WALKER, HUGHES and JARRETT v. REGINAM

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin, J.A. and Betts, J.): June 14th, 1968
(Cr. App. Nos. 32/67, 33/67 and 34/67)

[1] **Criminal Law—degrees of complicity—principals—principal in second degree—person present encouraging murderer to inflict at least grievous bodily harm:** Persons who are present when a murder is committed, not merely as onlookers but encouraging the murderer to at least inflict grievous bodily harm on the deceased, are guilty of murder as principals in the second degree (page 193, lines 32–39).

[2] **Criminal Law—murder—degrees of complicity—person present encouraging murderer to inflict at least grievous bodily harm principal in second degree:** See [1] above.

[3] **Criminal Procedure—appeals—appeals against acquittal—acquittal regularly arrived at cannot be appealed:** An acquittal regularly arrived at by a court of competent jurisdiction acting within its jurisdiction, although erroneous in point of law, cannot be questioned on appeal (page 194, lines 3–10).

[4] **Criminal Procedure—judge's summing-up—contents of summing-up—relevant law, salient features of evidence, and application of law to facts:** A judge summing up the law and evidence in the case to a jury should direct them as to the law which is applicable and may, and generally does, go through the evidence and comment on it; he should assist them as to the facts by dealing with the salient features of the evidence, especially if the case is complicated and lengthy; and he should in all cases assist them as to the application of the law to the facts (page 194, lines 21–27; page 195, lines 13–19).

[5] **Criminal Procedure—judge's summing-up—evidence—judge may comment on evidence:** See [4] above.

[6] **Criminal Procedure—jury—delivery of verdict—foreman to inform judge of verdict forthwith, without addressing him on other matters:** When a jury returns for the delivery of its verdict, the foreman should inform the judge forthwith what the verdict is, and should not be allowed to address him on other matters (page 197, lines 1–9).

[7] **Criminal Procedure—jury—delivery of verdict—jury acquitting of murder not to be asked for verdict on manslaughter if evidence warrants murder verdict only:** A verdict of manslaughter on a charge of murder is unlawful if the evidence warrants a verdict of murder but not one of manslaughter, and if in such a case the jury return a verdict of not guilty of murder they should not be asked for a verdict on the alternative offence, but the accused should be acquitted (page 195, lines 29–41; page 197, lines 9–15).

[8] **Criminal Procedure—verdict—conviction of offence different from that charged—manslaughter verdict on murder charge unlawful if evidence warrants murder verdict only:** See [7] above.

[9] **Criminal Procedure—verdict—taking verdict—foreman not to address judge on other matters but only to state verdict:** See [6] above.

[10] **Criminal Procedure—verdict—taking verdict—jury acquitting of murder not to be asked for verdict on manslaughter if evidence warrants murder verdict only:** See [7] above.

The appellants and five others were charged in the Supreme Court with murder.

A friend of the deceased heard the appellants and some others planning to beat up the deceased. He told the deceased, who sent him to get a taxi so that they could go home. While doing this the friend was attacked by a gang which included the first appellant. The deceased came to his friend's aid, and the second appellant told the gang that they did not want the friend, but the deceased. The gang attacked the deceased, who in self-defence stabbed the third appellant behind the ear with a knife someone gave him. The deceased then ran away, pursued by the appellants and others. He was tripped and fell, and the first appellant stabbed him on the left shoulder-blade. The second appellant shouted to stab him again, and the first appellant did so, in the back. The third appellant was there attempting to stab the deceased.

The trial judge (Brown-Marke, J.) began his summing-up with a long explanation of the law, including the law of manslaughter, and then went through the evidence at great length with an occasional comment, but he failed to relate the law to the facts concerning each accused, and in particular he failed to direct the jury whether alternative verdicts of manslaughter were possible on the evidence. When the jury returned to court after retiring, the foreman addressed the judge on the conduct of the trial and other matters before stating their findings. The first appellant was found guilty on the charge of murder and the second and third appellants were found not guilty. Upon each of these findings of not guilty, the registrar asked the foreman: "What of manslaughter?" and received a verdict of guilty of manslaughter.

On appeal, the first appellant contended that the judge had erred in not directing the jury that there was evidence of self-defence on which they might acquit and of provocation on which they might return an alternative verdict of manslaughter. The second and third appellants, while maintaining that their acquittal on the

charge of murder could not be interfered with on appeal, contended that the only proper verdict was murder and the verdicts of manslaughter were unwarranted by the evidence and therefore unlawful. The Crown conceded that the proper verdict was murder. With regard to the first appellant, it pointed out that there was no evidence of self-defence or provocation and neither defence was put forward at the trial.

