

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 198/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA
VS.
ALEXANDER PASCOE

Norman Manley for appellant

Miss Carol Malcolm for the Crown

May 28, June 1 and 18, 1990

GORDON, J.A. (Ag.):

On 4th October, 1988, the applicant was convicted in the Home Circuit Court for the murder of Derrick Harrison on 14th June, 1986. The Crown's case rested on the evidence of the sole eyewitness, Miss Eulalee Harrison.

Miss Harrison said on 14th June, 1986 about 8:25 p.m. she was at the intersection of Binns Road and Railroad in the parish of St. Andrew with Julie Chambers. Derrick Harrison, Miss Harrison's nephew, walked up to them, spoke to Miss Chambers and walked away on Conway Road. Witness walked off behind Derrick Harrison and saw applicant Pascoe, also called Prince, jump off a wall by Conway Road and go up to Derrick Harrison. Applicant held Derrick's hand as they walked and said, "Why the blood claut yuh beat up Phil for?", and witness heard Derrick say, "Man don't bring them things to me". She next saw applicant raise his

right hand and saw and heard the sound of a blow applicant struck Derrick in his neck. Derrick held his neck and said, "Prince is me yuh do so and me and yuh don't have anything". Derrick then fell on Farram Road near its intersection with Conway Road and applicant ran off. Witness went to the fallen man, saw him bleeding from his neck and she ran back up the road towards Julie Chambers, raising an alarm. Where the incident occurred, she said, was well lit by street lights. She denied suggestions put to her by the defence that applicant was surrounded and attacked by at least three men armed with knives and in the struggle, which ensued, Derrick Harrison was struck fatally.

On 14th June, 1986, Acting Corporal Augustus Brown was at the Olympic Gardens Police Station about 9:50 p.m. when he received a report from Julie Chambers. He visited Madden's Funeral Home, there he saw the body of the deceased. On 19th June, 1986, he saw applicant at the Olympic Gardens Police Station, cautioned and told him of the report he had received, that is, that he had stabbed Derrick Harrison fatally. Applicant said, "Officer, is gang them gang me, sir".

In a post mortem examination on the body of deceased, performed by Dr. Royston Clifford, a 1" long incised penetrating oblique stab wound to the left side of the neck was found. The wound penetrated the chest cavity and lacerated the thoracic aorta, which is the largest blood vessel in the body, resulting in massive haemorrhage. The overall depth of the wound was 6" and death resulted therefrom. A severe degree of force was required to inflict this injury.

In an unsworn statement from the dock, the applicant said he was going to visit his mother when he

saw four men take up position ahead of him on the road. Two came to him, demanded money in an attempt at robbery and one tore off his back pocket. The other, whose hand he had boxed away, pulled a knife and came at him. He held on to the hand with the knife and wrestled with him. Then he said, "His friend that was there hit me with a stone and started to hit me. The other two guy ran down on me with a knife also. He came behind me and stab at me. I went down and his hand came over my head to his friend that was in front of me that had the knife. When I saw that I let go and run off".

His defence, thus put, was that he had done nothing but avoid a blow intended for him and the deceased was killed by his partner-in-crime. In his unsworn statement the applicant did not challenge the statement attributed to him by Miss Harrison: "Why the b.c. you beat up Phil for?". He did not challenge the deceased's response: "Man don't bring them things to me". He did not contradict the statement made by the deceased on receipt of the fatal stab: "Prince is me you do so and me and you don't have anything". The evidence of the making of these statements was given by Miss Eulalee Harrison, whose evidence-in-chief on these points was not challenged. It was suggested to her that she did not see what happened at the time the injury was inflicted. She insisted she was there and saw it happen. It was also suggested that "apart from Pascoe at least three other men were on the road that night". This she denied. She denied that these men attacked Prince and in the struggle Derrick was injured and Prince ran for his life. This did not occur, she said. Prince ran when he killed Derrick. Defence attorney suggested to the witness that at least three men attacked the applicant. The applicant said four men attacked him. The trial judge left the issue of fact to be decided by the jury.

It is clear that the jury had to decide which version they accepted, the Crown's, that applicant and the deceased were the two persons involved in the incident, or the defence, which was that applicant and at least three or four other men were involved.

Against this background, Mr. Manley, who appeared for the applicant at the trial, urged two grounds of appeal, namely -

Ground 1 That the learned trial judge failed to put the defence fairly to the jury.

