BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 42 of 1998

BETWEEN:

HAYDEN DELISLE BOSTIC

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Hon. Mr. Justice Errol DaC. Chase, Chief Justice Acting, The Hon. Mr. Justice Colin A. Williams, Justice of Appeal and The Hon. Mr. Justice Frederick L.A. Waterman, Justice of Appeal. (Ag.)

1999: October 29

2002: November 22

Mr. A. Pilgrim in association with Mr. M. Lashley for Appellant

Mr. D. Saddler for the Respondent

DECISION

[1] On November 6, 1998 Hayden Bostic was convicted of the manslaughter of Vellin Weir on August 13, 1996 and on November 12, 1998 he was sentenced to 13 years imprisonment. His appeal is against conviction and sentence.

[2] Weir died on August 13, 1996 shortly after being shot. The case for the Crown was that on that evening at Six Roads in St. Philip the deceased Weir had discharged a number of shots from a firearm at one Merton Nurse but Nurse was not hit and rode away swiftly on his bicycle. The appellant who was in a shop nearby heard the shots, ran [1] out of the shop, went behind the shop, took up his gun, went to the front, fired eight shots in the direction of Weir and shot Weir in his back. The Crown says that when the appellant got his gun and fired on Weir, Weir had stopped shooting at Nurse five minutes earlier, according to the evidence of one of the witnesses for the Crown André Toppin and that Nurse had already ridden away on his bicycle and was no longer in danger. They say it was an act of aggression by the appellant towards Weir, that the appellant had said that Weir had troubled him before and that on this occasion the appellant seized the opportunity to shoot Weir in his back and that this was a deliberate and unprovoked act done by the appellant without lawful justification and excuse.

[3] The case against the appellant was based on a written statement (Exhibit H) which the police testified he had given: - (pp. 141 -143)

"…I saw Vallance sitting down under a plum tree in front of the bar next to Pop gap. I walk and went down through the back and went under the ackee tree next to the bus stop to carry you up Bayfield. When I get under the ackee tree I didn't see Vallance under the plum tree no more. I ask a fellow called Punk Man if he see Vallance and he tell me that he see Vallance, Garfield, and June Boy down by Cosmopolitan. I then see Vallance walking coming up he self. Then I get up and went toward the shop. I run and went to the back and tek up my gun from behind the shop and put it 'pon cock and put it in my pocket and went back 'round to the front of the shop. Then I saw Vallance coming towards me. Mahalia and Fiona come out of the shop and stop Vallance and ask he something. Quickly after Pop ride and come from through he gap Vallance then pull a gun from in front he waist and start firing at Pop. I went to run and I fall down. The gun drop out my pocket and I tek it up and start to shoot at Vallance. I shoot about eight shots at he and when the gun did empty I turn and run. I run straight to Fortescue. I ain't know if I hit Vallance when I shoot at he. When I get up Fortescue I went by the spring and spend a couple days. Then I went by Tall Man. I tell he that I gine get rid of the gun and he tell me that he want to keep it and I give he. I then left [2] by Tall Man and went three houses spring. Ever since that this happen I was hiding out up in the back where we live. I get fed up hiding out and I start feeling sick so I decide that I going into the police with a lawyer. I went to my lawyer and he carry me to District C Police Station."

[4] The Crown's case was also based on the evidence given by Janice McCarthy and her daughter, Tanya McCarthy. It was that while they were at home some time after 6.00 p.m. on August 13, 1996 they heard a noise outside like a breaking of something. They both went outside and saw the deceased Weir lying on the ground with blood coming from his chest and back and Tanya asked him what was wrong and he said, (p.56)

"Tanya, I got shot, help me, help me. Tanya help me, Hayden shoot me. Hayden shot me," and later (p.65) "Cobra man shot me". They understood him to mean the appellant. Other civilian witnesses gave evidence for the Crown.

[5] When the Prosecution closed its case, the appellant made an unsworn statement in which he said, inter alia,: (pp. 230-231)

And on the same day of the incident, sir, that I am standing here now charged for, Vallance Weir came to Six Roads. Weir was in the wall house. Don Harding shout Vallance and he did not respond. He went up, sit down underneath the plum tree, and then he went through the track, come round the back again and pass up the road again and Don shouted again. He did not respond. So I thought that he did leave Six Roads. So I went to the pool shop to play pool and as I was in the shop Vallance came up and was walking, coming towards me. Fiona and Mahaica walk out the shop the same time and stop in front of Vallance. While Vallance was talking to them Vallance was watching me. So the same time Vallance draw his gun and the same time Pop went through the gap so Vallance just turn and start shooting at Pop. So I run out the shop. I run and went through a track. When you hear X amount of gunfire, sir. Sir, same time I look back and there were two men running out the pool shop with guns which run Vallance out of Six Roads. These two men were riding a cycle, a black cycle which was parked by the White House opposite the shop. So I ran. I went three houses spring where I stayed.[3] And then as I was coming back down I was passing through Bushy Park where a girl told me that Garfield say that I is who shoot Vallance. So I say that I did not shoot Vallance.

