SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 12 OF 2002

BETWEEN:

AUGUSTINE MC PIERRE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mrs. Kay- Bacchus-Browne for the Appellant
Mr. Roger Gaspard D.P.P; Ms. Suenel Fraser with him for the Respondent

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2003: July 1;
September 22.

JUDGMENT

[1] REDHEAD, J.A.: On 8th October 2002 the appellant was convicted for the murder of his common law wife, Rosie Carter and at a separate sentencing hearing was sentenced to life imprisonment.

[2] The appellant and the deceased lived together for about seven or eight years. The deceased had three children by the appellant. The last child, at the time of the incident was just over one year old. The deceased left the appellant's home sometime shortly before the incident and returned to her mother's home at Fitz Hughes taking her last child with her.

[3] On 1st April 2000 at approximately 8:30 p.m. the deceased and the appellant were seen in the area of Golden Grove, Chateau Belair. He was seen pulling the deceased who was carrying a child in her arms towards an embankment on one Buckings Sampson's land. The appellant was also seen pressing a gun to the side of the deceased while he was pulling her. The deceased was resisting and was heard to utter the words:

> "On God Ronald (the appellant was also known as Ronald) nah shoot me nah shoot me nah kill me'
> The appellant was heard to say: " I go kill yuh mother cunt. I go kill yuh"

[4] The appellant then pulled the deceased up the embankment in some bushes, almost immediately afterwards two gunshots were heard.

[5] The following morning, 2nd April, 2000, at about 7:30 a.m. the body of the deceased was found in the bushes in 'Buckings' land in the same area where the appellant had been pulling the deceased the previous night. The deceased was found lying face down off a track in some bushes.

[6] The child which the deceased was carrying in her arms the night before was found, not far away, in a dingy under a house with sand in its nose and mouth.

[7] A post mortem examination carried out by Dr. M.J. Varunny revealed a gunshot wound at the back of the chest with the exit wound at the front of the chest and a two inch long laceration over the right eye. The doctor gave the cause of death as follows:-

> "A gunshot wound to the chest causing fatal injuries to the left lung and left ventricle of the heart and fatal hemorrhage thereof"

[8] On 13th August 2000, the appellant was found by members of the Criminal Investigation Department on a beach in Edinboro sitting next to a fireplace with a bag over his shoulder. A search of the bag revealed a .380 pistol which carried a magazine containing 5 rounds of ammunition. The appellant was arrested and taken to the Criminal Investigation Department and charged with the offence of being in possession of an unlicensed firearm.

[9] Later that day the appellant was cautioned and interviewed by Sergeant Edmund Bramble in relation to the death of Rosie Carter. He gave a statement under caution to the police. In the statement he admitted the killing but said it was done accidentally. Three grounds of appeal were filed on behalf of the appellant.

[10] Under ground one the appellant alleges that the learned trial Judge misdirected the jury regarding the law relating to recklessness.

[11] At pages 47 and 48 of the record the learned trial Judge instructed the jury as follows:-

> "there is also a sequel to that definition the whole issue of recklessness. An accused person or somebody may have not a real intention to kill somebody but will behave in such a reckless manner that he is supposed to know that by acting in that reckless manner, grievous bodily harm might follow and that grievous bodily harm if it results in death means that the person is guilty to the charge of murder or has committed the offence of murder.
>
> So the prosecution again is telling you that on the day in question the accused acted in a reckless manner by cocking that gun in those set of circumstances and that having a cocked gun in his hand, he should have realized that if anything happens and his finger touched the trigger that gun might go off and cause grievous bodily harm or kill.
>
> They are going further also to tell you that doing what he did that is the accused, he had in his mind that even if the gun went off he didn't care what that consequences were if somebody died or somebody was harmed in a grievous manner. So you first have to consider the issue of intention to cause the death of grievous bodily harm to any person and you also have to consider the issue of recklessness, that the accused might have had knowledge that his act or omission which caused the death would probably cause the death of or grievous bodily harm to some person and in doing so he just had no care as to whether that person was harmed grievously or whether the person died, so basically this is what the definition of murder entails."

[12] Unfortunately the learned trial Judge got it woefully wrong. He had not only blurred the distinction between intention and recklessness. He also seriously confused recklessness with intent in the definition of murder.

