The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 14 & 20 of 2015

Between:

KIAHNA TROTT-EDWARDS

Appellant/Respondent

-v-

THE QUEEN

Respondent/Appellant

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Charles Richardson, Compass Law Chambers, for the Appellant
Mr. Larry Mussenden, Ms. Nicole Smith, and Ms. Victoria Greening, Department of Public Prosecutions, for the Respondent

Date of Hearing: **16 June 2016**

Date of Judgment: **3 August 2016**

JUDGMENT

Critical part of defence case not put by defence counsel to prosecution witnesses contrary to defendant's instructions – refusal of judge to listen to explanation – effect on safety of conviction.

PRESIDENT

1. On 9 September 2015 the appellant, Kiahna Trott-Edwards, was convicted of the murder of Shijuan Mungal (the deceased) aged 16. The appellant was aged 31 at the time. She was later sentenced to life imprisonment and to serve a minimum of eight years before eligibility for release on parole.

The Facts

2. At about 4:00pm on the afternoon of 8 September 2014 (the first day of the school year) the deceased met Ja-Ja DeSilva at the bus terminal in Hamilton. It was DeSilva's 16th birthday and they were close friends. They were going to DeSilva's father's house to collect some birthday money. They had been there together on at least ten previous occasions.

3. At 4:45 pm they caught the No. 2 Ord Road bus to go to No. 60 Cherry Lane, Ord Road, Warwick. The deceased sat one row from the back of the bus together with DeSilva and a number of other schoolboys who were all close friends not only with the deceased but also the appellant's children. They called the appellant "Moms" or "Auntie Ki". The appellant boarded the same bus at about the same time. Her 11 year old daughter was with her. They sat a few seats in front of the deceased and DeSilva spoke to her when they got onto the bus.

4. During the first part of the journey the boys were laughing and joking and generally making a noise. As the bus was going over Southcote Hill one of the younger boys said something that upset the deceased who responded by "cursing him off". The appellant then turned round and told the deceased there were other people on the bus and to stop cursing. The appellant's tone was described as "snappy, irritated and bossy".

5. The deceased said he wasn't going to stop cursing as he wasn't the only one. The appellant replied: "You don't know who I am." The deceased asked why she was worrying about him as she wasn't his momma. She then said: "I'll beat you like I'm your momma" in a loud and aggressive voice. The situation then calmed down and shortly afterwards the appellant and her daughter got off the bus at the "Four Corners" bus stop, which was one stop early, and walked to their apartment at No. 60 Cherry Lane, Ord Road. As they were getting off the bus at the next stop to go to DeSilva's father's apartment Desilva said to the deceased: "Don't worry about the situation. I'm gonna do what I gotta do and we're leaving" DeSilva and the deceased walked to the courtyard of No. 60 Cherry Lane and the deceased waited in the courtyard while DeSilva went to his father's front door.

6. Meanwhile the appellant went inside her apartment with her daughter and then came back outside and sat on the wall outside her front door facing the courtyard. She was on her cell phone, and the deceased and DeSilva walked back across the courtyard to catch the bus back into town. The appellant questioned why the boys were still in her yard and told them to get out. The deceased said: "I'm getting out of your yard now." This is the broad background to the critical events that followed.

7. There were differing accounts of what precisely happened next. What is clear is that the appellant got up from the wall, picked up a baseball bat, walked towards the deceased and hit him with it on the left upper arm. Then she hit him with it again on the back of the head. The deceased stumbled but picked himself up and then went with DeSilva up the hill to Ord Road to catch the bus. He was disorientated and the bus driver asked if he was all right, to which he replied that he was not and that the lady on the bus had hit him on the head with a bat. He declined to go to hospital and after the deceased got off the bus the driver called his mother who collected him and drove him to hospital. His condition deteriorated and, sadly, he died three days later.

8. The evidence of the forensic pathologist, Dr. Milroy, was unchallenged. The deceased had suffered a fracture to the temporal bone of his skull with associated bleeding into the left temporal lobe of the brain. There was also a bruise to the left upper arm. His head injury was not amenable to neurosurgical correction. The temporal bone is one of the toughest bones in the body and significant force is required to break it. The pathologist described it as equivalent to hitting a homerun at baseball.

9. On 9 September 2014 the police contacted the appellant. She gave an account of what happened. She said the children on the back of the bus were cursing. She told them to have some respect for others and that one of the boys said: "Shut up and sit the fuck down. You're not my momma." She walked to her house and then saw the boys in her yard. She told them they had a nerve coming into her

yard after their behaviour on the bus and that they should leave. The deceased told her to shut up and was cursing her. He came towards her saying: "What are you going to do if I don't?" They continued to argue and she thought the deceased was going to hit her so she picked up a bat and hit him. She was arrested for causing grievous bodily harm, the deceased at that stage still being alive. After caution she said:

> "This is so unfortunate. That boy was going to hit me. These children are so disrespectful. He was going to hit me and he was fine when he left my yard."