[6] The grounds of appeal filed on behalf of the appellant are: -

1. That the Learned Trial Judge failed to put the defence of the Appellant adequately to wit:

1. The Learned Trial Judge failed to indicate to the jury the effect of the two defences i.e. self defence and prevention of an atrocious crime.

2. The Learned Trial judge summed up to the defence evidence in a manner unfavourable to the Appellant

3. The Learned Trial Judge failed to direct the jury adequately on manslaughter.

2. The Learned Trial Judge's direction in respect of capital punishment was prejudicial to the accused.

3. The Learned Trial Judge erred in law when he allowed the prosecution to treat prosecution witnesses as hostile witnesses without any foundation for the application being laid.

4. The Learned Trial Judge failed to indicate to the jury that the written statement of the accused could support an acquittal of all charges.

5. That the Learned Trial Judge failed to give adequate directions on grievous and serious bodily harm.

6. The Learned Trial Judge's direction that the accused man's statement was a confession was prejudicial.

7. The verdict was unsafe and unsatisfactory because the verdict of manslaughter was not disclosed on the facts before the jury.

8. The Learned Trial judge erred in law when he failed to discharge the jury from giving a verdict of murder.

9. The Learned Trial Judge's further directions were confusing to the jury who had stated that they could not agree on a verdict for murder.[4]

GROUND 1(a)

[7] On ground 1(a), it was contended that the trial Judge failed to indicate to the jury the effect of the two defences i.e. self defence and prevention of an atrocious crime.

[8] The record shows that in the course of his summation in dealing with the defences of the prevention of an atrocious crime and self defence, the learned Judge gave detailed directions at pages 207 - 213 of the record and we can find no fault with them. We can see no merit in this ground.

GROUND 1(b)

[9] On ground 1(b), it was contended that the learned Judge summed up the evidence of the defence in a manner unfavourable to the appellant.

[10] The learned Judge left the defence to the jury in this way (pp 234-235):

"Now, the case for the Defence is that the accused did not shoot Vellin Weir. The accused in his statement from the dock said that he could not remember the date but it was in August that Vallance, the deceased, drew a gun and fired at Pop. He, the accused, ran and two men ran out of the shop with guns which run Vallance out of Six Roads. The Defence say that the accused did not make the written confession, that he signed it after having been subjected to threats by the police, that he did not make any of the oral statements, and that he is entitled to be found not guilty because he did not shoot Weir. Learned counsel for the accused man in his address to you, however, did say that if the circumstances existed, then the accused was defending himself. So he did not shoot Weir -- their case is he did not shoot Weir or he was defending himself."[5]

[11] The summing up made it quite clear what the appellant's defence was. What the learned judge said in his summation could not have prejudiced the defence in any way.

GROUND 1(c) and GROUND 7

[12] The complaint on these grounds is that the learned Judge failed to direct the jury adequately on manslaughter and that the verdict was unsafe and unsatisfactory because manslaughter was not disclosed on the facts before the jury.

[13] The jury would have returned the manslaughter verdict on the basis of the following directions:- (pp. 235-236):

"If you come to the conclusion that the accused shot Weir and he did not intend to kill him or to cause him serious bodily harm, but nonetheless he shot Weir and that the shooting was an act which all sober and reasonable people would inevitably recognize would have subjected the deceased to at least the risk of some harm resulting therefrom, albeit not serious harm, then in those circumstances your verdict should be guilty of manslaughter. So that if you believe that he shot Weir and that when he did so he intended to kill him or to cause him serious bodily harm, the verdict should be guilty of murder. If you believe that he shot Weir and that he did not intend to kill him or to cause him serious bodily harm but nonetheless the act of shooting Weir was an act which all sober and reasonable people would inevitably recognize would have subjected the deceased to at least the risk of some harm resulting therefrom, albeit not serious harm, then in those circumstances your verdict should be guilty of manslaughter.

So manslaughter arises in this case if you find that the accused shot Weir and at the time he did not intend to kill Weir or to cause him serious bodily harm but that the shooting was an act that all reasonable people would regard as capable of resulting in some form of harm to him. And harm in this case means physical harm. In those circumstances, the intent to murder or cause serious bodily harm would not have been proved so your verdict would be guilty of manslaughter."[6]

[14] In considering counsel's submissions in support of these grounds we must have regard to the state of the evidence as disclosed by the appellant's written statement and by the evidence of eye-witnesses, for example, Kevin Trotman's evidence to the effect that the appellant discharged a firearm in the direction of the deceased. It is also of significance to recall that the issue of self defence was left to the jury to be determined on the evidence, and if it was open to the jury to find that the appellant was not acting in self defence, then there would have been evidence upon which the jury could have found that the appellant was engaged in performing an unlawful and dangerous act which resulted in the death of the deceased. A possible verdict of manslaughter therefore arose on the evidence. There is no merit in these grounds.

GROUND 2

[15] Ground 2 complains that the learned judge's direction at p. 2 of the record in respect of capital punishment was prejudicial to the appellant.

[16] There is no substance in this ground.

GROUND 3

[17] On this ground, it was contended that the learned judge erred in law when he allowed the prosecution to treat prosecution witnesses as hostile witnesses without any foundation for the application being made.

