JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 119 &120/2000

BEFORE: **THE HON. MR. JUSTICE BINGHAM J.A..**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

WAYNE CAMPBELL
MARK LAHOO
V
R

Jack Hines for the applicants
Miss Paula Llewellyn, Snr. Deputy Director Public Prosecutions (Acting) and **Miss Gail Johnson, Crown Counsel** for the Crown

April 22, and July 5, 2002

SMITH, J.A. (Ag.):

On the 8th June, 2000, the applicants Wayne Campbell and Mark Lahoo were convicted for murder in the St. Ann Circuit Court before Mrs. Justice Norma McIntosh and a jury. The particulars of offence are that they on the 12th day of March, 1999, in the parish of St. Mary, murdered Dennis Reynolds. Each was sentenced to life imprisonment with the recommendation that he be not eligible for parole until he has served twelve (12) years.

Their applications for leave to appeal were refused by a single judge in Chambers on the 26th July, 2001. They renewed their

applications before this Court on April 22, 2002, when we refused them and ordered that the sentences were to commence as of September 8, 2000. At that time we gave brief oral reasons and promised to put our full reasons in writing. This we now do.

At the trial which began on the 29th May, 2000, the prosecution called five (5) witnesses, two of whom were eyewitnesses. The applicants gave unsworn statements and called an expert witness Miss Sharon Brydson, a government analyst attached to the Forensic Laboratory.

The eyewitnesses were Mr. Clement Johnson and Mr. Arthur Eccleston. Mr. Johnson told the Court of an incident which took place some two months before the fateful night of the 12th March, 1999. The deceased, alias Mongoose, was assisting Mr. Johnson in collecting money at the entrance to what was the Ecstasy – a popular nightclub in St. Mary. The entrance fee was $100 per person. The applicants and two others approached the gate and wanted to enter the club. Among them they only had $150 which they tendered. The deceased refused to let them in. They became boisterous and unruly. The deceased referred them to Mr. Johnson who was in charge. Mr. Johnson told them that they needed at least another $150. They continued to be disorderly. Lahoo drew a ratchet knife and threatened to "cut them up". The deceased told them he was only doing his job. They uttered further

ice pick. They stabbed the deceased several times. According to the witness "when them find out say Mongoose fail out" they let him go and ran. Mr. Johnson said that the deceased was unarmed as he strove hard to get away from the applicants. The other eyewitness Mr. Arthur Eccleston was sitting on a wall in close proximity to the club. He knew the deceased and applicants before. He heard something and ran towards the club. He saw the deceased and the two applicants. One was before the deceased and the other behind. One had an ice pick the other a knife; they were stabbing the deceased who fell. The applicants stooped over him and continued to stab him. Mr. Eccleston shouted at them to leave the deceased and they "backed off". Mongoose, he said, had nothing in his hands. He tried to lift the deceased who appeared to be dead. His intestines were protruding. Mr. Eccleston used the shirt of the deceased to band the intestines and, with assistance, took him to the hospital but he died on the way to the hospital.

On the 18th March, 1999, Mr. Eccleston attended the post- mortem examination and identified Mangoose's body to Dr. David Crawford who testified that there were nine (9) wounds to deceased's body – to the back, front and side. In the doctor's opinion, the cause of death was "intra-thoracic and intra-abdominal haemorrhage from multi stab wounds involving hard sharp objects varying in shape from flat to round".

Constables Fray Lewis and Patrick Barnes were the other two witnesses for the prosecution. At the time of the incident they were stationed at the Highgate Police Station. The applicant Campbell was handed over to Constable Lewis who took a ratchet knife from him and took him into custody. The knife was exhibited in court. The applicant Lahoo was held by the police and taken to the Police Station. An ice pick was taken from him and handed to Cons. Barnes, the investigating officer. Constable Barnes cautioned Campbell and asked him if the knife was his. Campbell replied: "Mi see him dip fe him waist say him a go kill me, so me nuh give him nuh chance". He also cautioned Lahoo, showed him the ice pick and asked him if that was the ice pick taken from him. Lahoo did not respond. Cons. Barnes arrested and charged them for murder after he had visited the morgue and had seen the dead body of Dennis Reynolds o/c Mongoose. The applicants were cautioned. Campbell said "mi nuh have nothing fi say" Lahoo said "Mi guilty". He testified that he took the knife and ice pick in sealed envelopes to the Forensic Laboratory.

In cross-examination he said he took a shirt of the applicant Campbell to the Forensic Laboratory A blood sample of the deceased was also taken to the lab. When shown his deposition by defence counsel the witness agreed that after Campbell was cautioned in relation to the murder charge he said " the man rush me".