Cases referred to:

(1) *Bangura (A.F.T.)* v. *R.*, 1964–66 ALR S.L. 388, applied.

(2) *R.* v. *Clinton* (1917), 12 Cr. App. R. 215.

(3) *R.* v. *Finch* (1916), 115 L.T. 458; 12 Cr. App. R. 77, applied.

Statute construed:

Criminal Procedure Act, 1965 (No. 32 of 1965), s.82:
The relevant terms of this section are set out at page 195, lines 32–35.

Gelaga-King for the first and third appellants;
C.N. Rogers-Wright and *Mackay* for the second appellant;
Awoonor-Renner, Principal Crown Counsel, and *St. Bernard, Senior Crown Counsel,* for the Crown.

SIR SAMUEL BANKOLE JONES, P., delivering the judgment of the court:

Eight youths, almost every one a schoolboy, were charged in the Supreme Court with the offence of murder and were tried by Brown-Marke, J. with a jury of 12 men. The trial covered a period of seven weeks, at the end of which the jury found the first accused guilty of murder on a unanimous verdict, the second guilty of manslaughter on a majority verdict of 10 to 2, and the third also guilty of manslaughter on a majority verdict of 10 to 2 as well. The first accused was sentenced to death, and the second and third were sentenced to terms of imprisonment of seven years and two years respectively. These three have now appealed to this court against their convictions and they are referred to in this judgment as the first, second and third appellants respectively.

The matter arose in this way: On January 18th, 1967 there was a sports meeting at the Brookfields Stadium in Freetown at which Louis Farmer, the deceased, took part in an invitation boys' relay race. Prior to this date, it had come to the knowledge of the deceased and some of his friends that a group of boys had planned

to attack him on the day of the sports meeting. They made a complaint at the police station before the meeting started and the police promised to be at the scene. After the deceased had run his race, he appears to have left the stadium and sent one of his friends named Augustus Paris, himself a schoolboy, to purchase some Diamints for him. On his way, Paris heard the appellants and some other boys planning to beat up the deceased. He went back and told the deceased, who sent him to get a taxi so that they could go home. Paris was beaten up by a gang of boys as he got hold of a taxi. The first appellant was one of them. The deceased rushed to Paris' aid, and the second appellant told the gang that they did not want Paris but the deceased. The deceased was thereupon set upon and in self-defence stabbed the third appellant behind one of his ears with a penknife which was given to him by someone. The deceased appears to have freed himself, and took to his heels, running away from his attackers and towards the stadium field. He was then pursued by all the appellants and others. On his way, and hard by the entrance of the main gate, he was tripped. He fell down, and the first appellant then stabbed him whilst on the ground with a knife on his left shoulder. The second appellant was then heard to say: "Chooke am back leh he nor go run and jomp again" (stab him again so that he will not be able to run and jump again). The first appellant then stabbed him again, this time on his back. He was then heard to say: "I have stabbed you now, you will never run or jump again." The third appellant was seen at the scene attempting to stab the deceased with a knife. The group of boys then dispersed in various directions. They were pursued by some onlookers. When the first appellant was caught he said, "Do yah, nor to me one grane chooke" (I was not the only one who stabbed). The other accused persons were subsequently arrested. In their statements to the police when charged, the first and third appellants said they each had nothing to say until they got to court. The second appellant said among other things: "I don't know who stabbed the deceased because I was not there. I was at the bus station." None of them gave evidence in court, but each relied on his statement to the police. The doctor who did the post-mortem examination saw only two stab wounds on the body, the first on the left scapula and the second in the region of the seventh rib. Both wounds were about two inches long. In his opinion, death was due to haemorrhage as a result of the wounds and shock.

