JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 112/1999

BEFORE: **THE HON. MR.JUSTICE BINGHAM, J.A.**
THE HON. MR.JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH ,J.A. (Ag)

KIRK MANNING
V
R

Ian Wilkinson, Keith N. Bishop and **Miss Shawn Steadman** for the appellant

Miss Tricia Hutchinson for the Crown

7th, 8th , 9th May and June 18, 2001

WALKER, J.A.:

On June 4, 1999 in the Home Circuit Court, Kingston the appellant was convicted of the non-capital murder of Carl Campbell. He was sentenced to imprisonment for life with a recommendation that he should not become eligible for parole before serving a period of 20 years. He now applies to this court for leave to appeal against that conviction and sentence. For the reasons stated hereunder, this application is granted. We treat the hearing of the application as the hearing of the appeal. The appeal is allowed, the appellant's conviction is quashed and his sentence set aside. However, in the

interests of justice a new trial is ordered to take place at the earliest possible time.

Here the case for the prosecution was that at about midnight on February 12, 1998, Sandra Bryan, the mother of the deceased, Carl Campbell, was called from her bed at her residence at Mackfield Terrace, Saint Andrew. She went out into the street where she saw her son, Carl, and the defendant. At this time she witnessed an altercation between both men during which the defendant threatened Carl using the words "If you come back to me with any argument a going to bus you pussy hole." To this threat Carl replied "Hey pussy hole, go suck you mother." Immediately the defendant pulled a gun and shot Carl. Carl ran off for a short distance then fell to the ground. After that, despite the entreaties of the witness not to kill her son, the defendant shot his victim again and again before running away in the direction of his house. The medical evidence revealed that the deceased was shot four times and died from multiple gunshot injuries. In defence the appellant gave a rambling unsworn statement in which he pleaded, alibi. But his defence assumed disastrous proportions when he called a witness, Victoria King, who promptly gave evidence which placed him unequivocally on the scene of the crime. Her evidence, however, raised in favour of the appellant an issue of self defence for she testified that she saw the deceased who was armed with a cutlass move menacingly towards the appellant just before the appellant "back out waan gun out of him pants and when him back out the gun, mi si fire come from the gun; mi hear the gunshot fire."

In numerical terms this appeal was supported by 16 grounds, several of which were argued together at the convenience of counsel and the court. In substance these grounds resolved themselves into two main complaints both of which are, in our view, meritorious. Firstly, grounds 10-14 complained that the directions of the trial judge on the issue of self-defence were deficient and that as a consequence the appellant was deprived of the opportunity of an outright acquittal. Secondly, grounds 15 and 16 alleged a miscarriage of justice on the basis that the directions of the trial judge on the issue of provocation were flawed to the extent that the appellant lost the opportunity of being convicted of the lesser offence of manslaughter.

SELF DEFENCE

On this issue the directions of the trial judge were as follows:

> "Another defence that is available on a charge of murder is the defence of self-defence. 'A man who is attacked in circumstances where he honestly believes his life to be in danger and that he is in danger of serious bodily injury, may use such force as on reasonable grounds he believes is necessary to prevent and resist the attack. If in using such force he kills his attacker he is not guilty of any crime even if the killing is intentional.
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> Self - defence is made out when it is established to your satisfaction, or you are not sure about it, that the accused believed that he was in imminent danger of death or serious bodily injury. In other words, Madam Foreman and Members of the Jury, if you are satisfied that the accused man, and I will give you further details on that later on, was acting in lawful self-defence, if that is your finding that he was in fact present and fired the shot, that he was acting in defence of himself as he feared bodily injury or if you are not certain whether or not he was acting in self-

> defence, then you would return a verdict of not guilty.
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> The onus of proof remains throughout on the prosecution. Therefore on a consideration of all the evidence if you are left in doubt whether the killing may not have been in self-defence a proper verdict would be one of not guilty. Because any doubt belongs to the accused man on any particular issue. Or if on considering the evidence in the case as a whole you are in doubt, any reasonable doubt, then you give the accused the benefit of the doubt.
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> The defence of self-defence in this case arises on the case for the defence. You will recall that the witness, Victoria King, said that the deceased had a cutlass and that he moved towards the accused with the cutlass and then the shots were fired. I will give you further details on that and I will give further consideration to that at a later stage".

Those directions were plainly inadequate and although the trial judge promised to return to the subject matter "later on" he never did, except to re-iterate that it was the duty of the jury to acquit the defendant if they came to a finding that the defence of self-defence succeeded. Specifically, the trial judge did not sufficiently relate his general directions on self-defence to the particular circumstances of the case and the defence offered: see ***R v Lancelot Webley*** [1990] 27 JLR 439. But, more glaringly, the trial judge failed to direct the jury that once the issue of self-defence is raised in a case on a proper evidential basis, the burden is on the prosecution to negative that defence and not on the defendant to prove it, and that unless the prosecution discharges that burden the defendant must be acquitted : see ***R v Abraham*** [1973] 3 All ER 694; [1973] 57 Cr. App. R 799; ***R v Lancelot Webley*** (supra). These omissions on the part of the trial judge amounted to material non-directions.

