2nd PROOF

Privy Council Appeal No.34 of 1976

THE DIRECTOR OF PUBLIC PROSECUTIONS - - - - - - - - - Appellant

v.

FREDERICK DALEY AND BURNETT McGHIE - - - - - - - - - Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL;
Delivered The 4th December, 1978

Present at the Hearing:

LORD DIPLOCK

LORD HAILSHAM OF SAINT MARYLEBONE

LORD SALMON

LORD EDMUND-DAVIES

LORD KEITH OF KINKEL

(Delivered by LORD KEITH OF KINKEL)

This is an appeal from a judgment dated 15th June 1976 of the Court of Appeal of Jamaica. The respondents were tried in the Clarendon Circuit Court of Jamaica before Melville J. and a Jury, upon an indictment charging them with having, on 22nd April 1975, murdered Sydney Smith. On 8th December 1975 the jury returned in respect of each of the respondents a unanimous verdict of guilty of manslaughter, and the presiding judge sentenced each of them to thirty months' imprisonment at hard labour. The respondents appealed to the Court of Appeal of Jamaica, which by a majority (Graham-Perkins J.A. and Watkins Acting J.A. Zacca J.A. dissenting) allowed the appeal and set aside the convictions. The Court later granted leave to the Director of Public Prosecutions for Jamaica to appeal to Her Majesty in Council, and certified that the appeal involved certain points of law of exceptional public importance. Their Lordships will refer later to the points of law so certified.

Upon the evidence presented at the trial it emerged that for some days prior to 22nd April 1975 the two defendants had been cutting fence posts along the line of a projected electric power cable on land occupied by the Jamaica Cordage Co. Ltd. It appeared that they had authority to do so from another company which held a contract in connection with the construction of the power cable. On 22nd April the defendants arrived at the premises of the Jamaica Cordage Company and found that the posts had been removed from where they had left them and stacked up beside a shed near the gate giving access to the premises. This had been done as a result of instructions given by a superior to the deceased man Sydney Smith, who held a position of some responsibility with the Jamaica Cordage Company.

The defendants had an interview with the deceased in the shed, and it was common ground that a dispute arose over the defendants' right to possession of the posts. There was a sharp conflict as to what happened next between the evidence of three prosecution witnesses, who were also employed by the Jamaica Cordage Company and were present at the scene, and the account given by the defendants in unsworn statements which they made from the dock. According to the former, the defendants threw stones at the deceased, who entered a storeroom inside the shed and closed the door. The defendants continued to throw stones at the door of the storeroom. Later the deceased left the storeroom and ran across the yard towards the company's offices. The defendants threw stones at him as he ran. The witnesses were at variance as to whether any stones actually struck him. There was a concrete ramp in the yard rising from ground level to a height of about four feet. The deceased fell as he reached this ramp. The witnesses were again at variance as to whether he fell because he had been struck by a stone or because he tripped over the ramp. Two of them said that the defendants threw stones at the deceased as he lay across the ramp.

Both defendants stated that after the dispute arose the deceased tried but failed to take a knife from one of those present in the shed, that he entered the storeroom as though looking for a weapon, that having emerged from it he told them to stay where they were and ran towards the company's offices where he kept a gun, and that he tripped and fell over the ramp. There was other evidence that the deceased did keep a gun at the company's offices.

The deceased was later found to be dead. According to medical evidence, he had sustained a fracture of the sternum and also a fracture of the skull on the right side towards the back of it. He had no other injuries apart from a small laceration on the left side of the chin. The fracture of the skull had apparently involved no bruising or other external signs of injury apart from haemorrhage from the right ear. The medical witness expressed the opinion that it was possible but unlikely that the fracture of the skull as well as that of the sternum had been caused by the deceased tripping and falling over the ramp.

It appears that when the prosecution's case was opened to the jury, it was placed almost entirely on the basis that the defendants had murdered the deceased by stoning him to death, but some indication was given that there might be room for a verdict of guilty of manslaughter, on the ground that the defendants had acted under provocation. When counsel for the prosecution addressed the jury after the conclusion of the evidence, however, he suggested that their verdict might be one of manslaughter on the ground that the defendants had by their unlawful actions put the accused in a state of terror with the result that in trying to escape from them he had fallen and fatally injured himself. Counsel for the defendant McGhie had already addressed the jury on the evidence, because he had himself led some evidence, and had not dealt with the aspect so raised by the prosecution. Counsel for the defendant Daley, who had led no evidence, addressed the jury after counsel for the prosecution, and apparently he dealt with the matter by objecting to its being raised at such a late stage and seeking to brush it aside as being of no importance. The presiding judge left it open to the jury to return a verdict of guilty of what he described initially as "manslaughter in trying to escape" and later as "manslaughter by flight", and directed them at considerable length upon the law relating to the matter and as to the view of the evidence which would entitle them to return such a verdict. This was the verdict which the jury in fact returned in respect of both defendants.