Counsel for the first appellant filed ten grounds of appeal and argued almost all of them. He submitted, for example, among other things, that the learned trial judge failed to direct the jury that there was evidence on which they could have returned a verdict of not guilty or an alternative verdict of guilty of manslaughter—evidence of self-defence and provocation respectively. We are of the opinion that the learned trial judge rightly considered himself not called upon to so direct the jury, because the facts patently disclose that the first appellant was never attacked by the deceased, nor was he provoked by him. Rather, the deceased was fleeing from an attack on him by all the appellants and some others and was being hotly pursued by them, when he was tripped to the ground by someone. Thereupon his pursuers overtook him, and the first appellant stooped over him and deliberately stabbed him twice, as a result of which he died. It follows, in these circumstances, that neither the defence of self-defence nor that of provocation was open to the first appellant. Indeed, neither of these defences was put forward by counsel in the court below. The jury in our opinion were rightly directed and properly brought in the only verdict open to them, namely that of guilty of murder. The appeal of this appellant is accordingly dismissed.

Different considerations apply to the second and third appellants. Counsel on their behalf urged that on the evidence, as well as on the direction of the learned trial judge, each should have been brought in guilty of murder, and the Crown conceded that this would have been the proper verdict. The learned trial judge, after explaining to the jury what the expressions "aiding and abetting" and "common design" meant, went on to say as follows: "If, accordingly, the blow struck by one of the accused persons caused death whilst the others were present aiding and abetting him, each of the accused persons will be guilty of murder." And the learned trial judge repeated this direction several times again to the jury. On the evidence it is quite clear that both the appellants were present at the scene not merely as onlookers but actively taking part, by encouraging the first appellant to encompass what they had all set out to do, namely to at least inflict grievous bodily harm on the deceased. Death ensued, and the law clearly is that these two were principals in the second degree and ought therefore in the circumstances to have been brought in guilty of murder. But the jury unanimously found each of them not guilty of this offence. There is clearly nothing we can do about this. In the case of *Bangura* (*A.F.T.*) v.

R. (1) this court, in a matter which involved the same principle, stated as follows (1964–66 ALR S.L. at 392):

> "The appellant has been regularly acquitted and discharged . . . by a court of competent jurisdiction. The acquittal, though erroneous in point of fact, was made within the jurisdiction of the court below. On the authorities this court cannot in law properly question that acquittal."

In the present case, the acquittal was erroneous in point of law, but the result is the same, namely, that this court cannot interfere with the jury's verdict.

The question of law to be decided by us is whether the jury's verdict of manslaughter in both cases should stand. Counsel submitted that the learned trial judge misdirected the jury by non-direction, and that the jury may have been confused and consequently felt themselves entitled to return a verdict of manslaughter in each case, one which, he further submitted, was unwarranted in law and therefore unlawful. There are to be found in Archbold, *Criminal Pleading, Evidence & Practice,* 36th ed., para. 564, at 163 (1966), certain guidelines as to summing-up by judges:

> "After the conclusion of the evidence and arguments, the judge sums up the case to the jury. In doing so, he should direct them as to the law which is applicable, and he may and generally does go through and comment upon the evidence which has been given. In a complicated and lengthy case it is incumbent on the judge to assist the jury by dealing with the salient features of the evidence; but in a short case and one in which the issue of guilt or innocence can be simply and clearly stated, it is not necessarily a fatal defect to a summing-up that the evidence has not been discussed."

There is no doubt that this was a complicated and lengthy case which called for great care in the art of directing a jury. What the learned trial judge did was to direct the jury, among other things, as to the law, for example, relating to manslaughter. He did so at length at the very beginning of his very long summing-up—one which must have occupied several hours. He gave, so to speak, the book definitions of voluntary and involuntary manslaughter, of provocation which reduces murder to manslaughter and of excusable homicide. He then went through the evidence at great length with a comment here and there. He properly directed the jury both on the burden and standard of proof and rightly told

them that they should consider the case of each accused separately. He, however, with respect, failed to apply the law to the facts relating to each accused. The jury were therefore left with a direction as to the law *in vacuo* and were faced with the difficult task of applying it to each individual case. Had the learned trial judge directed the jury that in the case of these appellants the facts did not warrant a verdict of acquittal because there was no evidence of self-defence, nor a verdict of manslaughter because the evidence did not disclose provocation on the part of the deceased, and that in any case neither of them relied on any of these defences (see *R.* v. *Clinton* (2)), then if the jury had still returned a verdict of manslaughter, such a verdict would have been considered perverse. In the case of *R.* v. *Finch* (3), it was stated that it is not sufficient to direct the jury on the law of a case; they are entitled to the judge's assistance as to the facts as well. And we would add, that they are also entitled to his assistance as to the application of the law to the facts. It is therefore our view, with respect, that the learned trial judge, by not directing the jury as to the correct application of the law relating to manslaughter to the facts, misdirected them. As regards these appellants, it was a case of murder or no murder, and we find that an excursion into the law of manslaughter so far as they were concerned was totally unnecessary. However, once the learned trial judge undertook to direct them as to the law of manslaughter, it became necessary and indeed obligatory for him to further direct them as to whether or not an alternative verdict of manslaughter was possible on the evidence. Unfortunately, he neglected to do so, and the jury returned a verdict which was wholly unsupported by the evidence.

