JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 6 OF 1983

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

TREVOR FACEY V. REGINAM

Michael Erskine and M. Saunders for the appellant

A. Smith for the Crown

December 10, 1984 & February 8, 1985

CAMPBELL, J.A.

On December 10, 1984, we quashed the conviction for murder and set aside the sentence. We substituted therefor a conviction for manslaughter on the ground of provocation and sentenced the appellant to 12 years imprisonment at hard labour. We then promised to put our reasons in writing which we now do.

The appellant was convicted in the Home Circuit Court on January 20, 1983 for the murder of Milton Forbes. The facts on which the prosecution relied were that on July 1, 1981 about 5:00 o'clock p.m., the deceased, Mr. Alvin Parkinson and one other were on a building site at Ackee Walk on Candlelight Crescent in the parish of Saint Andrew installing grills to the back door of a house. The appellant was a watchman for a building on the site employed by Mr. Winston Smith a contractor and builder who was actually at work on the day in question. The appellant desirous of cooking his evening meal, proceeded to where the deceased and his workmates were, and picked up an empty paint pan which the deceased had washed out the day before. The

deceased rushed at the appellant wrested the paint pan from him saying it belonged to him the deceased. A fight took place between the deceased and the appellant during which, in the words of Alvin Parkinson a witness for the prosecution "the two men were fighting "blow for blow and lick for lick." The appellant apparently not being a match for the deceased ran to call one Melbourne Harvey through whom he claimed the paint pan. The appellant returned with Melbourne Harvey and in the words of Mr. Winston Smith another prosecution witness "there was some kind of confrontation" between the deceased, Mr. Parkinson and another on the one hand, and the appellant on the other hand. They were all "agitated" with the appellant demanding the paint pan as his and the deceased and his co-workers resisting his claim. Again in the words of Mr. Winston Smith "the appellant got more irate" and started throwing stones at the deceased and his co-workers. The co-workers of the deceased retaliated by stoning the appellant. The appellant and Melbourne Harvey left the scene promising to return which they did shortly after, within half an hour, in the company of a mob of about 25 persons. This mob surrounded the building in which the deceased and his co-workers had taken refuge. The mob stoned the building, broke down a back door of the building and about ten of them including the appellant entered. The appellant was armed with a knife. In the building a fight ensued in the course of which the deceased cried out for Parkinson who responded by rushing into the room from which th· cry emanated. In the room he saw the deceased lying down bleeding from his chest from what subsequently proved to be a stab wound and the appellant standing in the room with a knife in hand with which he attempted to stab Parkinson.

The summing up and direction to the jury was criticized on appeal on a variety of grounds. However, save for that relative to the issue of provocation, all these other grounds were found to

be without merit. On the issue of provocation the ground of appeal is that:

> "The Learned trial Judge erred in law when he withdrew from the Jury's consideration the issue of provocation (see pp. 134 & 162) and accordingly he failed to direct or assist the Jury at all on that issue and to the related finding (or return) of a verdict of manslaughter."

The learned trial judge very early in his direction to the jury before summarizing the facts for their benefit withdrew the issue of provocation. He said:

> "Well on the evidence that you have to consider, issues of provocation and self-defence do not arise."

In his summary of the prosecution evidence however the learned trial judge specifically mentioned the fact that arguments and a fight took place between the deceased and the appellant before the incident in the building. He also specifically mentioned that a fight took place in the building between the appellant and the deceased. Referring to Mr. Parkinson's evidence he said:

> "According to Mr. Parkinson between the hours of 5 and 5:30 in the evening there was a dispute between Milton Forbes and the accused Facey. This dispute centred over an empty paint pan. Facey wanted it, Forbes said he can't get it, an argument developed. After that argument was over, the accused Facey left the scene and he came back with the other accused Harvey. There is a quarrel, a further quarrel, a fight ensued. Mr. Parkinson and one Michael parted the participants in the fight and both the accused - that is Facey and Harvey went away and came back in a couple of minutes after, with about 23 others. There were 25 of them in all. At that time ,Mr. Parkinson said he and the deceased Forbes were inside the building. The group of men threw stones and bottles in the house. Eventually the back door of the building was kicked off and ten or twelve persons entered. Facey entered the building, he had a knife in his hand. A dispute started in the house and 'them start to fight' that is Facey and Forbes."

Dealing with the appellant's unsworn statement, the learned trial judge also referred to the fact that therein the appellant mentioned that he was beaten twice over the paint pan, that he started to cry. He left and went to a shop where he bought some plaster and from there he went home. The learned trial judge in directing the jury with regard to this unsworn statement said:

> "Well Madam Foreman and members of the jury, it was not urged by the defence, but in my view it arises from the statement. The accused Facey is saying indirectly that he could not have committed that offence because at that time he was either at the shop buying plaster, or at his home. This is known in law as an alibi and the effect of an alibi is merely, if you accept that the accused, Facey was somewhere else, then he could not have been at Queensbury committing murder or any other offence."