The applicants made unsworn statements in which they depicted the deceased as the aggressor. The applicant Campbell told the court he was 27 years old. He spoke of the earlier incident. On the 14th February he and Mark Lahoo and two young ladies went to the Ecstasy Night Club. They saw Mongoose at the gate and told him they only had $300. Mongoose told them" that can't work". They pleaded with him. He told them to leave. Campbell said he asked the deceased "how him a gwan so". He portrayed the deceased as hostile, abusive and dismissive. He and his friend Mark Lahoo left, no doubt embarrassed and perhaps embittered.

On the 12th March he and Lahoo were on their way home. He noticed three persons behind him. Mongoose was one. Campbell stopped to speak to a lady. He then sat on a rail. He said that Mongoose approached him with a guinness bottle in one hand and a spliff in the other. Mongoose he said hit him in his head with the bottle. He did not retaliate instead he said to his friend, " Come Mark let us walk him out," and they went into the club. Mongoose followed them around and threatened to kill them if they remained in the club. They ran downstairs. Mongoose chased them. They bumped into two persons who fell. They ran into the road; Mongoose was behind. Mongoose held on to his shirt; they wrestled and fell. Mongoose was on top of him and slashed him across the face with the bottle. He said he saw Mongoose "dip to his

waist" and he thought he was in danger. The applicant stated that he had a knife which he used to "jook" Mongoose several times. He continued – "same time I feel a slight release off a me, I pull me hand off his shirt and I got up off the ground and saw Mongoose and my family which is Mark hold up". He told Mark to come and they both ran. They were chased and held by onlookers. The police intervened and took them to the police station.

The applicant Lahoo's account as to what took place is basically the same as that of Campbell. He said that after Campbell was hit in the face with the bottle they just walked away. Mongoose followed them saying "Yuh nah stay ya tonight because a kil me a go kill yuh". His account as to what took place in the road is as follows. Mongoose "hang unto" Wayne (Campbell). Wayne fell. The two of them were on the ground with Mongoose over Wayne. The bottle broke and Mongoose used it to slash Wayne across the face. The bottle fell out of his hand and he "dipped for his waist". The applicant Lahoo said he tried in vain to pull Mangoose off Wayne. Lahoo pulled an ice pick from his pocket and stabbed Mongoose in his back several times. Mongoose thereupon released Wayne who ran off calling to him (Lahoo) to come. They ran.

The defence called Miss Brydson, a Forensic Analyst. She testified that she analysed blood sample taken from the deceased Dennis Reynolds and concluded that he had 'Group B' type. She found human

blood on the shirt taken from the applicant Wayne Campbell. On a grouping analysis she found both Group 'B' and Group 'O' types of blood. A DNA analysis was done on the two sets of Group 'B' blood and she concluded that the Group 'B' blood found on Campbell's shirt belonged to the deceased.

Mr. Hines did not pursue the original grounds, but we granted him leave to argue the following supplemental ground of appeal:

1. That the learned trial judge erred in directing the jury that:

   "If you find there is excessive force it is murder because it means that the defence of self-defence is wiped away". (see pp.340 lines 13-16) as such a direction deprived the applicant of the possible verdict of guilty of manslaughter as not just self-defence but provocation was always in issue.

An examination of the impugned direction, in its context, will immediately reveal the demerit in counsel's contention. The learned trial judge had come to the end of her summing up. It was fair, thorough and correct. She, as is the wont of many trial judges in this jurisdiction, enquired of counsel whether or not she had left out anything. The record shows (p.30):

> "**Mr. McCalla**: I would say no, my Lady.
>
> **Her Ladyship:** Miss Malahoo?
>
> **Miss Malahoo:** No, my Lady. Although your Ladyship has dealt with the issue, just to direct My

> Lady to something that counsel said in his address that excessive force reduces murder to manslaughter.
>
> **Her Ladyship:** I didn't think it was necessary for me to say since I say exactly what excessive force does. If you find excessive force was used it does not reduce murder to manslaughter it is murder not manslaughter. If you find that there is excessive force it is murder because it means that the defence of self-defence is wiped away".

The learned trial judge had earlier given the jury full and proper directions on provocation and its effect in reducing murder to manslaughter. It is clear beyond peradventure that the jury would have understood the learned trial judge to be saying that where a person kills another with the requisite intent for murder in circumstances in which he would have been entitled to an acquittal on the ground of self-defence but for the use of excessive force the defence fails altogether and he is guilty of murder not of manslaughter. No doubt, the learned trial judge had in mind the decision of the House of Lords in ***R v Clegg*** [1995] A.C. 482.

We found no merit in this complaint.

It was for this reason we refused the applications and made the order set out at the commencement of the judgment.