What then is the position in law? Should such a verdict be allowed to stand? I opine not. Now, s.82 of our Criminal Procedure Act, 1965, is germane to this question. It reads:

> "When a person is charged with murder he may, if the evidence so warrants, be acquitted of murder and convicted of manslaughter although he was not charged with that offence."

We construe this section to be restrictive in its operation and therefore inapplicable, as it were, at large. The operative words are "if the evidence so warrants." In this case, the evidence clearly did not warrant a finding of manslaughter in the case of each of these appellants. We therefore consider such verdicts unlawful and it is our duty to set them aside, and we so do. The result,

therefore, is that the convictions and sentences of the second and third appellants are set aside and it is ordered that a judgment of acquittal be recorded in each case.

There are one or two comments which we find ourselves called upon to make before we rise. During the course of the hearing of this appeal, we had recourse, on the application of counsel, to the tape-recording of that part of the proceedings when the jury returned from their retirement to pronounce their verdicts. The transcript reads as follows:

"Registrar: How do you find the first accused on the charge of murder?

Foreman: I would like to say a few words before I give my verdict, My Lord. My Lord, we are judges of fact in connection with this murder trial that has been going on fairly for seven weeks, but first and foremost through your Lordship's permission, we extend our heartfelt sympathy to the bereaved family and we conclude by saying that it is rather unfortunate the late Louis Farmer died. We heard all the evidence adduced in this court, that of the prosecution as well as the defence, and also your Lordship's directive, in the definition of murder, manslaughter, voluntary manslaughter, express malice, implied malice, voluntary act, and malice, and for the prosecution to have established the indictment of the accused persons, and to consider the evidence only in this court, and also that of common design, aiding and abetting, and we come to give our verdict. Thank you, my Lord.

Registrar: How do you find the first accused on the charge of murder?

Foreman: The first accused, guilty of murder. (Silence!) Unanimous. (Silence!)

Registrar: How do you find the second accused on the charge of murder?

Foreman: Not guilty of murder.

Registrar: What of manslaughter?

Foreman: 10, guilty of manslaughter; 2, not guilty.

Registrar: How do you find the third accused on the charge of murder?

Foreman: Not guilty of murder.

Registrar: What of manslaughter?

Foreman: 10, guilty of manslaughter; 2, not guilty. And we are asking for mercy."

Our first comment is, that it was most undesirable for the learned trial judge to have allowed the foreman of the jury to have embarked on the delivery of a speech before returning their verdicts. He should have been firmly silenced and told to get on with the business in hand. Nothing could have been more irregular and more demonstrative of the misconception of the functions of a jury than the conduct of this foreman. We would like to express the hope that no trial judge will permit a repetition of such a thing in this court in future. The next comment is, that we think that after the foreman returned a verdict of not guilty of murder in favour of these appellants, the learned trial judge ought not to have permitted the registrar to put the further question—"What of manslaughter?" in the light of the jury's rejection of the legal position of these appellants. The learned trial judge should, with respect, have proceeded to acquit each of them in turn after that jury's verdict.

Appeal of first appellant dismissed; appeals of second and third appellants allowed.

COLLIER v. WILLIAMS

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Tejan-Sie, C.J. and Luke, Ag. J.A.): July 10th, 1967
(Civil App. No. 25/66)

[1] Civil Procedure—parties—plaintiffs—trespass to land—person in possession proper plaintiff: Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action for trespass to land is the person who was, or is deemed to have been, in possession at the time of the trespass; and where possession is doubtful or equivocal, the law attaches it to the title (page 200, lines 34–36; page 201, lines 3–4).

[2] Civil Procedure—parties—trespass to land—person in possession proper plaintiff: See [1] above.

[3] Tort—trespass—trespass to land—possession supports action—where possession doubtful law attaches it to title: See [1] above.

The respondent brought an action against the appellant in the Supreme Court for damages for trespass and an injunction.

The respondent and the appellant each led evidence of being in possession of the land in dispute. The respondent traced her