Leave was granted to the defendants to appeal against their conviction upon a number of grounds, principally concerned with the contention that their defence had not been fairly and adequately put to the jury. The majority in the Court of Appeal,

however, took the view that the really important question raised in the appeal was whether the trial judge, in the particular circumstances of the case, ought to have left it to the jury to return a verdict of "constructive" manslaughter. They decided that he ought not to have done so, and accordingly set aside the convictions. In granting leave to the Director of Public Prosecutions to appeal to Her Majesty in Council the Court certified that their decision involved the following points of law of exceptional public importance:-

(1) Whether or not on an indictment which charged murder it is open to the jury to return a verdict of manslaughter (regardless of the category) where there is sufficient evidence to support such a verdict.

(2) Whether quite independently of Counsel's opening to the jury, it is proper for Counsel for the Crown in his closing speech to address the jury on such issues as arise from the evidence and to seek from them any verdict which is returnable on the indictment and may reasonably be founded on such evidence.

(3) Whether or not irrespective of the address of Counsel on either side it is the duty of the trial judge to leave to the jury all issues that arise from the evidence and to direct them on such alternative verdicts that may be open to them having regard to such evidence; and

(4) Whether or not in the instant case the issue of "manslaughter by flight" as defined by the trial judge fairly arose on the evidence and whether or not his directions in that regard were fair, clear and adequate.

It was conceded by counsel for the respondents, in their Lordships' view rightly, that the first of the questions so certified must be answered in the affirmative. Their Lordships know of no reasons, in principle or in authority, which might raise any doubt about the correct answer to this question.

As regards the second of the certified questions, their Lordships consider that this may appropriately and conveniently be dealt with in conjunction with the third, since both fall to be answered by application of the same essential principles. Both questions are, however, to be considered under reference to circumstances, such as those of the present case, where in a trial upon an indictment charging murder simpliciter the evidence led leaves room for a verdict of manslaughter of some category. Their Lordships regard it as well settled law that in such a situation it is the duty of the trial judge to leave it to the jury to decide whether the alternative verdict of manslaughter is the appropriate one, and to give them due directions upon the applicable rules of law and upon the view of the evidence which might warrant the returning of such verdict. This has been laid down in a number of decided cases, of which it is necessary to refer to one only. In Kwaku Mensah v. The King (1946) A.C. 83 Lord Goddard C.J. delivering the advice of this Board said at p.91:

"But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the judge must put that question to the jury. This was distinctly laid down in Rex v. Hopper (1915) 2 K.B. 431, a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation. The ruling was expressly approved by the House of Lords in Mancini v. D.P.P. (1942) A.C. 1. The reason for the rule is that on an indictment for murder it is

open to the jury to find a verdict of either murder or manslaughter but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury, because if they accept it or left in doubt about it the prosecution have not proved affirmatively a case of murder."

In the light of that statement of the law it is plain that question (3) of the questions certified in the present case, read as relating to the situation where in a trial on an indictment for murder the evidence leaves room for a verdict of manslaughter, falls to be answered in the affirmative.

In their Lordships' opinion it follows as a corollary that question (2), read as relating to a similar situation, must also be answered in the affirmative. There can be no reasonable ground for objection to counsel for the prosecution dealing in his closing address to the jury with an issue which is raised by the evidence and is of such a nature as makes it appropriate to be brought by the presiding judge to the attention of the jury. Reference was made in the course of the argument to a passage in the opinion of Lord Keith of Avonholm in Ramsook Ramlockan v. The Queen (1956) A.C. at p.490, where he said:

> "In cross-examination counsel (for the prosecution) was, however, in their Lordships' view, bound to put to the accused any inferences from the evidence which he proposed to put before the jury."

In the present case neither of the defendants gave evidence upon oath, so counsel for the prosecution had no opportunity to put to them in cross-examination the inference that the deceased met his death through tripping over the ramp while fleeing from their stoning, and as a consequence of it. In their Lordships' opinion counsel for the prosecution is not in such circumstances debarred from advancing to the jury a view of the evidence which has become possible in the light of the way in which it has developed, and which is such as to lead to a verdict of guilty of a lesser offence that that charged. It cannot always be predicted at the beginning of a trial just how the evidence will develop, and prosecuting counsel is acting consistently with his duty if he takes the earliest available opportunity of drawing attention to the possibility of any tenable inference which may emerge. Counsel for the prosecution did so in the present case. It is of course necessary that defending counsel should be afforded the opportunity of dealing with any such suggested inference. Here, under a rule abolished by statute in English procedure (see Criminal Procedure (Right of Reply) Act 1964, s.1), and which could with advantage, in their Lordships' view, be abandoned also in other jurisdictions, counsel for one of the defendants, because he had led evidence, made his closing address to the jury before prosecuting counsel. Therefore he did not deal with the matter of manslaughter "while trying to escape". While it might have been appropriate for the trial judge specifically to ask him whether he desired to deal with the matter after it had been raised, it was equally open to counsel to apply for leave to do so. Counsel for the other accused, who had led no evidence and therefore addressed the jury after prosecuting counsel, did deal with the matter, no doubt in the manner which seemed best to him from the tactical point of view. It lay within the discretion of the trial judge whether or not he should invite defending counsel who had first addressed the jury to supplement his address. Their Lordships are unable to say that in the circumstances the trial judge, by offering no such invitation, erred in the exercise of his discretion.