10. As to be expected in cases of this nature, there were differences between the witnesses as to what they described happening in the yard. DeSilva said the appellant had the bat in one hand and the phone in the other. The deceased was looking back at her over his shoulder. The appellant hit him on the left arm between the shoulder and the elbow. The deceased just stood there with his hands down by his side. Then she hit him again with the bat to the back of his head behind the ear.

11. Carolyn Rewan was living at No. 68 Ord Road. She heard shouting and cursing and looked out of her bedroom window and saw the appellant shouting. She was about 20 yards away. She saw a short boy (the deceased) and a tall boy (DeSilva) walking towards the appellant. The she saw a baseball bat come up and hit the deceased on the head. It appeared as if the baseball bat, which was held by the appellant, came out of nowhere. It came down fast and forcefully. She didn't see the deceased do anything to the appellant before or after she hit him. She thought the appellant held the baseball bat with both hands. Mrs. Rewan called her husband because she was scared as the appellant had hit the deceased so hard with the bat.

12. Justin Trott-Ray was one of the boys on the bus. He saw the appellant sitting on the wall. He saw the appellant hit the deceased holding the bat with both hands. She hit him on the head. The deceased was not walking towards her. She hit him twice on the arm and then on the head.

13. Le-Jai Tucker was another of the boys on the bus. He saw he appellant sitting on the wall and speaking on her phone. He heard her complain about the deceased behaving disrespectfully. He heard a verbal exchange between them but could not make out what they were saying. He did not see the blows struck because his view was obstructed by a cherry bush, but he did see the deceased drop to the ground. Tucker agreed that he had divided loyalties because he knew both the deceased and the appellant well. It was put to him that in a statement to the police he said she hit him on the arm and then on the head. He agreed but said this was what he had been told.

14. The appellant's evidence was that she was sitting on the wall and that her daughter was outside but none of the prosecution witnesses said that they saw the daughter outside. The deceased was agitated and using offensive language. "That bitch keeps talking shit. I'm tired of that bitch." She told him to leave. He came towards her. She picked up the bat with her right hand with the phone in her left hand. She believed he was going to hit her. She did not think the first blow was going to deter him and struck a second blow, intending to hit him in the same place.

Issues for the Jury

15. The judge in her summation described the issues for the jury as follows:

    1. Had the prosecution proved an intent to kill or cause grievous bodily harm;
    2. Had the prosecution negatived self-defence;
    3. Was there provocation to reduce murder to manslaughter
    4. If the jury rejected self-defence and provocation, was there a defence under s296 of the Criminal Code reducing murder to manslaughter because although some force was required, excessive force was used.

16. By their unanimous verdict, the jury concluded that none of the defences (absolute in 2 and partial in 3 and 4) applied and that the appellant intended at least to cause grievous bodily harm if not to kill the deceased.

17. Mr. Richardson, who appeared for the appellant on the appeal but did not represent her at the trial, sought to advance seven amended grounds of appeal. There was an eighth which he, understandably, did not pursue. Grounds six and seven are those which have most concerned this Court and it is with those that Mr. Richardson commenced his submissions. In essence what those grounds amount to is this. It was the appellant's case that the deceased had ducked immediately before or as the fatal blow was struck. However, this aspect of her defence was never put to any of the prosecution witnesses by leading counsel then representing her, Mr. Courtney Griffiths QC, and when it was drawn to the attention of the prosecution and the judge it was dealt with inappropriately and to the prejudice of the appellant.

18. Mr. Richardson produced a draft affidavit from Mr Griffiths and this was subsequently sworn. To this affidavit Mr Griffiths exhibited his client's written instructions in the form of her witness statement. In it she said this at para 9:

> "He balled his fists and took up a fighting stance, fearing that he was going to punch me I hit him again with the bat. I was aiming to hit him on the arm again but seeing the blow coming, he ducked a bit and the bat connected heavily with the side of his head."

19. At the end of the statement under the heading "Conclusion" she said she neither intended to kill the deceased or cause him really serious harm and in answer to the question what was going through her mind when she hit him she said:

> "I was terrified he was going to attack me, right there in front of my daughter, on my own doorstep. All I wanted him to do was to go away. That's the only reason why I hit him."

