J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 42 of 1971

BEFORE: The Hon. President
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Graham-Perkins

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R. v. LEARY WALKER

21st JUNE, 1972

Mr. F.M.G. Phipps, Q.C., with Richard Small for appellant.

Mr. C. A. Harris for the Crown.

EDUN, J.A.:

The appellant was charged with the murder of his wife Ruby Walker and he was convicted of manslaughter on the ground of diminished responsibility. The main ground of appeal which in our view warranted consideration was whether or not the trial judge was correct in not leaving to the jury the defence of self-defence.

The facts were that the appellant and his wife were separated because of matrimonial difficulties. The witness Urcell Facey for the Crown deposed that about 7.40 p.m. on March 17, 1970, he heard a screeching sound of car brakes and screams coming from a car. He ran to his gate and saw the body of a woman (later identified as Ruby Walker) fall out of the side of the car into the road, from the driver's seat. The body he said was riddled with blood, it struggled and then appeared to him dead. He then saw the accused standing at the head of the woman and a little boy (their son of about five

/years old) .....

years old) came out of the car and said, "Daddy why you do that?" and the appellant replied "there was nothing left for me to do." The witness said he observed the appellant advance towards him, he heard the click of a ratchet knife coming from his direction and with that he retreated into his yard. About ten minutes later, he returned to the spot and observed that the car was gone but the deceased's body was still in the road. Police came later. Dr. Dawson who performed a post mortem examination on the body found eleven stab wounds on both the front and back of the upper part of her body in the area of her shoulders and chest. He was of the opinion that the injuries were caused by varying degrees of force, that death could have occurred in minutes and that there were many different positions possible in which the wounds were dealt or received. He concluded that it was possible that the deceased was stretched across the lap of the assailant face downward.

There can be no doubt that it was the appellant who stabbed his wife Ruby Walker and as the result of which, she died. The appellant was taken in custody on March 20, from his car and in the left pocket of that car a black handled knife with human blood stains of the same blood group as that of the deceased, was found. When arrested and cautioned, the appellant in a voluntary statement said among other things.... "While driving along Sunrise Crescent an argument ensued as to her whereabouts that evening. She was driving. She stopped and raised an alarm and rushed out of the car, then something happened. Then Karyl (the son) said to me "Daddy why did you kill Mummy? A man was in the vicinity. Karyl was crying.... I handed over the knife to the police.... I had no intention of hiding nor evading the police but the shock of the incident did not, and even now at writing has not, worn off ....."

/The prosecution led .....

The prosecution led in evidence that statement of the appellant as part of their case. There was at the close of the crown's case no evidence as to the circumstances in which the deceased came to be stabbed. In an unsworn statement at the trial, the appellant said (among other things):

> ".....The following day I was asked to leave the home. I left. The statement I gave to the police concerning the marriage is true. While we were travelling in the car we quarrelled about the same man who I saw driving her that evening. She flew in a temper and said 'Is my damn man, if you don't like it you can go and kill your blasted self' I was surprised because strong language was never used in our family. After saying that she stopped the car and rushed out. I went to her, held her and pulled her back. I was over into the driving seat. She fell across my lap and in struggling to get her inside the car she grabbed and held on to my testicles and squeezed me. I felt a cramping pain. I felt as if I was going to faint. I remember seeing the knife in the centre tray of the car along with a cigarette lighter. I remember reaching for the knife. Beyond that I don't remember anything. I heard "Karyl saying "Daddy why you kill Mummy? Then I knew something had happened. The rest is as I stated."

The learned trial judge told the jury that there was no evidence warranting his leaving the defence of self-defence. Attorney for the appellant submitted that there was sufficient evidence for the jury to decide. Attorney for the Crown submitted that there was no such evidence establishing self-defence and if he was wrong, he invited the Court to apply the

/proviso

proviso. We were unanimously of the opinion that the learned trial judge was wrong and that this was not a case for applying the proviso.

