

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 9 of 2016

BETWEEN:

DWAYNE OMAR ALLEYNE

Appellant

AND

THE QUEEN

Respondent

Before: The Hon. Sir Marston C. D. Gibson, K.A, Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. William J. Chandler, Justice of Appeal (Acting)

2019: May 22,

2020: July 24

Ms. Lesley Cargill and Ms. Rashida Edwards for the Appellant

Ms. Krystal Delaney and Mr. Oliver Thomas for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] On 17 June 2016, the appellant was convicted and sentenced to death for the murder of Paul Hope (the deceased) on 21 January 2008. He now appeals against his conviction.

THE CASE FOR THE PROSECUTION

[2] It was the case for the prosecution that on the day in question, sometime about 8.00 am, the deceased left Ashton Hall, St. Peter, and went to

Maynards Housing Area, also in St. Peter. The deceased was accompanied by a friend, Jason Chandler. They were joined by Duane Sandiford, cousin of the deceased and Lloyd Scantlebury. The parties were in the area of the play park.

- [3] The appellant came into the area shortly thereafter. The deceased walked towards the appellant and confronted him about an incident concerning the deceased sister's car. According to the evidence given by Duane Sandiford and Jason Chandler, the appellant drew a firearm from his waist and shot the deceased who fell to the ground. The appellant then stood over the deceased and shot him 2 more times as he lay there.
- [4] On 22 February 2008, the appellant went to the police station. He was accompanied by his attorney-at-law. The appellant was questioned and he gave a written statement. He was subsequently arrested and charged with murder.
- [5] The preliminary report prepared by then Consultant Pathologist Dr. Karl Winskog dated 23 January 2008, indicated that the deceased sustained 3 gunshot wounds: (1) to the throat with the bullet passing through the main artery on the left side, continuing through the spinal cord and exiting on the left side of the neck; (2) through the right arm and the right side of the chest with a bullet resting at the right side of the vertebral column; and (3) to the right side of the hip with the bullet buried in the bone. Cause of

death was due to the injuries on the main artery in the neck and the injuries to the spinal cord.

THE CASE FOR THE DEFENCE

[6] The appellant gave an unsworn statement in his defence. He called no witnesses.

[7] According to the appellant's unsworn statement, that morning he had left his home to go by the shop when he was confronted by the deceased. The deceased grabbed him by the shirt and pulled a firearm on him. The appellant snatched at the firearm and a struggle ensued during which the firearm discharged accidentally and struck the deceased. The appellant managed to gain control of the firearm. The deceased lunged at the appellant on 2 occasions and on each occasion the appellant shot the deceased in self-defence. The appellant then dropped the firearm and ran away.

THE GROUNDS OF APPEAL

[8] The appellant has appealed his conviction on 3 grounds:

- “1. The learned trial judge erred when she failed to give a complete direction on the defence of accident to the jury.
2. The learned trial judge erred when she allowed an application by the prosecution to admit prejudicial evidence that the Appellant had pointed a firearm at two of the prosecution's witnesses after the altercation occurred.
3. The learned trial judge erred when she gave a direction on motive to the jury based on the spurious evidence of Duane Sandiford, a witness for the Crown.”

GROUND 1

Submissions

[9] Ms. Lesley Cargill, counsel for the appellant, submitted that the written and oral statements made by the appellant to the police and his unsworn statement all raised the issues of accident and self-defence. She submitted that **Andre Best v R, Criminal Appeal No. 18 of 2001 (Best)** sets out the guidelines which a judge should follow when giving directions on accident. Counsel contended that, while the judge gave a direction on accident, that direction was incomplete. This failure, counsel argued, made the conviction unsafe.

[10] In response, Mr. Oliver Thomas for the respondent submitted that the judge gave a complete direction on accident. He contended that, while a strict formula of words was not used, the direction contained all the elements as outlined in **Best**.

Discussion

[11] According to **Best**, where the defence of accident has been raised by a defendant, the trial judge is required to:

- (1) offer a definition of accident;
- (2) explain to the jury that the burden of proof is upon the prosecution to negative the defence of accident and that the defendant has no burden of proof;
- (3) explain that accident provides a complete defence, and, if a jury accepted that defence, they would have to acquit;

- (4) 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
- (5) ensure that he or she relates the issues of fact giving rise to the defence of accident to the legal principles of the defence.

[12] At **para 20** of **Best**, this Court stated that it would not venture to stipulate any set formula of words which should be used by trial judges in their directions on accident. As long as the trial judge directs in accordance with the principles enunciated above, in his or her own style, he or she will not be in error.