PROVOCATION:

On this issue the trial judge directed the jury as follows:

> "Now Madam Foreman and Members of the Jury, in Jamaica you can tell a man about his sister, about his brother, about his aunt and even about his father but do not speak disparagingly about his mother, because it's going to get him very upset. And you as Jamaicans you know that this is so, that when someone speaks disparagingly of your mother you are not pleased about it. I therefore direct you that the words "Hey pussy-hole go suck you mother" are capable of amounting to provocation as a defence on a charge of murder.
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> Whether in fact the words amount to provocation it is for you to determine. You must ask yourselves what effect would these words have on a reasonable man. Now a deliberate and intentional killing done as a result of legal provocation is not murder but it reduces the offence to one of manslaughter. Manslaughter is a lesser charge than murder. I will give you further directions and more details on that aspect of the case at a later stage".

Later on the trial judge did return to address the issue of provocation. He gave further directions in these terms:

> "So based on what I have said to you, when you retire to consider your verdict and when you return you will be asked by the Registrar whether you find the accused guilty or not guilty of murder. If you say guilty then that would be the end of the matter. But suppose you say not guilty, the Registrar would then go on to ask you about manslaughter, how do you find is the accused guilty or not guilty of manslaughter. And remember what I told you that manslaughter would only arise if you believe that the accused was provoked and as a result of that provocation he lost his self-control and fired the shot, and I put that the words used are capable of amounting to provocation.
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> In addition to that, in addition to that, the witness Victoria King said that the deceased had a machete and that he moved towards the accused just before

> the shots were fired. That too is a factor that you can take into consideration in considering the question of provocation. Because provocation might consist of words said or of things done or of both together. So here we have words said, "Pussy –hole", whatever it is, and moving towards him with the machete. A provocative act with the machete, that is if you believe that there was a machete, and that the deceased moved towards the accused with this machete, and the words that were spoken.
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> So, if you find that there was legal provocation sufficient to cause this man to lose his self-control, fired these shots, then you will return a verdict of guilty of manslaughter. But if you have any doubts on this point, question of provocation, as on any other point, then, any reasonable doubt, you return a verdict of not guilty. If you say guilty that would be the end of the matter. If you say, and I point out again, if you say not guilty of murder, you will be asked whether you find him guilty or not guilty of manslaughter. Your finding in respect of manslaughter will depend on whether or not you find that he was present and was provoked to the extent that such provocation caused him to act as he is alleged by the prosecution to have acted."

A close reading of those directions discloses a failure on the part of the trial judge to appreciate and, therefore, to articulate the fact that section 6 of the Offences against the Person Act preserves the dichotomy developed at common law between the subjective condition (relating to the conduct of the particular defendant) and the objective condition (relating to the reasonable man). Section 6, as amended, provides as follows:

> "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."

The recent decision of the Privy Council in ***Robert Smalling v The Queen***, Privy Council Appeal No. 45 of 2000, delivered on the 20th March, 2001 is a case in point. In delivering the opinion of the Board Lord Bingham of Cornhill identified the two conditions, namely the subjective and objective conditions that are involved in the defence of provocation then went on to say:

> "...To satisfy the first, subjective, condition there must be four ingredients:
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> (1) provocation (whether by conduct or words or both), and whether on the part of the deceased or another party (***R v Twine*** [1967] Crim LR 710; ***R v Davies, (Peter)*** [1975] Q.B. 691;
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> (2) a loss of self-control by the defendant;
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> (3) a causal connection between (1) and (2);
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> (4) a causal connection between (1) and (2) and the killing by the defendant of the deceased.
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> The jury's consideration of the objective condition ('whether the provocation was enough to make a reasonable man do as he [the person charged] did' assumes a finding that the provocation was enough to make the defendant do as he did. But at the stage of summing-up the judge is not of course concerned to decide whether those four ingredients are present but only with the vital but preliminary question whether 'there is evidence on which the jury' could properly find that they are."

In the instant case the trial judge clearly confused the first, subjective test with the second, objective test when he said:

> "Whether in fact the words amount to provocation it is for you to determine. You must ask yourselves what effect would these words have on a reasonable man".

Furthermore, the trial judge fell again into error, albeit in favour of the appellant, when he directed the jury:

> "But if you have any doubts on this point, question of provocation, as on any other point, then, any reasonable doubt, you return a verdict of not guilty."

He should properly have told the jury that if they were in doubt that the appellant was acting under provocation they should find that he was so acting and return a verdict of manslaughter: see ***George Stewart v R***, unreported, Supreme Court Criminal Appeal No. 36/95 delivered 20th May, 1996. Finally, we think that the trial judge also erred in failing to direct the jury that if they were satisfied that the appellant had committed a criminal offence, but were not sure whether the offence amounted to murder or manslaughter, they should convict of the lesser offence of manslaughter: see ***George Stewart v R*** (supra).

Accordingly, we would dispose of this appeal in the terms stated at the outset of this judgment.