Ground 2 The learned trial judge improperly stopped counsel for the defence asking the witness Eulalee Harrison questions about Phil and the witness' knowledge of Phil.

It is convenient to deal with Ground 2 first as we observed that when counsel asked the questions he desired, the answer he got showed that the witness had no personal knowledge of the incident in which Phil was allegedly involved. When counsel asked if she was present during an incident between Phil and Derrick the witness replied in the negative.

Counsel sought the Court's guidance thus:

"Might I ask her if she has heard of an incident between Phil and Derrick?"

The learned trial judge refused to allow the question to be put.

When this part of the transcript was brought to Mr. Manley's attention he did not persist in this ground as obviously there was no merit in it.

On Ground 1, Mr. Manley submitted that the learned trial judge misdirected the jury when he invited them to infer a lack of sincerity in the defence. The defence, he

said, suggested to the witness what in fact the defence said happened that night. The defence maintained that the witness was not there and did not see what she said she saw.

On record the bulk of the cross-examination of this witness was devoted to establishing the location of the various roads in the vicinity of the area when the incident occurred and the suggestions put to the witness were made in two questions near the end of this exercise.

The passage impugned is found on pages 48-49 of the record and runs thus:

"Now you have before you the evidence of one witness of fact. The Defence is saying that this witness Eulalee Harrison was not present, was not there. Of course, I must bring before you the posture of the Defence, rather the image of the Defence, because the Defence is saying that Eulalee Harrison you were not there on Conway Road and Binns Road that night and the Defence is also putting to Eulalee Harrison you did not see the incident. Now thereafter what the Defence did to Eulalee Harrison is suggest to her that at least three men were on the road that night. The Defence is saying to Eulalee Harrison further that the men surrounded the accused. Now you must look at the evidence in the light of how the Defence conducted it, because if the Defence is saying to Eulalee Harrison you were not on the road that night, you may well ask the question how can they be suggesting to her that three men surrounded the accused. How can they be suggesting to her that there was a struggle and that is how the deceased got cut if they are saying at the same time that she was not on the road that night. So you must look on it that way and say whether or not the Defence is really being sincere to you when they say to her you were not there that night on the road and so did not see the

"incident and in the same breath the Defence is saying to her you must have seen that it was three men out there that night, suggesting there was a struggle, there was a struggle between accused, men and deceased, suggesting to you that one of the other men made a misdirected blow and that is how the deceased came to his death; because you must in fact view the Defence in light of how they conducted the case and say in all sincerity that is how they conducted the case before you."

The learned trial judge left the defence as projected in cross-examination of the witness Harrison for the jury's consideration. The terms "**sincere**" and "**sincerity**" used by the judge were by way of comment. He was entitled to comment on the evidence. It seems the defence was blowing hot and cold and the comment was justified. He indicated the posture of the defence as contained in the suggestions put to her and left it to them to determine how they viewed this aspect of the case.

The directions he gave on the burden and standard of proof were correct and at pages 63-64 he gave these directions on the statement made by the applicant -

"It is for you to say whether or not you accept that account as to what happened that day as told to you by the accused. If you accept that he is speaking the truth, if you are satisfied of his innocence, then it is your duty to find him not guilty. If you are not too sure whether or not to accept his account, if you are not too sure whether or not he is innocent, well equally you find him not guilty, because the Prosecution would not have proven the case to you to the extent that you are sure of his guilt. But if you don't believe what he is saying, you don't convict him because you don't believe him. You still go back

"and examine the Prosecution's case, go back and examine what he is saying in his statement to you and if you are satisfied with the Prosecution's case to the extent you feel sure of his guilt, then it is your duty to convict him of this charge of murder."

The issues that arose for the jury's consideration were dealt with fairly by the learned trial judge. They had on the one hand the sworn evidence of the prosecution witness, Miss Eulalee Harrison, and on the other hand the unsworn statement of the applicant. The directions on the burden of proof were clear and the jury accepted the prosecution's case. There was no half-way house of manslaughter as Mr. Manley attempted to show quite unsuccessfully. The applicant said he never possessed the knife that inflicted the injury and there was no credible narrative of events on the basis of which provocation could have been left for the jury's consideration.

We were not persuaded by Mr. Manley's submissions on Ground 1. The Jury who saw the witnesses and heard the evidence unfold came to a verdict on proper directions. The application raised points of law and is treated as the hearing of the appeal. The appeal is dismissed, conviction and sentence affirmed.