[13] The record discloses that judge gave the following direction on accident to the jury at **p 485 lines 7 to 15**:

“The defence of accident also arises on the evidence and on the oral statements of the accused man. The accused man said that during the struggle for the gun, the gun fired. That is an accident, an action over which the accused man had no control. If you believe the accused man was struggling for the gun and that it went off accidentally and that the deceased was killed as a result, then he is guilty of nothing. You will find him not guilty.”

[14] The judge continued at **p 486 line 24** to **p 487 line 11**:

“If the prosecution has satisfied you, so that you feel sure that the accused man shot at the deceased three times with the intention of killing him and that the shooting was not caused by any accident, nor was it done in self- defence as I have explained to you, you may find him guilty of murder. If you are not so satisfied and you believe that he shot him and that the shooting was an accident or in self-defence or both, because as you recall, Mr. Foreman and your members, the case for the defence as I repeat, is that during the struggle the gun went off, accident; and then the accused man got the gun and shot the deceased in self-defence, then the accused man is not guilty of anything, and you will find him not guilty.”

- [15] Earlier in her summation at **pp 413 to 414** the judge gave the jury general directions on the burden of proof and standard of proof. However, at the time of dealing with the defence of accident, the judge did not inform the jury that the burden of proof is on the prosecution to negative the defence of accident and that a defendant has no burden of proof. Nor did the judge inform the jury that if they had a reasonable doubt about the issue of accident, then the appellant was entitled in law to the benefit of that doubt.
- [16] Having regard to the above, we hold that the direction on accident given by the trial judge was deficient in some respects. There is therefore merit in this ground.

GROUND 2

Submissions

- [17] Counsel's complaint here is that the prejudicial evidence given by Angie Hope, sister of the deceased, that the appellant pointed a firearm at her and her brother Norman Hope after the incident had occurred substantially outweighed the probative value. She argued that, while the judge gave a warning to the jury in relation to that evidence, the allegation made by Angie Hope did not form part of the *res gestae* of the offence and, would if true, constitute a separate offence.
- [18] Ms. Cargill also submitted that there was a real likelihood that the evidence would have been misused by the jury in some unfair way. It would be open

to the jury to conclude that because the appellant pointed a gun at Angie Hope and Norman Hope he also left home with the firearm that morning and after the altercation took the firearm with him because it was his firearm.

[19] Counsel contended that the trial judge should have exercised her discretion under **sections 114 and 115** of the **Evidence Act, Cap. 121 (Cap. 121)** to exclude that evidence. Therefore, the judge fell into error when she dismissed the appellant's application in that regard.

[20] In response, Ms. Krystal Delaney pointed out that the application which was made to the court was not for the exclusion of the particular evidence but for a mistrial. The evidence had been given by the witness and there was no objection by defence counsel at that stage.

[21] Ms. Delaney submitted that there was no real risk of unfair prejudice. The evidence was relevant and of significant probative value to the Crown's case as to the manner in which the incident unfolded. The evidence having been admitted, the judge gave the jury certain directions in relation to how that evidence was to be treated.

Discussion

[22] According to **p 204** of the record, the witness Angie Hope gave evidence of the appellant pointing a firearm at her brother Norman Hope. That evidence was admitted without objection from then defence counsel, Mrs. Angella Mitchell-Gittens. The witness was cross-examined on her

evidence. It was on the next day that an application was made for a mistrial on the basis that the prejudice to the appellant was so great that it could not be cured.

[23] In a nutshell, the appellant's argument is that the evidence was inadmissible because it was unfairly prejudicial to the appellant and tended to show that he had committed another offence when the only charge which the appellant faced was that of murder.

[24] According to **section 44 (1) of Cap. 121**, the evidence that is relevant in proceedings is evidence that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of a fact in issue in the proceedings.

[25] **Section 114 of Cap. 121** gives the court the discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial nature. And, **section 115** deals specifically with the court's power in criminal proceedings. These sections provide:

“114. Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in undue waste of time, the court may refuse to admit the evidence.

115. In criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the accused, the court may refuse to admit the evidence.”

[26] Probative value has been defined in **section 2** as “the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.”

[27] There is no definition of unfair prejudice in the Act. However, the authorities in Australia can provide guidance in this regard, for **Cap. 121** has been modelled in large measure on the Australian Evidence Act and our **sections 114** and **115** are comparable to sections 135 to 137 of the Australian Act. Those sections state:

“135. General Direction to exclude evidence:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

136: General direction to limit use of evidence:

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

137: Exclusion of prejudicial evidence in criminal proceedings:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.”

