BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 7 of 2015

BETWEEN:

DONOVAN GEORGE BARNES **Appellant**

AND

THE QUEEN **Respondent**

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

2015: November 18
2016: March 8, April 14
2017: April 11

Mrs. Angella A. Mitchell-Gittens for the Appellant.
Mr. Elwood Watts for the Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] This is an appeal against conviction. The appellant was charged with murdering Raymond Hewitt (the deceased) on 14 November 2010. On 14 September 2012, he pleaded not guilty to that charge. Trial commenced and on 2 October 2012, the jury returned a verdict of not guilty of murder, but guilty of manslaughter. On 26 February 2013, the appellant was

sentenced to a term of 8 years imprisonment by **Crane-Scott J** and was ordered to spend 5 years and 265 days in prison, full credit having been given for the period spent on remand. On 28 February 2013, the appellant completed a notice of appeal in which he contended that the "proceedings were unsafe and the sentence unsatisfactory".

[2] This appeal was first listed for hearing on 12 January 2015. On that date Mr. Marlon Gordon, the attorney-at-law who had appeared as counsel for the appellant at his trial, informed the Court that the matter had been assigned to another attorney-at-law by the Community Legal Services Commission. The matter was adjourned to 9 April 2015.

[3] The grounds of appeal and skeletal arguments were filed on 2 April 2015. On 9 April 2015, Mrs. Angella Mitchell-Gittens, counsel for the appellant, apologised for the late filing. The respondent was given time to file its response and the appeal was scheduled for hearing on 18 November 2015. Illness of counsel for the appellant prevented the Court from proceeding with the appeal on 18 November 2015, and a further adjournment was granted to 8 March 2016. Regrettably, the absence of the appellant (due to challenges encountered by the prison authorities) necessitated a further adjournment to 14 April 2016, when the appeal was finally heard.

The Crown's Case

[4] The Crown's case was based largely on circumstantial evidence.

[5] On the night of 14 November 2010, the appellant and the deceased were participating in a domino game at the appellant's residence.

[6] According to a witness, Ms. Crystal Wiggins, during the course of the game, the appellant left, and she remained with the deceased and one Tristan playing 'Go to Pack'. The appellant returned and took up three of the dominoes and went inside his house. On his return, there was an argument between the appellant and the deceased. The appellant told the deceased something distasteful about his mother and the deceased retaliated in similar vein, raised the domino table and threw it over her head in the direction of the appellant who was behind her. Ms. Wiggins extricated herself from between the two men as they struggled and ran inside her home with her son. She later observed the deceased coming from the area of her neighbour's house. The deceased then sat on the wall in front of that house and held his side.

[7] Another witness, Ms. Michelle Lashley, testified that the appellant lived in front of her house. She stated that she observed the deceased playing dominoes with other persons but at that time she did not see the appellant. Ms. Lashley's evidence was that as she was plaiting her daughter's hair, she heard a lot of noise. She looked outside and saw the deceased against a wall

with a chair up to his chest, and the appellant making pushing motions at the deceased. She did not see anything in the appellant's hand at the time.

[8] The deceased received injuries. He was transported to the Queen Elizabeth Hospital where he was pronounced dead. The post mortem conducted by Dr. David Gaskin revealed that the cause of death was a stab wound to the chest.

The Appellant's Written Statement

[9] The appellant's written statement was admitted in the prosecution case without objection. That statement is as follows:

> "I was playing domino, French, Sunday evening, it was about four of us. The game done, I went inside, I went to de fridge, I cut piece of my pear and went back outside wid the knife in my hand I cut de pear wid. When I reach outside Raymond Hewitt said something I did not quite remember what he said. I told he 'bout his mother. He take up de domino table top and threw it in my face, so that is how I get de burst over my forehead. He tek up a chair and start it me wid it. I still have de knife in my hand. I do not know if the knife cut im 'cause I was defending myself wid my hand in de air. Somebody hold me and pull me away. He was trying to kill me wid de iron chair."

The Defence

[10] The appellant's defence was self-defence. He gave an unsworn statement which was similar to his written statement. The appellant stated in part:

> "He was hitting me with the chair, so I hold up my hand in the air for avoiding the chair hitting me in my head. I get frightened for my life so I hold up my hand and push him off, pushing the chair off with my hands (demonstrating). So I don't know what happened. I never stabbed him with the knife. I don't know if the knife catch him. Okay. He was

> hitting me, so I had fear my life because I think he want to kill me with the chair, so I just keep on push him off, push him off when he come with the chair at me. Until somebody come and try part the two of us. Somebody come and draw me to the next side, part the two of us."

Grounds of Appeal

[11] Mrs. Mitchell-Gittens filed 5 grounds of appeal which dealt solely with the conviction.