[13] He also emphasized his misdirection at page 48 of the record when he said to the jury:-

> "You also have to consider the issue of recklessness that the accused might have had knowledge that his act or omission caused the death or would probably cause the death of or grievous bodily harm to some person and in doing so had no care to, as whether that person was harmed grievously or whether the person died. (my emphasis.) So basically this is what the defence of murder is."

[14] Learned Counsel for the respondent, Mr. Gaspard conceded that the learned trial Judge erred in that the learned trial Judge blurred the distinction between intention and recklessness and also between recklessness and inferred intent. In my opinion the learned trial Judge had confusion in his mind so far as recklessness and intent are concerned.

[15] Learned Counsel however contended that notwithstanding the misdirection the appeal should be dismissed because a jury properly directed would have arrived at the same verdict. In other words learned counsel is asking us to apply the proviso. I shall return later to this aspect of this matter in my judgment.

[16] Learned Counsel Mr. Gaspard, also submitted that having regard to the issues joined between the Crown and the appellant, the misdirection by the learned trial Judge did not result in the respondent suffering any miscarriage of justice.

[17] Learned Counsel for respondent also submitted that the Crown's case is that the appellant intentionally killed Rosie Carter pursuant to threats made by him shortly before the shooting.

[18] In R v Woollin [1998] 3 W.L.R. 382 the appellant who had lost his temper threw his three month old son on a hard surface. The child suffered a fractured skull and died.

[19] At the appellant's trial for murder the Judge told the jury that if they were quite satisfied that the appellant must have realized and appreciated when he had thrown the child that there was a substantial risk that he would cause serious injury to the child it would be open to them to find that he had intended to cause injury and they should find that the offence of murder was proved. The appellant was convicted. On his appeal to the House of Lords, quashing the conviction of murder and substituting a conviction of manslaughter, it was held that where a defendant was charged with murder and the simple direction that it was for the jury to decide whether the defendant had intended to kill or do serious bodily harm was not enough the jury should be directed that they were not entitled to find the necessary intention for a conviction of murder unless they felt sure that death or serious bodily harm had been a virtual certainty…….. the decision being one for them to be reached on a consideration of all the evidence that the use of the phrase "a virtual certainty" was not confined to cases where the evidence of intent was limited to admitted actions of the accused and their consequences; and that the use by the trial Judge of the phrase "substantial risk" had enlarged the scope of the mental element required for murder and been a material misdirection."

[20] So too the misdirection in the instant case is a material misdirection.

[21] Under ground 2 the appellant alleges that having visited the locus in quo which was substantially altered and having permitted the jury to hear fresh statements by some of the prosecution witnesses those witnesses were not presented for cross-examination by the defence neither did the learned trial Judge give the defendant an opportunity to demonstrate his version of where and how the incident occurred thereby amounting to a mistrial.

[22] Learned Counsel for the respondent conceded that there were alterations to the crime scene but none of these was substantial. He argued that the jury having visited the location would have been mindful of any such alterations and would have made allowances for same, as they saw fit.

[23] Mr. Gaspard submitted that notwithstanding the fact that on the court's return from the locus in quo, none of the crown's witnesses was presented for cross-examination by counsel for the appellant, this would not have occasioned the appellant any prejudice.

[24] Learned Counsel for the respondent contended that at the locus counsel for the appellant was afforded the opportunity to pose questions to the relevant witnesses for the crown, in the presence of the jury and that counsel for the appellant did.

[25] In my view the procedure adopted was wrong. The trial takes place in the courthouse. A visit to the locus is to point out, demonstrate, highlight certain events or occurrences that took place at the time the offence was committed. When the Court reconvenes in the court house then the witnesses are cross-examined on what was pointed out or demonstrated at the scene.

[26] In Karamat v The Queen [1956] A.C. 265, Lord Goddard observed:-

> "so long as the witnesses taking part are recalled to be cross examined, if desired, their Lordships are unable to see that the accused person is any way prejudiced, but they would observe that it is essential that every effort should be made to see that the witnesses make no communication to the jury except to give a demonstration."

[27] In Reg v Martin [LR 1CCR 378] The court said there was no irregularity in allowing such a view, though such precautions as may seem to the court necessary ought to be taken to secure the jury so that they do not improperly receive evidence out of court.

[28] It seems to me that the gravamen of learned counsel's complaint is that she was not given an opportunity to cross-examine the prosecution's witnesses who demonstrated certain things at the scene. From the record there is no indication that there was a request nor did counsel say that there was a request to cross-examine which was denied.