[28] In **Papakosmas v The Queen [1999] HCA 37**, the High Court of Australia defined unfair prejudice at para 91 as follows:

“[91] Evidence is not unfairly prejudicial because it makes it more likely that the defendant will be convicted. In *R v BD*, Hunt CJ at CL pointed out:

“The prejudice to which each of the sections [ss135,136 and137] refers is not that the evidence merely tends to establish the Crown case; it means prejudice which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way.”

[29] At para 92, McHugh J cited the following passage from the Interim Report of the Australian Law Reform Commission:

“[92] ... By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, i.e on a basis logically unconnected with the issues in the case. Thus evidence which appeals to the fact-finder’s sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required.”

[30] In **Dupas v The Queen [2012] VSCA 328 (December 2012)**, the Court of Appeal of Victoria stated:

“The Evidence Act does not define the term ‘unfair prejudice’. Consistently with the common law, it has been interpreted to mean that there is a real risk that the evidence will be misused by the jury in some unfair way. It may arise where there is a danger that the jury will adopt ‘an illegitimate form of reasoning’ or ‘misjudge’ the weight to be given to that particular evidence. An inability to test the reliability of the evidence may carry with it the danger of such misjudgment. Evidence is not unfairly prejudicial because it inculpates the accused.”

- [31] It was the prosecution's case that the appellant was the one who came on the scene armed with a firearm, that he shot the deceased after a confrontation and that after the deceased fell to the ground the appellant shot him 2 times. The appellant then left the area with the firearm.
- [32] On the other hand, the appellant's defence was that it was the deceased who had the firearm, and that during a struggle the deceased was shot accidentally and then in self-defence. The appellant stated that he dropped the firearm and fled the scene.
- [33] In our opinion, the burden rested on the Crown to establish that the appellant shot the deceased in circumstances which did not amount to accident or self-defence. As stated earlier, the Crown's case was that the appellant drew a gun from his waist and shot the deceased. This was diametrically opposed to the appellant's case that the deceased had the gun. The issue of whether the appellant dropped the gun at the scene or took it away with him was important to the Crown's case. It was therefore open to the jury to find that the appellant went to the area with the firearm and that he left the area with that firearm.
- [34] We do not consider that such a conclusion would have been "logically unconnected with the issues in the case." Looking at the Crown's case in the round, this would not have been a misuse of the evidence and there was no danger of unfair prejudice to the appellant.

[35] Further, the direction given by the judge ensured that the evidence was not misused by the jury. The judge directed the jury in the following terms at **p 459 line 11 to p 460 line 5** of the record:

“... both of them gave evidence that the Accused man pointed a gun at the witness Norman. It would be improper if you believe this evidence to conclude from the fact alone that the accused man murdered the deceased. This evidence may help you to determine the question whether the accused man took a gun away from the scene or whether he had a gun at all as the prosecution has said that he did. Even if you believe that the accused man had a gun and took it away from the scene and pointed it at Norman Hope, this does not mean that he could not have shot the deceased in circumstances which amounted to accident or self-defence as he said in his statement from the dock and is his defence.

So you must not misuse this evidence to jump to a speculative conclusion that because this witness saw the accused man in his evidence with a gun, that it follows from that alone that he murdered the deceased; but you may use that evidence to help you determine whether or not you believe that the accused had a gun.”

[36] The judge also directed the jury at **p 422 lines 11 to 19** that:

‘But there is also some circumstantial evidence, that is, the evidence of-for example, the evidence of siblings Angie and Norman Hope, who gave evidence that on the morning of the killing, they saw the accused man with a black gun which he pointed at Norman, is evidence of circumstances. You must closely examine this evidence in the way I told you, because I mentioned to you that circumstantial evidence is easily fabricated in order to cast suspicion on another.’

[37] It was also Ms. Cargill’s contention that the evidence should not have been admitted, because, if true, it showed that the appellant had committed a separate offence.

[38] On this issue, in **Marcus Gill v The Queen, Criminal Appeal No. 15 of 2007**, this Court adopted the following principle enunciated in **Nelson (John Holmes) v HM Advocate 1194 S.L.T 389**:

“The Crown can lead any evidence relevant to the proof of the crime charged, even though it may show or tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise referred to expressly in the complaint or indictment.”