Ground 1

[12] On this ground, counsel contended that "given that the appellant's confession statement raised the defences of accident and self-defence and given also that the prosecution did not adduce any evidence to negative these defences which are complete defences, the appellant's case ought not to have been sent to the jury for their deliberation."

[13] Mrs. Mitchell-Gittens submitted that the only evidence that the deceased had been stabbed was found in the oral and written statements of the appellant which raised the defences of self-defence and accident. The prosecution led no evidence to negative these issues and thereby failed to discharge the burden of proof. In these circumstances, counsel contended, the trial judge was obliged not to call upon the appellant to answer the charge.

[14] Counsel also submitted that it was the responsibility of the trial judge not to allow the jury to consider evidence upon which they could not safely convict. Since defence counsel failed to make a no case submission, if the

trial judge was of the opinion that no reasonable jury properly directed could safely convict, the matter should have been raised for discussion with counsel: **R v Brown [1998] Crim. L.R 196**.

[15] Further, counsel relied on **Neverlaine Springer v R, Criminal Appeal No. 17 of 2005 (Neverlaine Springer**) to support her contention that, even if the submission had been made and failed, this Court in its supervisory capacity could still quash the resulting unsafe conviction.

[16] In response, Mr. Elwood Watts, counsel for the respondent, took issue with these submissions. First, he pointed out that, having regard to the evidence of Ms. Lashley as to the deceased with his back to a wall with a chair in his hand while the appellant was making motions at the deceased, it was right for the case to be left for the consideration of the jury. Second, the appellant was represented by experienced and competent counsel at trial, who clearly felt that there was a case for the appellant to answer. Third, counsel argued that the facts in this case are distinguishable from those in **Neverlaine Springer**.

[17] We agree with Mr. Watts' submissions. In our opinion, **Neverlaine Springer** can be easily distinguished from this case. In **Neverlaine Springer**, there were no eyewitnesses to the events which led to the death of the deceased. There **Simmons CJ** stated at para 29:

> "The totality of the evidence in this case and its substantial basis were the oral and written statements of the appellant which clearly contained uncontradicted evidence of accident

> and self-defence. Of course, issues of self-defence and accident are essentially issues of fact for the jury's determination. In a case where there are several witnesses whose evidence touches and concerns those issues, a trial judge should properly leave them for the jury's decision. But where, as here, the only evidence raising these issues comes from the defendant and forms part of the prosecution case, in our view a judge would be entitled to stop the case."

[18] By contrast, this was not the state of the evidence in this case. There were two eyewitnesses, in particular Ms. Michelle Lashley, whose evidence differed in certain material respects from the appellant's written statement. There was also the medical evidence that the deceased had died from a stab wound, along with the appellant's admission that he had a knife in his hand during the course of the struggle. Further, the appellant spoke only of one occasion between himself and the deceased when the deceased was pushing at him with a chair and he was defending himself with a knife in his hand. In our opinion, these were all matters which were properly left for determination by the jury, whose primary duty it was to decide the facts and assess whether self-defence or accident arose on the evidence.

[19] We turn next to the complaint regarding the judge's responsibility where counsel fails to make a no case submission. It must be stressed that the appellant was represented by counsel with extensive criminal law experience. He did not make a no case submission at the close of the prosecution's case but decided that the matter should be left for the

determination of the jury. We endorse the statement at paragraph **D15.67** of **Blackstone's Criminal Practice 2011** that:

> "It is defence counsel's responsibility to make a submission of no case to answer should the circumstances warrant it (Juett [1981] Crim LR 113). In general, the trial judge is neither required nor even entitled to intervene if no submission is made. Exceptionally, however, the interests of justice may demand that the judge take the initiative and suggest that there may not be a case to answer. In such exceptional cases and assuming there was not in fact enough evidence to go to the jury at the end of the prosecution case, the Court of Appeal will quash the conviction, notwithstanding that defence counsel did not make a submission."

[20] We have carefully examined the record, and we do not agree that a submission of no case should have been made, or if made, would have been successful. We are of the opinion that there was sufficient evidence to go to the jury. This was not an exceptional case. Therefore, it would have been inappropriate for the trial judge to take the initiative and intervene as argued by counsel. If the judge had done so she would have usurped the function of the jury. This ground cannot be sustained.

Ground 2

[21] Here it is alleged that the trial judge erred in law when directing the jury on self-defence, in particular when she directed them that when they examined the evidence of Michelle Lashley they could find that (i) the threat from the deceased may not have been serious, (ii) the threat could even have been relatively minor and (iii) the appellant could have averted

violence to himself by taking some simple action such as running back to his house.

[22] Counsel submitted that the analysis of the evidence of self-defence was particularly crucial as self-defence was a central issue in the case and reliance was placed on it by the appellant. In the circumstances, inviting the jury to reach those conclusions on the basis of Ms. Lashley's evidence was inviting them to speculate and to deliberate on the basis of an erroneous consideration.

