

In the circumstances, the view of this court is that the conviction for murder must be quashed and the sentence of death set aside. A conviction for manslaughter is substituted and the appellant must serve a sentence of imprisonment. In the circumstances of the case we think a sentence of twelve years imprisonment is appropriate and the appellant is sentenced accordingly, with the sentence to run from the date of his conviction, May 16, 1990. [135]