BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 17 of 2011

BETWEEN:

TROY STANFORD **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C.D. Gibson, KA, Chief Justice, The Hon. Mr. Justice Andrew D. Burgess and The Hon. Madam Justice Kaye. C. Goodridge, Justices of Appeal.

2015: June 15
December 16

Mr. M. Tariq Khan, Ms. Carol-Ann N. Best and Ms. Alexandria Thomas for the Appellant.
Mr. Alliston Seale for the Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] On 15 June 2008 sometime after midnight, Matthew Joseph (the deceased) suffered a gunshot wound while at Bush Hall, St. Michael.

That wound was fatal. The appellant was arrested and charged with his murder. On 14 June 2011 he pleaded not guilty to that charge. At the conclusion of the trial on 23 June 2011, the jury returned a verdict of guilty of manslaughter. On 15 August 2012 **Kentish J** sentenced the appellant to 18 years and 29 days imprisonment, full credit having been given for the time spent on remand.

The Case for the Prosecution

[2] On the night in question, the appellant was the conductor of motor vehicle registration number ZR-259 which was driven by Philip Small alias "Agony". The deceased was the conductor of motor vehicle registration number ZR-289 which was driven by Corey Lovell.

[3] Shortly after midnight, both vehicles were at the junction of Lenister Road, Bush Hall, St. Michael, where ZR-259 was collecting passengers who had attended a cavalcade held at the National Stadium. Motor vehicle ZR-259 was parked in front of ZR-289.

[4] At about ten minutes past midnight, the deceased left his vehicle and approached ZR-259. A scuffle ensued between the deceased and the appellant. Philip Small got out of motor vehicle ZR-259 and ran around the van with a gun in his hand. The appellant said "Gimme that" whereupon he took the gun from Small, turned around and shot

the deceased. The deceased ran off followed by the appellant who shot at him again. The body of the deceased was later discovered by Kenrick Reeves in Reeves' backyard.

The Case for the Defence

[5] The appellant elected to give an unsworn statement in which he stated that, while he was putting passengers inside his vehicle, the deceased came and stood in the van's doorway. A passenger brushed against the deceased and he started to curse. The appellant told the deceased there was no need for that type of behaviour, whereupon the deceased chucked him and punched him in the head.

[6] According to the appellant, they started to struggle and he ended up with his back against a wall with the deceased on top of him. "Agony" held the deceased around his waist and pulled him away. The deceased then made a grab at his waist and the appellant saw "Agony" and the deceased struggling for a gun. The appellant tried to get the gun away from them and during the struggle the gun discharged. People started running in all directions. As the appellant opened the front door of his van to go inside he heard another explosion. He became afraid, got out of the van, ran across the road and went home.

[7] The appellant denied having a gun at the material time or shooting anyone. He stated that the gun discharged accidentally while "Agony", the deceased and he were struggling for it. He called no witness.

The Grounds of Appeal

[8] The appellant filed seven grounds of appeal against his conviction and sentence. We set out the grounds and discuss them below.

Ground 1

[9] This ground is introductory in nature. It simply states that the appeal is against conviction and sentence. Nothing further needs to be said about it.

Ground 2

[10] On this ground it is alleged that the sentence is "too excessive". It is appropriate to deal with this ground after consideration of the other grounds relating to the conviction.

The Appeal against Conviction

Ground 3

[11] It is the contention of Ms. Thomas, counsel for the appellant, that the judge erred when she failed to ascertain the difficulties faced by the

jury after she called them back from deliberating when they had not reached a verdict.

[12] She submitted that the failure to ascertain whether the jury needed clarification or assistance on any point makes it impossible to properly comprehend whether their difficulties were resolved or not as these were not articulated at any given point in time. She relied on **Berry v R (1992) 41 WIR 244**; **Springer** (**Neverlaine) v The Queen, Criminal Appeal No. 17 of 2005** and **Goldbourne v The Queen, JM 2010 CA 101.**

[13] Mr. Seale, counsel for the respondent, submitted that there was nothing improper about the judge recalling the jury as she was merely complying with the provisions of **section 42** of the **Juries Act, Cap. 115B**. It was also his submission that the cases cited by Ms. Thomas were not of assistance having regard to the facts in this case.

[14] The record reveals that shortly before the jury retired the trial judge instructed them in the following terms:

> " .... if at any stage of your deliberations you wish to have any part of that evidence checked or read back to you, that can be arranged. You will do this through your foreman, who will let one of the marshals know and the Court will reassemble for that purpose.
>
> Secondly, if you would at any stage of your deliberations like me to repeat or elaborate upon any

> direction of law which I have given you, please do not hesitate to ask. It is fundamental that you understand the principles which you are required to apply and if you have any doubt about these principles then you are not only entitled to ask for further assistance but you should ask for it, and the procedure is the same as I have just outlined to you. You will indicate through your foreman that you require such assistance and a note signed by the foreman indicating the problem causing you difficulty should then be handed to the marshal who will pass it to me. Upon receiving such a request I shall discuss the matter with the Director of Public Prosecutions and counsel for the accused and the court then reassemble for the purpose of assisting you."

