[2012] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 77/2010

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MISS JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

KETEY LAWRENCE v R

Dwight Reece for the appellant

Dirk Harrison and Miss Yanique L T S Gardner for the Crown

8 March and 20 April 2012

BROOKS JA

[1] During the early morning of 3 May 2009, arising out of a violent confrontation between Mr William Tait and the appellant Mr Ketey Lawrence, Mr Tait was stabbed in the chest. He died as a result of his injury. The fatal incident occurred at the gate of Miss Latoya Bradshaw at Lime Tree Garden in the parish of Saint Ann.

[2] The appellant was tried, in the circuit court for that parish, for murdering Mr Tait. In his unsworn statement he said that Mr Tait had struck him on his face and that he (the appellant), thereafter, ran away. He did not say whether he had struck Mr Tait. He did say, however, as the last sentence of his statement, "I was defending myself, m'Lady".

[3] Perhaps partly because of this defence, and partly because of his behaviour prior to the stabbing, the learned trial judge declined to leave the issue of provocation for the jury's consideration. She, however, gave the jury directions on the issue of self defence. The appellant was convicted of murder on 9 June 2010. He was sentenced to serve 20 years imprisonment at hard labour and a condition was imposed that he would not be eligible for parole until he had served 10 years of that term.

[4] He has appealed against his conviction. A single judge had refused him leave to appeal but, on 8 March 2010, the appellant renewed his application before us. Mr Reece argued, on his behalf, as a supplemental ground of appeal, that the learned trial judge erred when she declined to leave, for the jury's consideration, the offence of manslaughter, due to provocation, as an alternative verdict. Miss Gardner for the Crown, in a concise but very well reasoned submission, agreed with Mr Reece. Having heard both counsel, we made the following orders:

(i) The application for leave to appeal is treated as the hearing of the appeal.

(ii) The appeal is allowed and the conviction and sentence for the offence of murder are quashed.

(iii) A verdict of manslaughter is substituted therefor.

(iv) The appellant shall serve a term of 15 years imprisonment at hard labour commencing on 9 September 2010.

We promised, at that time, to put our reasons in writing. We now fulfil that promise.

The evidence

[5] It is apparent that the appellant considered that Miss Bradshaw was subject to his dominion, despite the fact that their intimate relationship, which had produced three

children, had ended some time before the day of the incident. On his account, he had positioned himself at her gate on the morning in question, waiting to see why she had not come out when he had stopped there and blew his car's horn. During his wait, she arrived home in a taxi. This was some time after 12:45 a m and she was with a man. The appellant confronted her, asking where she was coming from at that hour. She asked the man to leave and the man obliged. The taxi drove away with the man aboard.

[6] Shortly after that, while the appellant was with Miss Bradshaw, outside of her home, her cellular telephone rang. The appellant took it from her and demanded to know who was calling. He got no answer but shortly thereafter, the other man returned. According to the appellant's statement the man approached him, and used something to hit him on the face. On Miss Bradshaw's account, when Mr Tait (the man to whom the appellant had referred) approached the couple, the appellant grabbed on to the front of her shirt. She said that the men "just started fighting". She couldn't tell which one approached the other first and she didn't see either of them with anything in hand.

[7] In trying to separate them, she received a cut to her cheek, she couldn't tell how she came to be cut but she then saw the appellant run toward his car. She heard something hit the car and she surmised that it was Mr Tait who had thrown the missile. The appellant got into his car and drove off. She then saw Mr Tait run toward the taxi but saw him fall. She ran toward him and discovered that something had gone terribly wrong. He died on the way to the hospital.

The law

[8] Section 6 of the Offences Against the Person Act provides that where there is evidence on which a jury could find that a defendant was provoked to lose his self-control, the question of whether the provocation was enough to make a reasonable man do as the defendant did, should be left to be determined by the jury. Where the jury accepts that there is provocation, in law, they are entitled to convict the defendant for manslaughter instead of murder. "[F]or a charge of murder to be reduced to manslaughter on the ground of provocation it must be shown that the provocative conduct relied upon had suddenly and temporarily deprived the defendant of his power of self-control" (see **R v Sara Thornton** [1993] 96 Cr App R 112). Acts done and words said by persons, other than the victim, may also constitute provocation (see **R v Thompson** (1971) 12 JLR 558).

[9] Also to be noted is that the defence of provocation may arise even if a defendant does not state that he was provoked. That was the ruling of the Privy Council in **Bullard v R** [1957] AC 635. At page 642 of the report, their Lordships said that where there is evidence which could amount to provocation, "it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing is unprovoked". At page 644, their Lordships ruled:

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of

> justice and it is idle to speculate what verdict the jury would have reached."