In Lashley v. R. (1958-59) 1 W.I.R. p.100, it was held that in order to raise the defence of self-defence, there must be some evidence, that -

1 the appellant had reason to fear death or bodily injury from some action or words of the deceased or of a person or persons acting in complicity with him;

2 the appellant had no opportunity to retreat or retreated as far as he could; and

3 the appellant struck the blows causing the injuries which resulted in the deceased's death with the intention of defending himself from death or injury, that is, that he considered his life or limb in actual danger.

The facts in the instant case disclosed that:-

1 there was no evidence on the case for the Crown proving in what circumstances the deceased came to be stabbed, apart from the appellant's unsworn statement at the trial. It must be remembered that the onus is on the Crown to negative self-defence;

2. though it is true that in his unsworn statement, the appellant said he remembered reaching for the knife, he did not remember stabbing his wife. However, Urcell Facey an independent witness relied upon the Crown as credible, stated that when the child asked "Daddy why you do that?", the appellant said "there was nothing left for me to do." The appellant's reply was not inconsistent with a reasonable inference that he was conscious and that he had killed his wife because he was acting in self-defence;

3 in the appellant's statement at the trial, he said he was over into the driving seat when he held his wife and pulled her back. Urcell Facey supports that fact when he said that he saw the body of the woman fall out of the side of the car into the road from the driver's seat;

4 the appellant claimed that his wife fell across his lap when he pulled her back into the car, and in that position, she grabbed on to his testicles and squeezed them. The doctor gave as his opinion that there were many different positions possible in which the wounds were dealt or received and it was possible that the deceased was stretched across the lap of the assailant face downward.

In those circumstances, if what the appellant said was true, (a) it was utterly unreasonable to expect the appellant to retreat when he was within the confines of a car and under the weight of his wife, and (b) the silent testimony as to the distribution of the injuries coupled with the doctor's opinion is not inconsistent with those injuries being inflicted in self-defence. The evidence disclosed a credible narrative constituting the appellant's cardinal line of defence. We cannot, therefore, understand why the learned trial judge took it upon himself to decide a question of fact. He was in fact deciding that in comparison with an excruciating pain, there were eleven stab wounds, and as a matter of law, the appellant had no reasonable grounds to believe he was in fear of serious bodily injury to himself. We are not prepared to stipulate that excruciating pain, however caused, must conform to a set standard of behaviour in reaction; each case must depend and be decided upon its own facts.

In R. v. **Dinnick** (1910) C.A.R. p 72, Lord Darling

/C.J. .....

C.J. at p. 79 said:-

> "But there is a principle of our criminal law which we think has been violated in this case - namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury ..... "

As regards the invitation to apply the proviso, we took the view which coincides with the reasons for decision in R. v. Badjan (1966) 50 C.A.R. p. 141. It was there held that where a cardinal line of defence (e.g. self-defence) has been placed before the jury, but has not been referred at all in the summing-up, it is in general impossible for the Court of Criminal Appeal to apply the proviso, and refrain from quashing the conviction. In that case there was evidence in the Crown's case which negatived the defence of self-defence. Yet, Edmund Davies J.(as he then was) said at p. 143:-

> "In the course of his direction to the jury, the learned Commissioner said nothing about the defence of self-defence which the appellant had raised. It was a defence, which in the light of the evidence, might have been regarded as of tenuous worth, but it was a defence which the appellant was entitled to have left to the jury for their assessment. Unhappily and unfortunately, the learned Commissioner did not advert to that defence."

In the instant case, except for an inference, there was no evidence in the Crown's case which would go to negative self-defence and the learned trial judge definitely withdrew that

/defence from .....

defence from the jury. The defence was of a kind which, however weak or tenuous, might, if believed by the jury or if it caused them to entertain a reasonable doubt, have resulted in a complete acquittal. In other words, the withdrawal of that defence, of itself, in the light of the evidence amounts to a denial of justice to the appellant and it is tantamount to condemning him without his being heard; a substantial miscarriage of justice.

For the reasons given, we allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice ordered a retrial at the present sitting of the Home Circuit Court. In the meantime, the appellant is to remain in custody.