This Court recognises that these instructions to the jury accord with the procedure outlined by Lord Lane CJ in **Gorman [1981] 1 WLR 545**.

[15] The jury retired at 1.46 pm and were recalled by the judge at 4.09 pm, after some two hours and twenty minutes of deliberations. The following exchange then ensued:

> "THE CLERK: Mr. Foreman, please answer yes or no. Have you reached a verdict upon which you are all agreed?
>
> MR. FOREMAN: No ma'am.
>
> THE COURT: Is it likely that you will reach a verdict on which you are all agreed?
>
> MR. FOREMAN: At this point it is hard to decide, ma'am."

[16] The judge then proceeded to ask the jury to retire once again and seek to reach a unanimous verdict, but if they could not agree, she could accept a majority verdict. They retired again at 4.13 pm and returned at 5.00 pm when they delivered a verdict of guilty of manslaughter: eleven agreed and one dissented.

[17] In our judgment the cases relied upon by counsel can be distinguished on the facts. Those cases dealt with circumstances where the jury had indicated to the judge that they needed clarification or assistance which was not provided. This was not the case here. What the cases show is that a judge is under a duty to assist a jury which has indicated that they need the judge's help.

[18] There is nothing in the record which indicates that the jury sought any clarification or assistance on any issue or requested further directions. The extract referred to earlier shows that the jury's sole difficulty was that of reaching unanimity as indicated by the foreman's response. In the face of the judge's clear directions as to how they should seek assistance from the court and the fact that no such request was made, we cannot agree with counsel that the judge erred as she contends. We hold that this ground cannot be sustained.

Ground 4

[19] It is contended in this ground that the judge erred in that she undermined the appellant's case by failing to mention all the issues and facts relating to the defence of accident in her summation. In addition, it was contended that she failed to mention the Crown's witness' admission during cross-examination.

[20] Ms. Best, counsel for the appellant, submitted that the judge "failed to make reference to the elements of the defence of accident and whether there were any facts to corroborate the appellant's assertion on the evidence as presented by both the Crown and the defence". She submitted that the judge did not follow the principles outlined in **Best v R, Criminal Appeal No. 18 of 2001 (Best).**

[21] It was counsel's further submission that the judge failed to properly direct the jury that the burden rested on the Crown to prove beyond reasonable doubt that it was not an accident.

[22] Ms. Best's final submission on this ground was that the judge failed to direct the jury on the discrepancies which arose on the case for the prosecution, particularly that of the prosecution's main witness, Corey Lovell, who in evidence admitted that the shot went off during the scuffle between the deceased and the appellant.

[23] Mr. Seale countered these submissions by stating that the judge did all that could be done to make it clear to the jury that accident was one of the defences in the case and that her treatment of the defence of accident could not be criticised. He argued further that there was no inconsistency in the evidence of Corey Lovell relating to the scuffle and the discharge of the firearm.

[24] In **Best,** this Court stated that when the defence of accident has been raised, a trial judge is required to:

> (i) offer a definition of accident;
>
> (ii) explain to the jury that the burden of proof is upon the prosecution to negative accident and that a defendant has no burden of proof;
>
> (iii) explain that accident provides a complete defence, and, if a jury accepted that defence, they would have to acquit;
>
> (iv) direct the jury that if they have a reasonable doubt about the issue of accident, then the defendant is in law entitled to the benefit of that doubt; and
>
> (v) ensure that he relates the issues of fact giving rise to the defence of accident to the legal principles of the defence.

[25] Our examination of the record reveals that the trial judge fully complied with the requirements of **Best**. We are of the opinion that

the trial judge properly directed the jury on the defence of accident and did not in any way undermine the appellant's defence.

[26] The judge identified the discrepancies and inconsistencies which arose on the evidence. We do not agree that an inconsistency arose in the evidence of Corey Lovell. This complaint is misconceived. This ground cannot be sustained.

Ground 5

[27] It is alleged on this ground that the judge erred by "failing to give a balanced summation of the defence's case in contrast to that of the prosecution's case by placing too much weight on the element of provocation to the detriment of the defence's complete defence of accident and self-defence".

[28] Mr. Khan submitted that the judge over emphasised the issue of provocation leading to an imbalance during the summation. He stated that the defence of accident was simplified to its bare elements by the judge. Consequently the summation was weighted more in favour of the prosecution. He cited **R v Nelson [1997] Crim. L.R 234** and **R v Bentley (Deceased) [2001] 1 Cr. App. R 21.**

[29] Mr. Seale responded to this criticism of the summation in these terms. He submitted that provocation was an issue which "loomed large"

during the trial as the evidence of the appellant was that the deceased chucked him against the van and he was pushed onto a wall. He continued that provocation required careful exposition and explanation because the jury as laypersons might think of provocation as something different from what the law recognises it to be.

[30] Counsel submitted further that accident was an easier concept to explain to the jury and the judge dealt fully with this defence.

[31] We do not agree that the judge fell into error. We are of the opinion that the judge dealt fairly with the case for the prosecution and the case for the defence. She identified the issues for the jury and gave the appropriate directions to them. The judge listed the discrepancies and inconsistencies which arose on the evidence. She stressed that the defence was that the death of the deceased was an accident. In our view the summation was a balanced one. This ground fails.

