



The Court Of Appeal for Bermuda

CRIMINAL APPEAL No. 4 of 2008

Between:

ANDRINA TAMARA SMITH

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
 Ward, JA
 Auld, JA

Date of Hearing: **1 June 2009**
Date of Judgment: **1 June 2009**
Reasons for Decision: **19 June 2009**

Appearances: Mr. C. Richardson of Juris Law Chambers for the Appellant
 Mr. C. Mahoney of Department of Public Prosecutions
 for the Respondent

REASONS FOR DECISION

Zacca, President

On June 1, 2009 we dismissed the appeal against conviction. The reasons for doing so follow.

1. The appellant, who was charged with the murder of Edward Dill, was convicted by a jury for the offence of manslaughter. On May 16, 2008 she was sentenced to eight years imprisonment.
2. The prosecution's case as it unfolded was that the deceased and the appellant had a relationship which produced a daughter who was one year old. The deceased frequently visited the appellant at her apartment and would sometimes spend the night.
3. On the night of October 15, 2006 the appellant along with her female friend went to the Mid Atlantic Boat Club in the parish of Devonshire. At the boat club the appellant had three or four alcohol drinks. They left the club and after going to an Esso Service Station to get a pizza, the appellant returned to her apartment on the morning of October 16, 2006 at about 1 A.M.
4. On her return home she found the deceased in her bed room. They had an argument and the deceased slapped the appellant in her face the sound of which was heard by a tenant in the apartment upstairs. The deceased closed the bed room door leaving the appellant on the outside of the door. Her grandmother who lived in one of the bed rooms saw her crying. She told the grandmother that she was OK.

5. It was the prosecution's case that the appellant then went to the kitchen and having armed herself with a knife went back to the hall and tried to enter the bed room where the deceased was.
6. At the time the deceased was inside the bed room and by the door trying to block her from entering the room. The deceased was holding their daughter. The appellant was on the outer side of the door.
7. It was alleged that the appellant used the knife and plunged it through the door on several occasions in an effort to get at the deceased. The knife penetrated the door and cut the deceased in the region of his neck severing his carotid artery. The deceased then went to the bed room occupied by the grandmother and whilst holding his neck asked her to call the ambulance. He then stumbled through the apartment and out the front door. The upstairs neighbour assisted the deceased by applying towels to his neck. She held him until the police and ambulance came. On October 17, 2006, Dr. Michael Sven Pollanen performed an autopsy on the deceased and his opinion was that the cause of death was a stab wound to the neck which severed his carotid artery.
8. An expert witness Janice Johnson, a forensic specialist, specializing in crime scene analysis and crime scene reconstruction including trajectories and blood stain pattern analysis, testified that having examined the bed room and other areas of the apartment and having regard to the amount of blood seen, it was her opinion that the deceased received the stab wound whilst he was in the bed room close to the door. There was also

evidence that debris from the door as a result of the knife plunges through the door was seen on the knife.

9. The appellant in her defence testified that on her return home there was an argument in the bed room and the deceased threw her to the ground and punched her in her face several times. She attempted to scream but the deceased had his hand around her throat and said that he felt like killing her. She saw an opportunity to get out of the room and opened the door. In her attempt to go out of the room, the deceased grabbed her by her hair and pulled her back towards him. She fell to her knees and tried to crawl out of the room but the deceased again held her by her hair and pulled her to her feet and dragged her towards the kitchen. The deceased held her against the counter in the kitchen and began to choke her again with one hand whilst punching her with the other hand. She reached around for something and found a knife and swung it towards the deceased making contact. As a result he let her go. She saw that he raised his hand to his neck and he then walked to the bed room leaving her in the kitchen. She did not intend to kill him but was trying to stop him beating and choking her and believed that he would kill her. Her act was done in self defence.
10. The learned trial judge instructed the jury on self defence and provocation. The verdict of the jury indicates that self defence was rejected and that the incident happened at the door of the bed room as the prosecution alleged. However, the jury accepted that there was provocation and returned a verdict of manslaughter.
11. Four grounds of appeal were filed, grounds 2-4 relating to the issue of self defence. These grounds were abandoned at the

hearing of the appeal. However, ground 1 which follows, was argued by Counsel for the appellant.

Ground 1

The learned trial judge erred in law when he refused an application by the defendant for an expert witness on behalf of the defendant to be interposed due to constraint of time. The refusal of the application, in the context of this trial, amounted to an infringement of the defendant's right to a fair trial.

12. The prosecution had presented Ms. Janice Johnson as a blood spatter expert. The defence wished to challenge her evidence as to where the stabbing had taken place. A report from a blood spatter expert Hannah Goy, who was not called at the trial, was presented to this court on behalf of the appellant. The purpose of the report was to challenge the findings of Ms. Johnson that the stabbing took place through the door and into the bed room.
13. Ms. Johnson's evidence was to the effect that she saw no blood patterns or any type of physical evidence at the scene that would indicate or suggest that the injured person was injured anywhere else in the apartment, other than the master bed room. Whilst defence Counsel was attempting to suggest that there was evidence to indicate that the injury may have taken place elsewhere, it was not put to the witness that the stabbing may have taken place in the kitchen.
14. Mr. Richardson for the appellant submitted that the evidence of Ms. Johnson was the crux of the prosecution's case. It was submitted that it was for that reason that the defence blood spatter expert ought to have been given an opportunity to give evidence.