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This leads on to consideration of whether or not the trial judge, being minded to place the issue in question before the jury, should have invited defending counsel to make submissions to him regarding the propriety of doing so. This also appears to their Lordships to be very much a matter for the exercise, in the light of the circumstances of the case, of the judge's discretion. In some cases it might be proper in the interests of justice to do so, in others not. It can be envisaged that such an invitation could in some circumstances present an embarassment to defending counsel, having regard to the tactical course which he thought it best policy to pursue in the client's interest. In the circumstances of the present case their Lordships do not consider that a proper exercise of the judge's discretion required him to invite submissions from defending counsel.

Their Lordship's turn now to the fourth and last of the certified questions, which is concerned with whether the issue of "manslaughter by flight" fairly arose on the evidence, and whether the trial judge's directions to the jury on that issue were satisfactory.

The law regarding manslaughter of the species with which this appeal is concerned was considered by the Court of Appeal (Criminal Division) in the case of Robert Mackie (1973) 57 Cr.App R.453. It is unnecessary to recite the facts of the case or to quote any passages from the judgment of the Court delivered by Stephenson L.J. It is sufficient to paraphrase what in their Lordships' view were there held to constitute the essential ingredients of the prosecutions proof of a charge of manslaughter, laid upon the basis that a person has sustained fatal injuries while trying to escape from assault by the accused. There are (1) that the victim immediately before he sustained the injuries was in fear of being hurt physically; (2) that his fear was such that it caused him to try to escape; (3) that whilst he was trying to escape, and because he was trying to escape, he met his death; (4) that his fear of being hurt there and then was reasonable and was caused by the conduct of the accused; (5) that the accused's conduct which caused the fear was unlawful; and (6) that his conduct was such as any sober and reasonable person would recognise as likely to subject the victim to at least the risk of some harm resulting from it, albeit not serious harm. Their Lordships have to observe that it is unnecessary to prove the accused's knowledge that his conduct was unlawful. This was made clear by Lord Salmon speaking with general concurrence in a slightly different but nevertheless relevant context in D.P.P. v. Newbury (1977) A.C. 500 at p.507. It is sufficient to prove that the accused's act was intentional, and that it was dangerous on an objective test.

Their Lordships are of opinion that upon the evidence in the present case there was material before the jury upon which, if they did not consider the defendants' guilt of murder to be established beyond reasonable doubt, they were entitled to find them guilty of manslaughter upon the basis which has been described. There was evidence that the defendants threw stones at the deceased. The jury by their verdict showed that they accepted that evidence. There was evidence that the deceased was struck by a stone or stones, but the jury were clearly entitled to regard that evidence as not being of sufficient quality to establish the fact beyond reasonable doubt. There could be no doubt that the deceased in the course of running across the yard sustained injuries which caused his death. If those injuries did not result from his being struck by stones thrown by the defendants, they could only have resulted from his tripping over the ramp and sustaining the injuries in his fall. Did he trip and fall because he was fleeing in haste on account of fear inspired by the defendants' conduct, or, as the defendants suggested, in the course of running to get a gun with which to threaten or attack them? Their Lordships are satisfied that upon a fair view of the evidence

on a whole any jury would have been entitled to infer that the former was the true explanation of the deceased's fall, and generally to hold that all the ingredients described above as necessary for a verdict of manslaughter had been proved beyond reasonable doubt. Therefore the issue of manslaughter was a proper one to put before the jury.

Their Lordships have carefully considered the terms of the trial judge's directions to the jury upon this aspect of the case. They are of opinion that these were such as fairly to apprise the jury of the ingredients which they must find proved to justify a verdict of manslaughter on the relevant basis. It is apparent that his directions were based upon, and accurately reflected, what was said in the case of Robert Mackie (supra). One consequence of this was that he told the jury they must be satisfied that the defendants knew that their conduct was unlawful. As now appears from D.P.P. v. Newbury (supra), that was putting the matter too favourably for the defendants, but the point has no materiality in the circumstances. The fourth of the certified questions is accordingly to be answered in the affirmative.

For these reasons their Lordships are of opinion that the decision of the Court of Appeal was wrong and should be reversed, and that the convictions of the defendants and the sentences imposed on them should be restored. They will humbly advise Her Majesty that the appeal should be allowed to that effect.