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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 132/2005

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

JONATHAN LINTON

V.

REGINA

Delano Harrison, Q.C. for the Appellant.

Mrs. Diahann Gordon-Harrison and Mrs. Sharon Millwood-Moore for the Crown.

28th June, 2008

Oral Judgment

COOKE, J.A.

1. The appellant Mr. Jonathan Linton was on the 27th July, 2005 convicted of the murder of Xavier Chin. On the 15th August, he was sentenced to life imprisonment, with the direction that he should not be eligible for parole until 25 years had lapsed. This trial took place in the Home Circuit Court on King Street, Kingston.

2. A synopsis of the factual background is as follows:

At 11 — 13 Eureka Crescent, Kingston 5 there is a printery known as Xpress Litho Limited. The deceased and the appellant were employees of that establishment. The appellant was from Portland and the deceased from Manchester. Neither had any residence in Kingston so they were allowed to sleep in the building which housed the printery. On the 20th November, 2003 when the printing operation closed for the day, both the deceased and the appellant were left behind in the building. On the morning of 21st November, the proprietor's son Dewy West went to the Printery. As he was accustomed he rang the buzzer to alert his presence and there was no answer. He pounded on the shutters and still there was no answer. Eventually he gained entrance, as the grill to the front was already open, and he prised opened the glass door. In the press room the deceased Xavier Chin was lying on his back in a pool of blood. He was still alive. The police were summoned. The deceased was taken to the Kingston Public Hospital where he succumbed to his injury on the 23rd November, 2003. Dr. Mahesh, the consultant pathologist found that, the right parietal bone of the deceased was fractured. The deceased death was due to this head injury and cardiac failure.

3. The Investigating Officer Det. Cons. Michael Bailey, in conducting his investigations contacted the Port Antonio Criminal Investigation Branch to assist him. On the 28th November, 2008 Cons. Bailey, went to the Police Station where the appellant was being held in custody. The evidence of Bailey was that after cautioning the appellant, he said:

> "... Officer, him go wake me up early out a bed and quarrel with me say me naw help him."

He further went on to say:

> "... And a quarrel with mi, come towards mi and mi swing a thing and it hit him."

The thing he swung was a 12 inches long piece of iron about 1 inch in diameter.

4. The appellant gave sworn evidence saying that he heard a rumbling early in the morning at about 4 a.m. "cursing, cursing that the damn boy won't help me". Then he heard a charging coming at him and when he looked around he saw the deceased charging at him with a screwdriver in a stabbing position. He grabbed the closest thing he could get, swing it and it hit Mr. Chin who staggered and hit a machine. The appellant said that he did not know what to do so he left.

5. The main issue to the trial was one of self-defence. This issue the learned trial judge left fairly and adequately to the jury for their considerations. The jury rejected the self-defence put forward by the appellant. As regards this, there was no complaint neither as to the adequacy of directions of the learned trial judge or as to the reasonableness of the verdict in that regard.

6. The appellant was granted leave to appeal by the single judge who first attended to this matter. The appellant filed supplementary grounds of appeal one of which was as follows:

> "The learned trial judge's directions on the law relating to provocation were inadequate: She failed to convey it sufficiently clearly to the jury's mind that if they were not sure or were in doubt whether the Appellant had acted under provocation when inflicting the material injury, they should find him guilty of manslaughter only.
>
> It is respectfully submitted that the deficiency here complained of effectively deprived the Appellant of a fair chance of acquittal of the murder charged and conviction of the lesser offence: manslaughter."

This supplementary ground for which leave to argue was granted was filed on the 15th July, 2008. It has come to the court's attention that there was a further supplementary ground of appeal filed on the 24th July, 2008. It is the court's view that, the subsequent supplementary ground can be properly characterized as being an addendum to the first and in fact does not add anything to the thrust of the force of the first supplementary ground. And therefore, with due respect to the learned Queens Counsel, we do not think it is necessary for us to advert to the further supplementary ground of appeal.

7. In respect to the first supplementary ground filed the basis of the complaint to be found at pages 175 – 176 of the summing up. It says:

> "Then you have to look at the question of provocation, whether he was provoked, and if you find that he was provoked, was it reasonable for him to be provoked by those words. If you find that that is so, then what you have to do is find him guilty of manslaughter, because of the provocation, if you find that there was provocation. So that is what I want to say ..."

The complaint was that, the learned trial judge did not tell the jury as she ought to have done what was the position if they were not sure or whether they were in doubt as to whether the applicant acted under legal provocation, in which case, the appellant should be the beneficiary of any such uncertainty. This in our view is a serious omission on the part of the learned trial judge. Counsel for the Crown could not but concede that this is so. Accordingly, the court is of the view that the complaint of the appellant that by this omission he was deprived of the opportunity to have the lesser verdict of manslaughter returned is of merit.

8. Consequently, we will pronounce as follows: the appeal is allowed, the conviction for murder is quashed and the sentence set aside. Substituted therefore, in the verdict of guilty of manslaughter. The sentence now imposed is 20 years at hard labour. That sentence is to commence on the 15th November, 2005.