[39] This Court went on at **paras 26 and 27** to state that the test is as follows:

- (1) Was the evidence relevant to prove the offences with which a defendant has been charged; and
- (2) Would fair notice require that the other crime be charged or otherwise expressly referred to in the indictment?

[40] In relation to the second question, this Court stated that this would be necessary if the other crime would tend to show that the defendant was of bad character and was so different in time, place or character from the substantive offence that the defendant would not have fair notice that the evidence would be led.

[41] In our opinion, even though the evidence that the appellant pointed a firearm at the witness Norman Hope suggested that the appellant might have committed a separate offence, it was relevant to prove the Crown’s case and to disprove the appellant’s version of events. The onus rested on the Crown to adduce evidence to support its case. It must also be remembered that the Crown was duty bound to adduce evidence of such a nature or kind to negative the issue of accident. The impugned evidence

was essential in this regard. There was no unfair prejudice to the appellant.

We therefore do not agree that the judge's decision not to declare a mistrial was incorrect.

[42] This ground cannot be sustained.

GROUND 3

Submissions

[43] On this final ground, the appellant submitted that the judge fell into error when she gave a direction on motive to the jury based on the evidence which a witness, Duane Sandiford, gave under cross-examination.

[44] Ms. Cargill drew the Court's attention to **p163 lines 5 to 13** of the record where the witness stated that the reason why the appellant shot the deceased was because his "boss" told him to do so and that the appellant was a "soldier" and that his boss was the one who told him to murder the deceased. Counsel contended that this evidence was unsolicited in that the witness was not answering any particular question at the time.

[45] Counsel also submitted that it was therefore a material misdirection for the judge to direct the jury that this was a possible motive for the appellant killing the deceased. By equating the allegation made by the witness to motive, the judge negated the defences raised by the appellant.

[46] Ms. Delaney countered that submission in this way. She submitted that when the judge stated "And here, Mr. Foreman and your members, is the only shadow of a motive for the killing of Paul Duckie that arises on the

evidence”, by prefacing ‘motive’ with ‘shadow of’, the judge was stating that the evidence did not amount to motive. Further, the judge immediately went on to remind the jury that the defence case was that the deceased was the one with the motive to attack the appellant.

Discussion

[47] Where a person is charged with the offence of murder, the onus is on the prosecution to prove that the killing was deliberate, intentional and unprovoked, without lawful justification or excuse. When an act is characterised as being intentional, this is a reference to the mental element or *mens rea*. In other words, at the time of doing the act, the defendant intended either to kill the deceased or to cause him serious bodily harm.

[48] The prosecution does not have to prove that a defendant had a motive for committing an offence. However, evidence of motive is admissible in order to show that it is more probable that the defendant committed the offence charged. As was stated by Lord Atkinson in **R v Ball [1911] A.C**

47, HL:

“Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased’s life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his ‘malice aforethought’, in as much as it is more probable that men are killed by those that have some motive for killing them than by those who have not.”

[49] According to Duff CJ in **R v Barbour [1938] SCR 465**, a decision of the Supreme Court of Canada:

“If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. But, I think, with the greatest possible respect, it is rather important that the courts should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged merely because it discloses some incident in the history of the relations between the parties.”

[50] During her review of Duane Sandiford’s evidence, the judge stated at **p 451 line 13 to 452 line 1**:

“He said that the accused was a soldier and that it was surprising what he did, because he the accused wasn’t even involved in the matter. There is no indication as to what this matter is. It certainly could not be the matter at hand which is him looking into Angie’s car. And he suggested that the accused boss put him up to shooting Paul.

And here, Mr. Foreman and your members, is the only shadow of a motive for the killing of Paul Duckie that arises on this evidence. The prosecution does not have to show any motive at all. But it is the case for the defence that the deceased is the one with all the motive to attack the accused and the accused man had no reason to be the aggressor in this case.”

[51] In this case, the prosecution did not lead any evidence, whether direct or circumstantial, that the motive for the killing was that the appellant was a soldier who had been told by his boss to carry out the act. What was presented to the jury was that (i) prior to the incident, the appellant and the deceased had a good relationship; and (ii) the deceased confronted the

appellant about an issue involving the deceased sister's car and the appellant drew a firearm and shot the deceased.

[52] In the circumstances, therefore, the direction given by the judge on motive could have led the jury to reject the appellant's defence that he did not have the intention to shoot the deceased and that the discharge of the firearm was an accident. This would have negated the defence of accident.

[53] Also, the direction could have affected the appellant's defence of self-defence, for if the jury accepted that the appellant had a motive to kill the deceased, then they could have found that it was the appellant who was the aggressor.