[29] It is clear to my mind that there must be a desire on the part of counsel to cross-examine the witness. That desire must be made known to the Judge. Counsel cannot sit by and say nothing and then for the first time in the Court of Appeal complain that she was denied that opportunity.

[30] For the sake of completeness I deal with one other matter under this ground. That is, whether it was permissible for the witnesses who had given their testimony to go to the scene and point out certain things.

[31] Karamat deals adequately with that issue. At page 263 Lord Goddard opined:

> "…..the judge was perfectly right in deciding that witnesses who had given evidence could attend at the view. In fact there was every reason why they should and it was just those witnesses from whom the jury would desire to get occular demonstration of their positions at the material time. It would or at least might enable the jury to understand the evidence they had given."

[32] In my opinion the same argument and reasoning are applicable in the instant case. This ground of appeal is therefore dismissed.

[33] I deal finally with ground three. The allegation is that the learned trial Judge misrepresented a vital fact to the jury in relation to Sergeant James' evidence regarding the accidental firing of the gun.

[34] Corporal Verden James told the jury in cross-examination:

> "Once the slide is pulled back a bullet enters the breach. On pressure of the trigger the gun continues to fire. In this gun if slide is pulled back and trigger is not squeezed it would not fire. If one stumbles without finger on the trigger with slide pulled back the gun will not fire."

[35] Coporal James also said under cross-examination

> " with an automatic any pressure on the trigger gun continues to fire. In the gun if the slide is pulled back and trigger is not squeezed it would not fire. If one stumbles without finger on the trigger with slide pulled back the gun will not fire."

[36] The learned trial Judge told the jury

> "Coporal James further explained to you that once you pull back the slide and the bullet enters the chamber any pressure on the trigger would discharge the gun and he says there is a possibility that if one stumbles the gun will discharge if your finger is on the trigger." (my emphasis)

[37] Although Coporal James did not actually use the words, (emphasize) the way the learned trial Judge put it was in the appellant's favour having regard to his defence of accident. Any misrepresentation of Coporal James' evidence was in the appellant's favour.

[38] I now look at the trial as a whole in order to determine whether the appellant had a fair trial notwithstanding the misdirection by the learned trial Judge. The prosecution's case is that the appellant was a fugitive from justice. He desired to go to live in the mountain. He wanted the deceased to go to the mountain to live with him. She resisted. Having regard to the evidence of Cecilia Edwards, the killing of Rosie Carter was deliberate. Cecila Edwards testified that on 1st April 2000 "I saw Rosie with this man, the man had one of Rosie's hands held with a gun pointing at her side. Rosie had a child in her other hand. Rosie was saying God Ronald nuh shoot me nuh kill me. She was pulling away. The man was saying 'I go shoot you." I go kill your mother cunt' that is how I got to know the man's name was Ronald. This was at night. I was able to see them by way of a lamp pole which was right there."

[39] The appellant's defence was accident which the jury clearly rejected. He testified on oath. He said among other things that he had the gun in his pocket but before he sat down with Rosie on the bank he took it out because of the marijuana he had stolen. Continuing he said:

> " I cranked the gun. As we proceeded higher up the mountain, I heard a noise behind me I turned to look behind. As I did so I stumbled and the gun went off."

[40] There is an unmistakable inference from appellant's testimony that when he stumbled one shot was discharged from the gun. Whereas Verthylin Gill testified that about 7:00 pm on 1st April 2000, she was at her home when she heard two gunshots. On the following day she and one Bernard Campbell went some 15 feet from her home where they saw the body of Rosie Carter.

[41] If the jury accepted Verthylin Gill's evidence when she said she heard two shots there was every justification in rejecting the appellant's defence.

[42] The case as presented by the crown is that appellant deliberately shot his common-law wife, after threats to kill her made by him shortly before the shooting. I am of the view that the case as presented by the crown is a strong one.

[43] The jury having rejected the appellant's defence, I would agree that a jury properly directed would have arrived at the same verdict of guilty of murder.

[44] I would therefore apply the proviso because there had been no miscarriage of justice notwithstanding the misdirection.

[45] The appeal is therefore dismissed the conviction and sentence are affirmed.

Albert Redhead
Justice of Appeal

I concur

Adrian Saunders
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]