

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

SAINT LUCIA

CRIMINAL CASE NO. SLUCRD 2009/0479

BETWEEN:

THE QUEEN

Claimant

AND

MARVIN WILLIAM

Defendant

Appearances:

Mr. Horrace Frazer, Counsel for the Defendant
Mrs. Victoria Charles Clarke, Crown Counsel for the Crown

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2013: February 11
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RULING ON SUBMISSIONS

- [1]. **CUMBERBATCH, J. :** The defendant was indicted by the Director of Public Prosecutions for the offence of murder contrary to section 85(b) of the Criminal Code. On January 28, 2013, a jury was empanelled and the defendant's trial commenced on the following day.
- [2]. The crown's case against the defendant is essentially that the defendant struck the deceased at the back of his head with a concrete block which resulted in his death. It should be noted that from the outset, the defence neither denied nor challenged the fact that the defendant struck the deceased on the back of his head with a concrete block. The defence however, in their defence

statement asserted that the defendant, in striking the deceased with the concrete block, acted in self defence.

- [3]. At the trial, three (3) witnesses testified to seeing the deceased and one Sylvanus engaged in a scuffle during which they fell and rolled down a slope ending up under a house. The witnesses testified to seeing Sylvanus called "Bullock" armed with a cutlass which he swung at the deceased before they clinched and rolled down the slope aforesaid.

The witnesses further testify that the defendant picked up a block and went under the house where the deceased and Sylvanus rolled. A short while after, the defendant emerged from under the house and left the scene.

- [4]. It is significant that none of the crown's witnesses testified as to what occurred amongst the defendant, Sylvanus and the deceased whilst under the house. Indeed, the collective evidence of the crown's witnesses is that after the defendant and Sylvanus left the scene, they went under the house to see what had happened to the deceased where he was found with injuries to his head whilst bleeding from his mouth, nose and ears. These observations were made with the assistance of a torchlight and cell phone lights as the area where the deceased was found was dark.

- [5]. The crown tendered a statement made by the defendant under caution which was unchallenged. The contents thereof are as follows:

"It so happen Sylvanus and I were standing by the road in La Pointe on Friday the 10th of April, 2009. It was night time because there was a government post lamp that was on. The two of us were there talking as usual. I myself see mister coming up the road. When I say mister, I am referring to the same guy who is Lester. All of a sudden he pushed his hand in a bag he had and pulled out a scissors at the same

time I saw his phone fall. I cannot recall nothing about the scissors but he also had a knife and a cutlass in the bag. When the phone fell Lester just ran on Sylvanus whilst the two of us were talking and he started stabbing Sylvanus. Then when I see that, the place where I was standing had a piece of brick, I took it and hit him in the head with it. I hit him only once. When I hit him the two of them fell and rolled under a house. I cannot recall really if there was anyone there. After I hit the man with the brick, I did not see Sylvanus and I myself went by Althea and I bought a hem to smoke. That was just about it."

[6]. The version of events dictated by the defendant to the police were different to that of the crown's witnesses in that the defendant was alleging the following;

1. The defendant states he was together with Sylvanus when the deceased rushed at Sylvanus having pulled a pair of scissors from a bag which also contained a knife and cutlass;
2. The deceased ran at Sylvanus and started stabbing him;
3. The defendant, on seeing that, picked up a brick and hit the deceased in the head once;
4. The deceased and Sylvanus then fell and rolled under a house.

[7]. Police Constable 667 Jeremie Smith, who was the investigator, was called as a witness. He tendered the aforesaid statement made by the defendant into evidence. He also testified that subsequent to taking the statement from the defendant, he took him to be medically examined. He was asked by the Director of Public Prosecutions why he took the defendant to be medically examined. His answer was as follows;

"I did this because he was involved in a struggle with the deceased"

- [8]. At this stage defence counsel strenuously objected and I stopped the witness from proceeding with further testimony. The jury was asked to withdraw and in their absence I requested the Director of Public Prosecutions and defence counsel to address me on the impact of this evidence on the fairness of the trial.
- [9]. The Director of Public Prosecutions submitted that a warning to the jury would be enough indicating to them that they should disregard the evidence of the investigator that the defendant was involved in a struggle with the deceased. The Director of Public Prosecutions also conceded that the evidence is inadmissible.
- [10]. Mr. Fraser for the defendant contended that he is uncertain as to how much damage has been done to the case for the defence and whether it can be cured by a simple warning to the jury to disregard the impugned evidence.

The question to be determined therefore, is whether I should in all the circumstances of this case allow its continuance.

- [11]. The principles to be applied were set out by Auld LJ in *R v Lawson* [2005] EWCA Crim 84, [2007] 1 Cr App R 20, a case concerning the improper admission of potentially prejudicial evidence, at para 65:

“Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including: 1) the important issue or issues in the case; 2) the nature and impact of improperly admitted material

on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; 3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant; 4) the extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed. We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction."

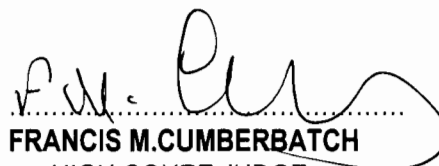
- [12]. It is common ground that this witness is the investigator of this fatal incident and during the course of his investigation he interviewed both the defendant and Sylvanus as to their involvement in this matter. Undoubtedly, in that role, he would have spoken to other persons about this matter whilst gathering evidence. It stands to reason therefore, that this is a very powerful witness for the crown.
- [13]. I find the impugned evidence to be fresh evidence which may or may not be admissible. Suffice it to say however, that this evidence was not disclosed in the statement of Police Constable James nor was there any evidence of the defendant being involved in a struggle coming from the

testimony of any of the crown's witnesses. Indeed the only evidence as to the defendant's involvement in this matter comes from the statement under caution in which no mention is made of a struggle between the defendant and the deceased.

[14]. As stated aforesaid the defendant will be relying on a defence of self defence in that he acted in defence of Sylvanus who was being attacked by the deceased who at that time was armed with a knife and pair of scissors. The fresh evidence introduces another version to this scenario which is that it was both the defendant and his associate Sylvanus who were involved in a struggle with the deceased during which the defendant was armed with a cement block and Sylvanus was armed with a cutlass.

[15]. I find in the circumstances the prejudicial effect of this evidence to the defence of self defence to be devastating. I cannot say whether or not a warning to the jury to disregard evidence from a witness as powerful as the investigator will cure the prejudice to the defence's case.

[16]. Accordingly, I find that to continue the trial in that circumstances would be unfair. In the circumstances I hereby rule this trial to be a mistrial. A date will be fixed for a retrial herein.


FRANCIS M.CUMBERBATCH
HIGH COURT JUDGE