15. It is not accurate to say that Hannah Goy was denied the opportunity of giving evidence. The expert who was from England was available at the trial for some time. However, the appellant's evidence in chief and cross examination which began on 12 March 2008 at about midday was not concluded until some time in the afternoon of the 13 March at about 3:40 pm. It appears that the witness who was in an advanced state of pregnancy needed to return to England that evening. The decision was taken by Counsel that he would be unable to call the witness. In fact we were told that the witness gave birth to a child soon after returning to England. The defence did not consider it necessary to call the witness prior to the appellant giving evidence. Nor was any application made to the trial judge to interpose the witness prior to the appellant's evidence. The appellant was in the witness box for nearly two days.
16. We are unable to say that the trial judge could be blamed for the witness not giving the evidence. We have examined the report and note that the expert was unable to state definitely where the stabbing took place. The furthest she could go was to say that the evidence of the appellant was not inconsistent with the blood spattering. Of course, she did not examine the scene of the incident as did Ms. Johnson. She relied on photographs and a DVD. Her examination was from photographs and a DVD. In her report she noted

“that limitations exist when using photographs and a DVD footage to interpret blood patterns, as identifications of blood stains may not be clear cut. Stains which appear to be blood may not be such and conversely, other stains may not have the obvious

appearance of blood, but if seen directly, or tested using chemicals, would be confirmed as such. Additionally, determining the angle of impact of directional stains on the point of origin of a blood stain pattern is difficult using two-dimensional photographs as blood pattern analysis involves a three-dimensional process and the angles and distortion in photographs can be misleading.”

17. In her report summary she states:

“In my opinion it is not possible to determine whether Mr. Dill was “stabbed in the kitchen as Ms. Smith submits, or whether he was stabbed in the rear (master) bed room. It would appear that given the extent of Mr. Dill’s blood loss within the rear bed room, locating any blood shed by Ms. Smith resulting from the beating she says occurred there, would be virtually impossible.”

At paragraph 32 of the report, Ms. Goy states:

“The arterial injury was to the left side of his neck and so the presence of the runs of blood on the left side of the door frame suggest that when the blood was projected there, Mr. Dill was moving from the hall into the living area. This is consistent with the Crown Scientist’s view that he was stabbed in the rear bed room and then moved through towards the living area and front door, but would not dispute Ms. Smith’s account that after being stabbed in the kitchen, he moved to the rear bed room, then the side bed room.

And then back through the living area, kitchen and front door.”

18. At paragraph 25, Ms. Goy stated:

“There are several features of damage on the door apparently caused by something sharp coming into forceful and repeated contact. I understand that there were seven such features on the hall side of the door, of which five had penetrated right through to the back of the door which would suggest that they were inflicted by a person positioned on the hall side. The presence of chips of wood from the door on the floor which are surrounded by blood stains suggests that the damage to the door was caused at the time of the incident under investigation rather than being “old” damage that predated the incident”.

There was also evidence that debris from the door matched debris found on the knife which was alleged by the prosecution to be the knife which was used to stab the deceased. This was very strong evidence that the stabbing took place when the knife plunged through the door into the bed room, inflicting the fatal injury.

19. We have examined the report of Ms. Goy and have concluded that having regard to the prosecution’s evidence, that even if this report on her evidence was before the jury, the verdict would have been the same.

20. The failure of the defence expert witness to give evidence in the circumstances of this case cannot be regarded as not affording the appellant a fair trial.

It is for the above reasons that we dismissed the appeal against conviction and affirmed the conviction.

Sentence

21. The appellant also appealed against the sentence of eight years imprisonment on the ground that it was harsh and excessive. Mr. Richardson for the appellant submitted that the trial judge sentenced the appellant on the basis that there was just one slap. He argued that the evidence of the appellant and the Doctor indicated that she had more than one injury, that there was evidence of domestic violence by the deceased prior to this incident. It was submitted that a sentence between four to six years would have been appropriate in a case where the provocation was as a result of domestic violence.

22. The Crown cited a number of Bermudian authorities which indicated that the sentence for those convicted for manslaughter as a result of provocation, where knives or other offensive weapons are used, the range of sentence should be 10 – 12 years.

Gregory Howard Dill v R Criminal appeal 11 of 1996.

Gernel Leroy Darrell v R Criminal appeal 2 of 2002 where a sentence of 12 years was imposed by the Court.

Randy Hilton Burgess Criminal appeal 5 of 2000 where a sentence of 14 years was upheld by the Court.

James Alan Dill Criminal appeal 8 of 2004, where a sentence of ten years was imposed.

23. In sentencing the appellant, the trial judge stated in part:

“There was, in my opinion, a considerable degree of time to cool the passion. She had been out there for some time. Granny had come out and talked to her. She had told granny what she said to her; by her words to her granny, there did appear to have been some cooling. Granny had returned to her bed room and all of that. It would have taken some time to walk to the kitchen, to get the knife and all of that. But instead, it seems the time was used, or appeared to have been used, for some seething, and the passion was raised again. This time it seems to be a passion of vengeance, a passion not tolerated by the law. So she got the knife, and with that passion, she returned and repeatedly plunged it into that door.

In those circumstances I would move from the low degree of sentencing to which I had earlier referred, to a higher degree of up to ten years imprisonment.”

24. We are of the view that in convictions for manslaughter, as a result of provocation, where knives or other offensive weapons are used to inflict injury, the range of sentence should be ten to twelve years.
25. In view of the sentencing remarks of the trial judge as a whole, we do not find that the sentence of eight years which was imposed by the trial judge was manifestly excessive.

For these reasons we dismissed the appeal against sentence and affirmed the sentence of eight years imposed by the trial judge.

Signed

Zacca, President

Signed

Ward, JA

Signed

Auld, JA