Privy Council Appeal No. 35 of 1972

The Director of Public Prosecutions - - - - - - - - - - - -Appellant

v.

Leary Walker - Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL 1974

Present at the Hearing:
LORD WILBERFORCE
LORD DIPLOCK
LORD CROSS OF CHELSEA
LORD SALMON
SIR ERIC SACHS

(Delivered by LORD SALMON)

The respondent was charged with murdering his wife. He pleaded not guilty and the jury found him not guilty of murder but guilty of manslaughter on the ground of diminished responsibility. The evidence that he had stabbed his wife to death was overwhelming and unchallenged.

At no time before or during his trial was it ever suggested by or on behalf of the respondent that he had killed his wife in self-defence. The defences relied upon were automatism, provocation and diminished responsibility. The respondent appealed to the Court of Appeal against his conviction and sentence. His Notice of Appeal raised a number of grounds on which the appeal should be allowed. The only ground, however, which was argued in the Court of Appeal was that the learned trial judge should have left self-defence to the jury, that he had failed to do so and that accordingly the conviction should be quashed. The Court of Appeal accepted this argument,

allowed the appeal, quashed the conviction and ordered a re-trial. The Director of Public Prosecutions now appeals to this Board by leave granted by the Court of Appeal under Section 7 of the Judicature (Appellate Jurisdiction)(Amendment) Act 1970 which provides that such leave may be given "where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable that a further appeal should be brought."

The relevant facts are clear and undisputed. Whilst the respondent, his wife and their son Karyl aged five were in a motorcar, the respondent's wife received eleven stab wounds. Any one out of three of those wounds was by itself capable of causing death. The jury having convicted the respondent of manslaughter, it is obvious that they decided that it was the defendant who stabbed his wife; and indeed no other conclusion would have been possible.

Karyl was called to give evidence but after he had answered only a few questions, the learned trial judge ruled, rightly in their Lordships' opinion, that his evidence ought not to be received and the jury were told that they should not pay any attention to what he had said - not that he had said anything of any relevance. Accordingly, the respondent was the only living person who could have told the jury of the circumstances in which he stabbed his wife to death. He elected not to give evidence and made an unsworn statement from the dock. The first part of that statement need not be read. It makes it plain that he married his wife in 1960 and that the marriage was happy until the middle of 1969 when trouble arose owing to her association with another man. From that time until the 17th March 1970, when his wife met her death, there seem to have been alternating reconciliations and quarrels between them. The statement then goes on: "While we travelled in the car we quarrelled about the man whom I saw driving her that evening - the same man who had dropped her home on January 19th. Well, she flew into a temper and said 'Well, it is my damn' man and if you don't like it you can go and kill your blasted self'. Well, I was shocked. I was surprised because strong language was never used in our family, never. After saying that she stopped the car and rushed out. I went at her, held her and pulled her back into the car. Now, I was over in the driver's seat. She fell across my lap and in the course of the

struggle to get her inside the car she had grabbed and held on to my testicles, and squeezed me. I felt a severe pain, cramp - I felt I was going to faint or something. I remember having seen a knife in the centre tray trough of the car, along with a cigarette lighter. I reached for the knife. Beyond that I don't recall anything until I heard Karyl say, 'Dada, why you kill Mummy?'."

There was also a written statement which the respondent had made under caution when arrested on 20th March. This statement however added nothing to the respondent's unsworn statement and omitted much of what that later statement contained. A witness living near the scene of the killing said that he saw a woman streaming with blood fall out of the driver's seat of a car into the road. This witness then heard a little boy who was in the back of the car ask the respondent: "Why he did that?", and that the respondent replied: "There was nothing left for me to do."

That is all the jury had before them which threw any light upon the circumstances in which the respondent killed his wife.

The question is whether the learned trial judge should have left self-defence to the jury. It not infrequently happens in a murder trial that self-defence is relied on as a defence but no question of provocation is raised although there is evidence from which provocation might reasonably be inferred. Self-defence, unless disproved by the prosecution, would entitle the accused to a clean acquittal whereas provocation would merely reduce murder to manslaughter. That is why provocation, although there is evidence to support it, is often not raised by the defence. If it were raised, it might prejudice the accused by offering the jury an option of returning a verdict of manslaughter which could result in the accused being sentenced to a long term of imprisonment instead of being acquitted as he would be, should self-defence be accepted by the jury. In such a case, it is the duty of the trial judge, after dealing with self-defence, to direct the jury that if they reject self-defence they may still find manslaughter on the ground of provocation, notwithstanding that it has not been relied upon by the defence and that they must do so unless satisfied beyond reasonable doubt that the defence of provocation should be rejected.

See Bullard v. The Queen [1957] A.C. 635 at p. 642; Reg. v. Porritt [1961] W.L.R. 1372.

There might be a case in which provocation is relied upon but not self-defence although there is evidence from which self-defence could possibly be inferred. This however is hardly more than a theoretical possibility because if there were even only the slimmest chance of self-defence succeeding, it is difficult to imagine any reason why Counsel for the accused should fail to raise it and elect to rely solely on provocation. In the present case, for instance, had self-defence been considered to be a practical possibility, there could have been no reason for not raising it. It could not have conflicted with the defences of automatism or diminished responsibility any more than the defence of provocation which was in fact raised. The experienced Counsel for the respondent discarded self-defence no doubt because they realised that such a defence had no chance of succeeding.