[54] We therefore conclude that the judge misdirected the jury when she directed them on motive. The trial judge gave no assistance to the jury as to the distinction between mens rea and motive. It was for the prosecution to establish mens rea. No direction was given to the jury to disregard the evidence that the appellant was 'a soldier' who was working for "his boss". The appellant therefore succeeds on this ground.

CONCLUSION

[55] The appellant faced the most serious charge, that of murder. One of the defences which he mounted to that charge was accident. The onus was therefore on the judge to ensure that the jury were given proper directions on the defences raised by the appellant. As we have stated earlier, the direction which was given on accident was deficient.

[56] Further, the judge misdirected the jury when she treated the evidence given by the witness Duane Sandiford as a providing a ‘shadow of a motive’ for the killing. In all the circumstances of the case, we are left in doubt that the conviction was safe and satisfactory.

[57] We have therefore concluded that we must allow the appeal and quash the conviction for murder in accordance with **section 4 (1) (a) and (3)** of the **Criminal Appeal Act, Cap. 113A (Cap. 113A)**.

SHOULD THERE BE A NEW TRIAL?

[58] The final matter for our determination is the question of a retrial. In this regard, **section 15** of **Cap. 113A** gives this Court the discretion to order a retrial in circumstances where the Court allows an appeal against conviction under **section 4 (3)** and quashes the sentence which was passed, if the interests of justice so require.

[59] In **Reid v R, 27 WIR 254 (Reid)**, the Privy Council stated that “the power to order a new trial should not be exercised where, at the original trial, the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed.” However, “where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso..., and dismiss the appeal.”

[60] In cases which did not fall within either category, the court would be required to weigh certain factors to determine what the interest of justice would require in any given case. These factors include:

- (i) the seriousness and prevalence of the offence;
- (ii) the expense and length of time involved in a fresh hearing;
- (iii) the length of time between the offence and a new trial;
- (iv) the availability of evidence to support the defence's case;
- and
- (v) the strength of the prosecution's case.

These factors are not exhaustive, and a court is required to give consideration to what is required in the interest of justice in a particular case. We now look at these factors.

[61] First, the charge which the appellant faced was that of murder, which is the most serious offence in the criminal calendar. The offence of murder is undoubtedly of grave public concern. Therefore, this Court must balance the competing interests of ensuring that persons charged with crimes and, in particular, serious crimes such as murder are prosecuted against the right of a defendant to a fair hearing within a reasonable time as provided for in the **Constitution**.

[62] For, as was stated in **Reid**:

“those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are...countervailing interests of justice which must also be taken into consideration.”

- [63] Second, there will be time and expense involved in a retrial, including the securing of witnesses by the relevant authorities and the conduct of the trial itself.
- [64] Third, the length of time which has elapsed since the offence and a new trial is highly relevant: **Bernard v The State [2001] UKPC 34**. The offence occurred in 2008 and the trial concluded in 2016. Some 12 years have elapsed since the date of the offence, the conviction of the appellant and the disposition of his appeal.
- [65] Fourth, the appellant gave an unsworn statement and called no witnesses at the trial in support of his defence. This is not to suggest that they ought to have done so but it is one of the considerations which we must bear in mind. In this regard, it would appear that there is no prejudice to the defence if the matter is retried based on the fading memories of witnesses.
- [66] Fifth, the prosecution called two witnesses, Duane Sandiford and Jason Chandler, who were eyewitnesses to the offence and whose testimony was crucial to the prosecution's case. There is no suggestion that the memories of these witnesses have faded or that the witnesses are unavailable to give evidence. It appears to us, therefore, that the prosecution's case is strong.
- [67] In balancing all these factors, we have to take account of the public's interest in the criminal justice system. Maintaining public confidence in this system is crucial to the administration of criminal justice. In a developing society like Barbados, we must also be mindful of the need to

ensure that our citizens feel assured that crimes do not go unpunished so as to undermine the public's sense of security. Justice also means ensuring that the victims of crimes and their families get closure for their loved ones especially where the offence is murder. Thus justice is about the society at large and the victims of crimes in particular as well as the accused persons.

[68] Having regard to the apparent strength of the prosecution's case, the fact that there are eyewitnesses to the alleged crime and that our Constitution places the highest value on human life, we are of the opinion that when all the factors are weighed, justice will be properly served by ordering a retrial.

DISPOSAL

[69] The appeal is allowed. The conviction is quashed and the sentence set aside. We order a retrial which should take place as soon as practicable.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)