20. At para 11 of his affidavit, Mr. Griffiths explained why he did not put this part of his instructions to the prosecution witnesses:

> "This was a consciously taken professional decision. This was a difficult case. First it was set against a background of highly charged emotion. The victim was a young man, and a schoolmate of all the witnesses as to fact relied upon by the Crown. They could all be properly described as young, vulnerable and reluctant witnesses. The defendant was a young mother who was a mother figure to most of those said witnesses as to fact. Those witnesses obviously felt conflicted and were reluctant to provide a coherent account of what in fact occurred. Many in fact asserting that they had not seen when the fatal blow was struck. It was important in the circumstances to lessen the ordeal these young men were being asked to endure, which led me to make the decision that I did."

21. We are bound to say that the Court is unimpressed by this explanation. True it is that it does not infrequently happen that defence counsel in error overlooks putting an element of his client's case to a prosecution witness or witnesses. But that is not what happened here because, Mr Griffiths says, he made a conscious decision not to put this part of his client's case.

22. The purpose of putting to a prosecution witness the defence version of an event or events is, first, so that the witness has an opportunity to comment on the truth or accuracy of what is being put to him, and, second to negative any suggestion when the defendant gives evidence that it has been made up for the first time in the witness box. That the deceased ducked was, in our view, if accepted, important to the defence because it was relevant to the appellant's case that she intended the second blow to land, like the first, on the arm and not the head. This in turn was potentially relevant to the issues of whether excessive force was used and whether the appellant intended to cause grievous bodily harm. Mr. Griffiths appears to have regarded lessening the ordeal of the witnesses by not putting his client's case to them as outweighing the interest of his client. But would it have lessened their ordeal? Carolyn Rewan saw the blow struck and does not fall onto the category of "young vulnerable and reluctant witnesses", but there is no explanation why ducking was not put to her. Justin Trott-Ray was cross-examined by Mr. Griffiths over 41 pages of transcript, and it

is difficult to see how failing to put this question lessened his ordeal. DeSilva was cross-examined by Mr. Griffiths over 87 pages of transcript at times quite vigorously so the point has even greater force in his case. As Tucker did not see the blows struck, it was reasonable not to put it to him. It seems to us to have been a serious error on the part of Mr. Griffiths not to have put it to any of DeSilva, Trott-Ray or Mrs. Rewan.

23. For whatever reason, Mr. Griffiths did not put to any of these witnesses that the deceased had ducked as the fatal blow was struck, it was not the fault of the appellant and the matter came to a head when the appellant gave evidence. In evidence in-chef, Volume 6 p1027, she said: "So when I swung a second time he ducked a bit, because he was stanced up so he ducked a bit and I caught 'im right, in the back of his head". When it came to cross-examination the following exchange took place on p1055:

> **"Mr. Field:**
> **Q.** Another very surprising thing – or perhaps you can help me if this is surprising or not – that was not put by your counsel, is that (the deceased) ducked when the second blow was swung.
>
> Can you explain that?
>
> **A.** I don't mean that he ducked completely, he ducked back to avoid.
>
> **Q.** But isn't that critical? That's actually setting up a (defence of) accident. It goes to the very root of your defence. So why wasn't it put to any witness?
>
> **A.** That's how it happened."

Then a little later Mr. Field said:

> "**Q.** So was that something you made up on the stand?
> **A.** No, I said that the first day. Soon as I went in. I explained everything that happened."

24. Mr. Field then made the point to the appellant that he thought she was running a self-defence case and it was a surprise when he heard for the first time of a ducking. The appellant reiterated that this had been her case all along. Mr. Field

emphasised the importance of the point because, he said, it opened up a new line of defence.

25. Mr. Griffiths then tried to show Mr. Field the appellant's proof of evidence, Mr. Field declined to look at it and the jury was sent out. The situation could and should at this point have been dealt with in the usual way with defence counsel explaining that ducking was in his client's proof of evidence and that he had failed to put it to the relevant prosecution witnesses. The witnesses could, if it was practical, have been recalled to have it put to them or alternatively it could have been made clear that the appellant was not making it up in the witness box. We have listened to the CourtSmart recording of the exchange that took place between counsel and the judge during the three minute jury retirement. Unfortunately the judge was not prepared to listen to Mr. Griffiths, who had a perfectly reasonable point to make. Mr. Griffiths began by seeking to show the judge his client's proof of evidence, so that she could see what the appellant was saying was not a recent invention. The judge's response was:

> "No, not interested in that. Not interested in that at all. Mr. Field is asking your client a straightforward question. Did you put to, suggest to, ask any of those witnesses whether or not they saw (the deceased) duck? That's straight forward."