The learned trial judge having thus clearly summarized the separate quarrels and fights between the deceased and the appellant which all took place within a short interval of time which in law could manifestly amount to provocation must in withdrawing the issue of provocation from the jury have inclined to the view that the said quarrels and fights one of which in the words of Mr. Parkinson was "blow for blow and lick for lick" were not such provocative acts as would cause a reasonable person so provoked to have retaliated in the manner in which the appellant did. In so withdrawing the issue of provocation from the jury, the learned trial judge may have relied on R. v. Moxam (1973) 12 J.L.R. page 1251 the head note of which reads as follows:

> "Where there is no evidence on which a reasonable jury could form the view that a reasonable person was so provoked as to be driven to violence resulting in death, it is the duty of the trial judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter."

In delivering the judgment of the court, Graham-Perkins, J.A. quoted with obvious approval the words of Viscount Simon in Holmes v. Director of Public Prosecutions (1946) 2 All E.R. 124 which are as follows:

> "If there is no sufficient material, even on a view of the evidence most favourable to the accused for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven to violence which produces death, it is the duty of the judge as a matter of law to direct they jury that the evidence does not support a verdict of manslaughter."

Thus the above judgment is based on the court's view per Graham-Perkins J.A. that before provocation as an issue can be left to the jury, the trial judge not only must be of the opinion that the words and or acts established in evidence can as a matter of law amount to provocation which is good law, but he must also be of opinion that firstly, the aforesaid words and/or acts would as a matter of law be viewed by a reasonable person as amounting to provocation which is bad law and secondly that as a matter of law, a reasonable person would be so provoked by the aforesaid words and or acts as to retaliate in the manner in which the accused person retaliated which also is bad law.

The reliance by the court in 1973 on the proposition of law stated by Viscount Simon in Holmes v. Public Prosecutions Director was "per incuriam" because the law had been changed by Law No. 43 of 1958 (now s. 6 of the Offences Against the Person Act) as stated in the Privy Council decision set out below.

In Glasford Phillips v. The Queen (1968) 11 J.L.R. 70 the Privy Council, in upholding as correct and appropriate the direction on provocation given by Smith J., (as he then was), took the opportunity to state the changes effected by Law No. 43 of 1958 to that part of the defence of provocation at common law crystallized in the above recited words of Viscount Simon in Holmes v. Director of Public Prosecutions (supra)

Lord Diplock delivering the opinion of the Board referred to the fact that Section 3C of the Jamaica Offences against the

Person (amendment) Law. No. 43 of 1958 contained a provision identical with that contained in S. 3 of the United Kingdom Homicide Act 1957 and is as hereunder:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

Thereafter at p. 72 he stated thus:

> In their Lordships' view it is beyond question that at common law by which the matter was regulated both in Jamaica and in England until the legislation cited above the relationship between the degree of retaliation and the nature of the provocation was a relevant factor in determining whether the offence proved was manslaughter and not murder. It is sufficient to refer to the words of Viscount Simon, L.C. in the House of Lords in Mancini v. Public Prosecutions Director with whose speech the rest of the House agreed. 'In short' he said at p. 9 'the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.' This is an elliptic way of saying that the reaction of the defendant to the provocation must not exceed what would have been the reaction of a reasonable man.
> In their Lordships' view the only changes in the common law doctrine of provocation which were effected by s. 3c of the Jamaica Offences against the Person (Amendment) Act, No. 43 of 1958 were (1) to abolish the common law rule that words unaccompanied by acts could not amount to provocation and (2) to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did, these two changes are interrelated.

> "The test of provocation in the law of homicide is two-fold. The first which has always been a question of fact for the jury assuming that there is any evidence upon which they can so find, is 'was the defendant provoked into losing his self-control?' The second, which is one not of fact but of opinion, 'would a reasonable man have reacted to the same provocation in the same way as the defendant did?'
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> "In Holmes v. Public Prosecutions Director it was laid down that although the second question was also one for the jury it was nevertheless the function of the judge to make a preliminary ruling as to whether or not the provocation was such as could provoke a reasonable man to react to it in the way in which the defendant did. It was this decision, not that in Mancini v. Public Prosecutions Director which was reversed by the English legislation of 1957 and the Jamaican legislation of 1958."

In R. v. Hart (1978) 27 W.I.R. p. 229 this court reaffirmed the modern view of the law governing provocation stated in Glasford Phillips v. The Queen (Supra). Kerr, J.A. in delivering the judgment of the court, after adverting to the twofold test of provocation stated by Lord Diplock in Phillips' case and in particular to the second test namely would a reasonable man have reacted to the same provocation in the same way as the defendant did? correctly stated that "It is essentially a matter for the jury." He further stated at page 235 that:

> "It cannot therefore be used by the trial judge as a basis for deciding whether or not the issue of provocation has been raised. What is required is evidence of provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to 'a sudden and temporary loss of self control.' If there is such evidence then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the twofold test as laid down in Phillips v. R."

In the instant case, the learned trial judge's summation of the facts, as already stated, disclosed facts which both individually and cumulatively were clearly provocative. The evidence further disclosed that the appellant was "agitated" when demanding his paint pan. He became more "irate" when his demand was repulsed.

As these acts were capable in law of amounting to provocation, it was the duty of the learned trial judge to leave the issue of provocation to the jury. As we could not say with certainty that had this issue been left to them, the jury nonetheless would inevitably have brought in a verdict of murder we allowed the appeal, quashed the conviction for murder, substituted a verdict of guilty of manslaughter and imposed a sentence of twelve years imprisonment at hard labour.