JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 124/07

BEFORE: THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.,

ERROL MITCHELL

v

R

Mr. Hopeton Clarke for the appellant
Miss Claudette Thompson for the Crown

ORAL JUDGMENT

March 16, 2009

SMITH, J.A.:

On the 21st June 2007, Errol Mitchell was convicted of murder. The particulars were that on the 22nd of March 2006, in the parish of Clarendon, he murdered Edward McKenzie. He was sentenced to 15 years imprisonment at hard labour without the possibility of parole before ten years. On the 21st January 2009, the single judge granted him leave to appeal.

The facts giving rise to the charge have their origin in an incident that took place on the day in question between the deceased and his stepdaughter, a young girl under 16 years. Although not admitted by the stepdaughter, the evidence in its totality revealed that there had been a

relationship between the appellant and the deceased's stepdaughter which apparently did not meet the approval of the deceased and which had prompted the beating incident. According to the evidence, the deceased had been beating his stepdaughter first with a machete and then with his fists.

Shortly after the incident, the appellant confronted the deceased and demanded to know why the deceased had been beating the stepdaughter. The deceased's response was to kick and then box the appellant. A fight ensued between the two men who were 'thumping each other' at the end of which the deceased was stabbed.

Mr. Clarke argued two (2) grounds of appeal:

(1) The learned trial judge erred in not acceding to the no case submission;

(2) The learned trial judge misdirected the jury on the issue of provocation thereby denying the appellant the chance of being convicted of the lesser offence of manslaughter.

Ground 1- No case submission

In respect of the first ground Mr. Clarke submitted that the transcript of the evidence shows that the deceased was the aggressor. He said the deceased kicked the appellant in the chest, boxed him and then a fight ensued. During cross-examination it was established that it was after the boxing and the kicking that the appellant pulled an ice-pick from his waist

> control and thirdly would that conduct would (sic) have caused a reasonable person to lose his self-control and also behave as the accused man did.

Then at page 112, line 16 the learned judge is recorded as having directed the jury thus:

> "Manslaughter is the unlawful killing of another person without the intention to kill or to cause serious bodily injury."

This, we think, is a misdirection in the case of voluntary manslaughter. We will return to this.

In the Privy Council decision of ***Robert Smalling v R*** No. 45/2000 judgment delivered by their Lordships' Board on the 20th March 2001 at paragraph 13, their Lordships referred to section 6 of the Offences Against the Person Act:

> "This reproduces exactly section 3 of the English Homicide Act 1957. 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 is preserved. To satisfy the first subjective condition there must be four ingredients;
>
> (1) Provocation whether by conduct or words or both and whether on the part of the deceased or another party. Their Lordships referred to ***R v Twine*** 1967 CLR 710 and ***R v Davis;***
>
> (2) A loss of self control by the defendant;
>
> (3) A causal connection between 1 and 2.

> (4) A casual connection between 1 and 2 and the killing by the defendant of the deceased.
>
> The jury's consideration of the objective condition whether the provocation was enough to make a reasonable man do as he the person 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."

Where the issue of provocation is left to the jury, it is trite law that provocation will reduce murder to manslaughter where the killing is voluntary. In those circumstances, a jury must first find that the appellant intended to kill or cause grievous bodily harm. The directions given by the learned trial judge at page 112 might have led the jury into thinking that it was unnecessary for the prosecution to prove an intention to kill. The learned judge erroneously directed the jury on involuntary manslaughter instead of voluntary manslaughter. This we clearly find was a misdirection and Crown Counsel has properly conceded.

We have therefore concluded that the conviction for murder cannot stand. Accordingly, the appeal is allowed in part. The conviction of murder is quashed and the sentence of fifteen (15) years set aside. We substitute a conviction of manslaughter and a sentence of ten (10) years therefor. The sentence is to commence as of the 21st June 2007.