It is just possible that cases may occur in the future, although this Board is unaware of any such case having occurred in the past, in which the defence relies on provocation but fails to rely upon self-defence although such a defence might possibly be inferred from the evidence. In this unlikely event, it would, no doubt, be the duty of the trial judge to leave self-defence to the jury and to give a careful direction on that defence.

In the present case, their Lordships are satisfied that the learned trial judge was entirely right in deciding not to leave self-defence to the jury. Neither the respondent nor his Counsel had suggested that he had acted in self-defence nor was there a scintilla of evidence from which it could be inferred that he had. Their Lordships consider that the Court of Appeal may have been led into error by a serious omission from the judgment in Lashley v. R. [1959] 1 W.I.R. at p. 105. In that case, which has often been followed, the Court, in analysing self-defence, unfortunately failed to refer to one of its essential elements, namely, that the accused should use no more force than a reasonable man, in all the circumstances, would have considered reasonably necessary to defend himself, his family or his home.

If, as in the present case, (a) the accused has not relied on self-defence and (b) the evidence is consistent only with the force used being far greater than could conceivably have been necessary, no appeal can succeed on the ground that the Judge has not left self-defence to the jury. The Judge would be quite wrong to do so because any verdict of manslaughter on the ground of self-defence would be perverse; there would be nothing to support it.

It is clear that the respondent's wife opened the car door and rushed out of it because she wanted to get away from her husband. As he dragged her back into the car, according to him, she "grabbed and held on to" his testicles. She clearly did this in an attempt to make him let go of her. Once he had got her back into the car, it should have been obvious to him that there was an easy way of getting her to release her hold without using any force. Although no doubt, as the Court of Appeal pointed out, it was impossible for him to retreat, he had only to open the car door and tell her she was free to go. No force would have been necessary to relieve him from pain. In any event, there is no possibility of any jury having any doubt at all but that the respondent, in stabbing his wife eleven times as he did, used much more force than could conceivably have been reasonably necessary.

The Court of Appeal held that the respondent's reply to his son immediately after the killing, "There was nothing left for me to do," was not inconsistent with a reasonable inference that he had killed his wife in self-defence. That no doubt is so. Had there been anything else from which such an inference could have been drawn, his reply would not have hurt him. It was entirely neutral. There was, however, nothing else from which an inference that the respondent killed his wife in self-defence could possibly have been drawn and, accordingly, a verdict of manslaughter on the grounds of self-defence could only have been perverse.

The following passages in the judgment of the Court of Appeal are significant: "The evidence disclosed a credible narrative constituting the appellant's cardinal line of defence," and a little later after references to the Badjan case 50 Cr. App. R. 141 "It was there held that where a cardinal line of defence (e.g. self-defence) has been placed

before the jury, but has not been referred to at all in the summing-up, it is in general impossible for the Court of Criminal Appeal to apply the proviso." No question of the proviso here arises, but the passage cited seems to indicate that the Court of Appeal were under the mistaken impression that self-defence was the cardinal line of defence placed before the jury by the respondent. Far from this being so, self-defence had not even been mentioned at the trial by the respondent nor by Counsel on his behalf and there was no evidence to support it. For these reasons their Lordships have come to the conclusion that the Court of Appeal fell into error in quashing the conviction.

It has however been submitted on behalf of the respondent that even if the Court of Appeal's decision was wrong, (a) it does not involve a point of law of exceptional public importance nor is it desirable in the public interest that a further appeal should be brought; and (b) it does not "tend to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future," (see Nirmal son of Chandar Bali v. The Queen Privy Council Appeal No. 46 of 1970 (unreported)) and that therefore this is not a case in which this Board should allow the appeal.

Their Lordships cannot accept this submission. They consider that the Court of Appeal were undoubtedly right in giving leave to appeal from the decision to quash the conviction. Were that decision allowed to stand, it would follow that, in addition to the defences actually raised on behalf of an accused, trial judges might, in the future, feel obliged to leave to the jury not only any possible but also any impossible defence which had not been raised but which human ingenuity might conceivably devise. Otherwise, after the defences put before the jury at the trial had failed, the accused might succeed in having his conviction quashed on the ground that the impossible defences had not also been left to the jury. Moreover, to leave such defences to the jury would only tend to confuse and hinder them in reaching a true verdict. This would indeed divert the due and orderly administration of justice.

The Court of Appeal has indicated that it would be in the public interest if this Board were to give some guidance on the "objective evidential value of an unsworn statement" by an accused, since it has for

some time been the standard practice in Jamaica to keep the accused out of the witness box. Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The Judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own Counsel and by the Court! The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves.

The Court of Appeal also indicated that it would be helpful to the administration of justice in Jamaica if this Board were to give some guidance about the application of the proviso in relation to self-defence. If a trial judge fails to leave self-defence when it should be left to the jury, their Lordships find it difficult to think of any case in which it would be proper for the proviso to be applied. The proviso can be applied only if the Court of Appeal is satisfied that there is no possibility of any injustice having been done. This could hardly ever

be so if a defence, however weak, upon which an accused relies at the trial or which is supported by evidence (even although it has not been expressly relied on) has not been left to the jury. In such a case, it would, as a rule, be manifestly unjust to deprive the accused of the jury's verdict on that defence. No question relating to the proviso arises however in the present case.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the conviction restored and the case remitted to the Court of Appeal for consideration only of the respondent's appeal against sentence.