Mr. Griffiths:

> "But what his starting premise was that the witness had manufactured that piece of evidence when she's in the witness box."

Judge:

> "Yes, he's suggested to her that. He's suggesting that to her."

Mr. Griffiths:

> "What I'm saying is, that is just not the case. There are two issues here."

Judge:

> "No, I'm sorry Mr. Griffiths; you cannot give evidence in this Court today."

Mr. Griffiths:

> "I'm not giving evidence."

26. The judge was then critical of Mr. Griffiths for interrupting Mr. Field's cross-examination. In summary, the judge was only prepared to proceed on the basis that because the matter wasn't put in cross-examination it was therefore a recent invention on the part of the appellant. She would give the jury appropriate directions in due course. This unfortunate conclusion could have been avoided if the judge had been prepared to listen to, and therefore appreciate, the point Mr. Griffiths was trying to make. It could also, very possibly, have been avoided had Mr. Field been prepared to take a less intransigent attitude.

27. The appellant's evidence resumed and Mr. Field put it to her first that ducking was not put to Mrs. Rewan, then they it was not put to DeSilva, and thirdly that it was not put to any witness. Then he suggested once again that this was because she had made it up in the witness box.

28. In re-examination, Mr. Griffiths asked her when was the first time she mentioned that the boy had ducked and she said when she was in the police station and that thereafter she mentioned it to her lawyer.

29. Turning to the summing up, the judge said this at p1437:

> "Further to the (appellant's) evidence about (the deceased) being hit in the head, she told us, and I quote, 'so when I swung the bat the second time, (the deceased) ducked a bit, and it caught him right in the back of his head."

30. She then went on to remind the jury that the prosecution's position was that she was making that up as she gave her evidence. She reminded the jury of Mr. Field's cross-examination and the similar criticism in the prosecution's closing speech. She said the matter went to the veracity of the appellant and that the failure to ask witnesses about the ducking could be used to draw the inference that she did not give that account of events to her counsel and that that in turn might have a bearing on whether they accepted her evidence on the point.

31. However, she then added that, before such inference could be drawn they had to rule out any other reasonable explanation. She explained counsel's duty to put his client's case but that in the course of a trial things sometimes get missed. The problem with this direction in the present case is that there was an explanation for the failure to ask the witnesses whether the deceased had ducked but the judge had refused to listen to it and accept it. In short there was a complete answer to the allegation that the appellant had made it up in the witness box. It was clearly set out in the appellant's proof of evidence and it was through no fault on her part that it was not put to the prosecution witnesses. The judge should not have left the option to the jury that the appellant was making it up in the box, particularly when there was nothing other than speculation to refute the Crown's contention as advanced in cross-examination relied upon in counsel's final speech and then repeated in the judge's summing up.

32. In our judgment what occurred was a regrettable series of errors. The first by Mr. Griffiths in failing to put to prosecution witnesses an integral part of his client's defence, namely that the deceased had ducked before the second blow was struck. The second by prosecuting counsel in failing to engage with counsel for the defence who was trying to explain that the failure was not the appellant's fault, and the third by the judge in adopting a dictatorial attitude and not being prepared to listen to Mr. Griffith's submissions in the absence of the jury. Thereafter the trial proceeded on a false footing. Prosecuting counsel continued to cross-examine the appellant on the false basis that fabricated the contention that the deceased had ducked when she was in the witness box, when in truth she had not. The same point was made in the prosecution's final speech and by the judge in summing up.

33. In a number of respects there was a strong case against the appellant. The blow to the head was struck with very considerable force and there was independent evidence that she was the aggressor. Errors of the kind that occurred are perhaps all the more important in such circumstances where the bottom line is whether the trial was fair. Mr. Field in the course of cross-examination emphasised more

than once that the issue whether or not the appellant ducked was an important one. We agree. The jury might have considered the issue relevant to whether the appellant intended to cause grievous bodily harm and to retaliatory action in self-defence or whether excessive force was used under s296. The way in which the matter was handled also reflected adversely on the appellant's credibility.

34. We cannot in these circumstances conclude that the conviction for murder is safe. Accordingly we set aside the conviction and sentence. It was not disputed that in the event of the appeal being allowed, there should in the interests of justice be a new trial and we so order. In these circumstances it is unnecessary to rule on the other grounds of appeal against conviction. It is also inappropriate to hear argument on the Crown's appeal against the minimum term to be served, the sentence of life imprisonment having been set aside. Any application for bail is to be made to a judge of the Supreme Court.

Signed

Baker, P

Signed

Bell, JA

Signed

Bernard, JA