We accept this as an accurate statement of the law. It was approved by this court in cases such as **R v Stephens** (1993) 30 JLR 537. It is also accepted that where a defendant is improperly deprived of this right, this court may set aside the conviction for murder and substitute therefor, a conviction for manslaughter.

The provocative acts

[10] In the instant case, the appellant seemed to have been saying, in his unsworn statement, that he did not have anything to do with Mr Tait's death. As has been earlier pointed out, it was only in his last sentence that he raised the issue of self defence and did so in the tersest fashion. There was, however, a series of words and actions which together, may be assessed to determine if, cumulatively, it could have constituted provocation.

[11] Firstly, on Miss Bradshaw's account, the appellant was angry at the time at which she was getting home. He said that he was "arguing with her". He asked her for an explanation and her response, as she described it, was combative; "[w]eh yuh a ask mi dat fah an mi an yuh nuh deh". The next matter is that her 'phone rang and she refused to answer it. He grabbed the 'phone from her and spoke harshly to the person on the line, by saying, "[w]eh di [expletive] yuh a call mi woman fah".

[12] Thirdly, the taxi then returned and Mr Tait exited. He called to Miss Bradshaw to come to him. When the appellant told her not to go, Mr Tait approached them with at least one of his hands behind him. Fourthly, according to the appellant, Mr Tait

questioned his intentions, following which, he said, Mr Tait hit him on the face. On Miss Bradshaw's testimony when Mr Tait asked the appellant, "[b]ig man weh yuh up to?", the appellant grabbed her, holding on to the front of her shirt. The fight then ensued. According to Miss Bradshaw "they automatically started fighting".

[13] Where, in considering the issue of provocation, there is a series of events "so closely connected that they could properly be regarded as one entire incident", the jury should be "directed that they could take into consideration...not only the provocative acts of the deceased" but also those of another person, "even though there is no evidence on which it could be said" that the deceased and that person were acting together (see **R v Thompson** at page 559). We agree with both counsel that, in the instant case there was such a series of events. There was, therefore, sufficient evidence of provocation to be left for the jury to consider.

Self-induced provocation

[14] There is, however, another issue. It seems that the appellant had initiated the aggression that early morning. His tone of speaking and his grabbing of Miss Bradshaw attest to that. Does that fact deprive him of the benefit of a direction on provocation? The principle involved is sometimes referred to as "self-induced provocation". The authorities suggest that provocation is not necessarily negatived by the accused being the aggressor or the person initiating the confrontation.

[15] Miss Gardner very helpfully referred to us the case of **Edwards v R** PCA No 6/1972 (delivered 27 June 1972). In that case Mr Edwards was convicted of murder after having stabbed his victim some 27 times. He pleaded the defences of self defence

and provocation. He said that he had gone to the victim's room to blackmail him at which time the victim attacked and cut him with a knife. He said that he "resorted to brawling tactics" and thereafter the events were "very confusing".

[16] The trial judge refused to leave the question of provocation for the jury's consideration. He directed the jury that Mr Edward's illegal intention in going to the victim's room prevented him from saying that he was provoked by the victim's response. The Privy Council found that a hostile reaction to such an illegal act, which reaction goes to extreme lengths, might constitute provocation. They ruled that it would be, in many cases, a question of degree, to be considered by the jury.

[17] We respectfully agree with that dictum. It was considered, with some reserved approval, by this court in **R v Campbell** (1992) 29 JLR 139). In **Campbell**, Carey JA, in giving the judgement of the court, said at page 141 F:

> "In cases of self-induced provocation, the jury will be required to focus on the reaction of the victim and the question to be answered, is the extent of the reaction by the victim – did it go beyond all reason? This means that a jury would have to exercise some mental acrobatics to contemplate the reasonable blackmailer, burglar or robber for example."

Application to the instant case

[18] In the instant case, the learned trial judge, when asked by defence counsel if she would consider leaving an alternative verdict to that of murder, for the jury's consideration, stated that she did not think it was appropriate. If it was that she was of that view, simply because the appellant seemed to have been the aggressor, we respectfully find that she was in error in that regard.

[19] The appellant's coarse language and abusive attitude coupled with his grabbing of Miss Bradshaw's shirt may or may not have justified Mr Tait coming to her assistance. These are questions of degree. They were for the deliberation of the jury. We agree that the appellant ought to have had the benefit of their consideration of the issue of provocation. He was therefore denied the opportunity of a conviction on the lesser count.

Conclusion

[20] The series of events in the instant case, could have, in our view, amounted cumulatively, to provocation so as to reduce a conviction of murder to one of manslaughter. In refusing to leave the issue of provocation for the jury to deliberate upon, we found that the learned trial judge deprived the appellant of a legal right to that consideration. She, therefore, erred in that regard. For that reason we found that the conviction of murder could not be allowed to stand and a conviction of manslaughter was therefore substituted.