[18] There is merit in this ground. The record shows that the learned judge permitted the Crown to treat certain of its witnesses as hostile without the proper foundation being laid. It is the Court's view, however, that [7] this procedural irregularity did not disadvantage the appellant or deprive the appellant of a fair trial.

GROUNDS 4 and 6

[19] These grounds allege that the learned judge failed to indicate to the jury that the written statement of the appellant could support an acquittal of all charges and that the learned judge's reference to the written statement as a confession was prejudicial to the appellant.

[20] In dealing in his summation with the written statement the learned judge gave the jury the following directions (p. 215)

In deciding whether you can safely rely on the written confession, you must decide two issues: One did the accused in fact make the confession? If you are not sure that he did, you should ignore it. If you are sure that he did make the confession then, two, are you sure that the confession is true? When deciding this question you should have regard to all the circumstances in which it came to be made and consider whether there were any circumstances that might cast doubt upon its reliability. You should decide whether it was made voluntarily or was, or may have been, made as a result of threats made to the accused by the police officers. You should also have regard to the contents of the confession itself and consider whether the accused appears to have made admissions to matters that cannot be true.

It is for you to assess what weight should be given to the confession. If you are not sure that the confession is true or that it was given freely and voluntarily by the accused you must disregard it. If, on the other hand, you are sure that it is true and that the accused gave it freely and voluntarily, you are entitled to rely upon it.

[21] No fault can be found with the above directions. The learned judge's reference to the written statement as a confession could not have and did not in any way prejudice the appellant's case in respect of the charge of murder. We do not see any merit in this ground.[8]

GROUND 5

[22] This ground alleges that the learned judge failed to give adequate directions on grievous and serious bodily harm.

[23] The relevant part of the record reads: (pp. 237 - 238)

(Jury return at 12:32 p.m.)

The Clerk: Mr. Foreman, please answer yes or no.

Have you reached a verdict upon which you are all agreed?

Mr. Foreman: No

The Court: Mr. Foreman, is there any likelihood on your reaching a verdict on which you all agree?

Mr. Foreman: No sir.

The Court: At this stage the time has come when I can tell you that I can accept a majority verdict, a verdict on which at least nine of you are agreed, but you should retire again and try to reach an unanimous verdict and if you cannot reach a unanimous verdict for murder -- you should try to reach a unanimous verdict. If you cannot, if you come to the conclusion of manslaughter, this court can accept a majority verdict on which nine of you are agreed, whether that verdict be guilty or not guilty. But you should retire again and try to reach an unanimous verdict. And you should only return a majority verdict if you find you cannot reach a unanimous verdict. Unanimous verdict has to be for murder for guilty or not guilty but you may reach a majority verdict on manslaughter or nine whether it be guilty or not guilty.

Now what is your difficulty?

Mr. Foreman: Seriousness of, how shall I put it, the seriousness of bodily harm, what is serious bodily harm.[9]

The Court: The seriousness of grievous bodily harm, grievous bodily harm or serious bodily harm applies if you find that at the time the act is committed the accused intended to kill the deceased or to cause him serious bodily harm. And serious bodily harm means no more than serious bodily harm. It doesn't have to be dangerous or life threatening. Does that help you in any way?

Mr. Foreman: Yes, sir.

The Court: Do you want any further direction?

Mr. Foreman No, sir.

The Court : Well, will you now please retire again and try to reach a unanimous verdict?

Mr. Foreman: Yes, sir.

[24] The gravamen of Mr. Pilgrim's submission was that as the jury had returned to Court and had indicated to the learned Judge that there was no likelihood of them reaching an unanimous verdict on the charge of murder the learned Judge's further direction on serious bodily harm was redundant. On the other hand, Mr. Saddler contended that the charge of murder was still a live issue and so the learned Judge's direction to the jury on serious bodily harm was very relevant.

[25] We can find no fault with the learned Judge's further direction to the jury relating to the difficulty they faced as to the meaning of serious bodily harm. We do not see any merit in this ground.

GROUNDS 8 and 9

[26] Ground 8 contends that the learned Judge erred in law when he failed to discharge the jury from giving a verdict of murder and ground 9 that the learned Judge's directions were confusing to the jury who had stated that they could not agree on a verdict for murder.[10]

[27] There is no merit in either ground. It is the Court's view that on an indictment charging murder if the jury determines that the accused is not guilty of murder but they are agreed that all the elements of manslaughter have been proved (where manslaughter is a possible verdict) they can return a verdict of manslaughter. The fact that the jury was not expressly discharged from giving a verdict on the charge of murder cannot affect the verdict. Further, the learned Judge's and the Clerk's questions to the jury and the Foreman's answers and the learned Judge's further directions to the jury, when the jury returned to Court at 12.52 p. m. (reproduced at paragraph 23) were clear.

[28] In the circumstances the Court is of the view that the sentence is not excessive. The appeal is dismissed and the conviction and sentence are affirmed, the sentence is to run from December 19, 1998.[11]

Justice of Appeal

Justice of Appeal Justice of Appeal (Ag.)