[23] Mr. Watts contended that there was no merit in this ground. He submitted that it was important to take the judge's summation as a whole, and that having regard to the judge's analysis of the evidence there was no error on her part.

[24] From pages 441 to 443 the judge directed the jury on self-defence. Thereafter, the judge set out what she considered as all the evidence in relation to self-defence, namely, the appellant's statements as to what had occurred and the evidence of Ms. Wiggins and Ms. Lashley. She then analysed the case for the Crown and for the defence. At page 445 line 18 to line 1 on page 446, the judge stated:

> "… if you accept, Mr. Foreman and members of the jury, that the accused man instinctively put his hand in the air to prevent his face from further injury and also had pushed him off or pushed the chair off and had done what he honestly thought was necessary to avoid further violence to himself, then you will find that his acts were reasonably necessary in his own

> self defence and not unlawful. And in those circumstances, the accused man must be acquitted."

[25] The trial judge then went on to contrast what the appellant had said with the evidence of Ms. Lashley at the point in time when she saw something happening between the appellant and the deceased. We therefore do not agree that the trial judge erred in her analysis of the evidence. We find no merit in this ground.

Ground 3

[26] The complaint on this ground is that the trial judge misdirected the jury as to the proper approach to take in their assessment of the issue of manslaughter. Counsel submitted that it was crucial that the jury be given directions as to the correct approach to take in their analysis of legal issues. Relying on **Beckford v R (1987) 85 Cr. App. R 378**, she submitted that the jury were misdirected and would have deliberated on an erroneous basis and so the conviction would therefore be fatal.

[27] In response, Mr. Watts submitted that the directions on manslaughter were lawful and focussed around the issues in the case. The only evidence which tended to show the appellant making pushing motions at the deceased came from Ms. Lashley and it was the appellant who admitted having a knife in his hand.

[28] Counsel for the appellant did not identify any specific error allegedly committed by the judge in her directions on manslaughter. We do not agree

with counsel that the judge misdirected the jury when she analysed the evidence of Ms. Lashley in the context of manslaughter. This ground also fails.

Ground 4

[29] This ground alleges that the judge erred in law when she characterised the evidence of Michelle Lashley as "provides you with a picture of a man with his back literally against a wall, who may not have been the aggressor at all and could very well have been defending himself from an attack by the accused".

[30] Mrs. Mitchell-Gittens accepted that a trial judge is entitled to make comments on the evidence but submitted that such comments must not have the effect of making the summation fundamentally unbalanced. She contended that the trial judge's characterisation of the evidence of Ms. Lashley effectively negatived the defence and was not an accurate representation of the evidence adduced.

[31] Mr. Watts responded to this criticism in this way. While accepting Mrs. Mitchell-Gittens' statement as to the judge's duty when expressing an opinion on the evidence, he contended that the judge adopted a balanced approach in her summation and the criticism was therefore unfounded.

[32] A summation must always be looked at as a whole. The extract which is the subject of complaint must be considered against the background in which it appears. The extract was preceded by the judge reminding the

jury that the witness could not say how the incident started, did not see the appellant with a knife and could not say how the deceased received his injuries. She then recapped Ms. Lashley's evidence before making the statement referred to. The judge summarised the Crown's case and stated:

> "...in the absence of any evidence as to how long Michelle Lashley had stood observing the accused and the deceased pushing at each other as she described, and in the absence also of any evidence as to how long it had taken her to leave the window, to go outside, to pull on a shirt and to meet the injured Raymond at her door, you will have to ask yourselves whether you are sure and certain that that fatal injury was in fact inflicted in the circumstances which she described while she was standing at the window, and while Raymond's back was against the wall."

[33] The judge then further analysed the evidence, posing certain pertinent questions for the jury and reminded them that these were all matters for them to determine as judges of the facts. We consider that the judge took a balanced approach in summarising the evidence. This ground cannot be sustained.

Ground 5

[34] It is alleged on this ground that the verdict is unsafe and unsatisfactory.

[35] Counsel submitted that if this Court agreed with her submissions on the grounds above, then there must be lurking doubt as to the safety of the conviction and the only recourse was to overturn that conviction.

[36] We are mindful of the fact that whether a verdict is to be regarded as unsafe depends upon all the circumstances of the case and whether on the

particular facts there is any lurking doubt that the verdict returned by the jury was anything but just. Having reviewed the evidence, and perused the summation in its entirety, we find no merit in the preceding grounds. We are satisfied that the appellant received a fair and just trial resulting in a verdict which was safe and satisfactory.

Disposal

[37] The appeal is dismissed. The conviction and sentence are affirmed.

Chief Justice

Justice of Appeal

Justice of Appeal