Ground 6

[32] On this ground it is contended that the judge erred in law by withholding the defence of self defence from the jury despite defence counsel having brought it to the judge's attention.

[33] Mr. Khan referred to page 373 of the record where the judge asked counsel whether anything had been omitted from the summation and the appellant's then counsel Mr. Kissoon replied:

> "Not directly, but I think, for having gone to the provocation, I thought you would have probably put in self defence also, but that's only an opinion and any defence available to the accused should be addressed."

[34] Counsel urged the Court to hold that there was a material failure on the part of the judge when she omitted to put the issue of self defence to the jury. He contended that the judge was under a duty to identify and refer to any possible or alternate defence arising on the evidence even in circumstances where that particular defence had not been relied on by defence counsel. Mr. Khan relied on **Archbold 2009 edition, para 4-379**; **Blackstone's Criminal Practice 2002, para D-16.14** and **Von Strack v R [2000] 4 LRC 232.**

[35] Mr. Seale submitted that if the judge had raised the issue of self defence it may have undermined the defence of accident. He contended that on the facts in this case accident and self defence were mutually exclusive and therefore the judge was correct not to put the defence of self defence to the jury.

[36] In our judgment the judge was not required to give a direction on self defence having regard to the facts in this case. First, the appellant

in his written statement at page 173 lines 12 -14 of the record stated "I ain't went to shoot he, it happened by mistake when I snatched the gun from the two of them". Second, according to PC Terry Hurdle the appellant made the following oral statement: "I see he and "Agony" struggling for the gun and I snatched it and as I get it a shot went off and I see he stumble" at page 168, lines 10-12. Third, in his unsworn statement the appellant said: "I then saw an object, a silver object in between their hands. They were struggling for it. I then realised that the object was a gun and I made a snatch for it, trying to tug it away from them. While we were struggling for the gun it discharged... The gun discharged accidentally while my driver, Matthew and I was struggling for it." See page 217 lines 22 to page 218 line 1 and page 219 lines 1-2.

[37] We are of the opinion that there was no evidence before the court which would have grounded the defence of self defence. Clearly the case for the appellant was that the shooting was an accident. It was never self defence. Therefore we consider that the judge was right not to direct the jury on self defence. To do so would have undermined the appellant's case. This ground cannot be sustained.

Ground 7

[38] The allegation on this ground is that the verdict is unsafe and unsatisfactory in the circumstances.

[39] Mr. Khan contended that the deficiencies identified in the summation are such that the appellant was denied a fair trial. In the circumstances, the conviction and sentence ought to be quashed.

[40] We have already stated that the summation was a balanced one and we are of the opinion that the appellant received a fair trial. We have concluded that the judge did not fall into error. It is our judgment that the verdict is safe and satisfactory. We therefore dismiss the appeal against conviction.

The Appeal against Sentence

Ground 2

[41] The point taken on this ground is that the sentence is excessive. Mr. Khan submitted that the judge failed to properly apply the relevant sections of the **Penal System Reform Act, Cap. 139 (Cap. 139)** and failed to consider compelling evidence of self defence. Other areas of complaint were that the judge incorrectly weighted the fact of the use of a firearm in a public place which prejudiced the appellant and erred when she found that there was no remorse on the

part of the appellant. He cited **Pierre Lorde v R, 73 WIR 28 (Pierre Lorde)** and **Bend v Murray v R, Criminal Appeals Nos. 19 and 20 of 2001**.

[42] In response, Mr. Seale submitted that while the appellant had expressed remorse to the probation officer that the deceased's life was taken in such a reckless manner, the judge was right not to place much weight on remorse because when the allocutus was put to the appellant he maintained that he did not shoot anybody, the gun went off by accident.

[43] It was counsel's further submission that this case fell within guideline 2 of **Pierre Lorde** and that when all the facts are taken into account the sentence imposed by the judge was appropriate in the circumstances.

[44] This was a contested matter. The application of guideline 2 of **Pierre Lorde** was appropriate. In our opinion the judge properly applied the provisions of **Cap. 139**. She took the aggravating and mitigating factors into account. She considered the pre-sentence report.

[45] As for remorse, the record shows that the appellant expressed regret at the death but maintained his position that it was an accident. We do not consider that the judge's comments on remorse caused her to

inflate the sentence. Further, this incident occurred in a public place with persons embarking and disembarking public service vehicles. In our judgment, the sentence imposed was proportionate to the seriousness of the offence. It was not excessive.

[46] Finally we consider it necessary to repeat this Court's observations in **R v Skeete DPP's Reference No. 1 of 2003**:

> "Public concern about illegal firearms and violence and the need for general deterrence must be reflected in the sentences passed by the courts. The public are entitled to expect the courts to play their part in fighting the proliferation of firearms and violence. These courts serve the public interest."

Disposal

[47] The appeal is dismissed. The sentence is affirmed and will run from 15 August 2012.

Chief Justice

Justice of Appeal Justice of Appeal