JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 42 of 1971

BEFORE: The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Robinson, J.A. (Ag.)

R. v. LEARY WALKER

J.S. Kerr, Q.C., Director of Public Prosecutions and Courtenay Orr for the Applicant.

F.M.G. Phipps, Q.C. with Richard Small for the Respondent.

26th, 27th, 28th July
29th September, 1972

FOX, J.A.:

The point of law

This is an application by the Director of Public Prosecutions for leave to appeal to Her Majesty in Council from a decision of this Court whereby an appeal by the respondent from his conviction in the Home Circuit Court for manslaughter on the ground of diminished responsibility, was allowed and a retrial ~~was~~ ordered. The authority for this application is contained in the provisions of ~~section~~ S. 7 of the Judicature (Appellate Jurisdiction)(Amendment) Act, 1970, Act 12 of 1970. These provisions enable an appeal to Her Majesty in Council by the Director of Public Prosecutions, the prosecutor or the defendant "where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought." This is the first application pursuant to those provisions which has come before this Court. Mr. Phipps suggested that the application should have been made when the decision of the

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Court was handed down, and that an application to a completely different panel of the Court was not competent. No such procedural restriction is imposed by law or practice and in our view, the suggestion is without merit.

In substance, the point of law which the Crown is seeking to question is the sufficiency of the evidence in the case to raise up the issue of self-defence. The learned judge determined that point of law adversely to the respondent. He ruled that self-defence did not arise on the evidence and withdrew that issue from the consideration of the jury. This Court thought he was wrong, and in a written judgment delivered on ~~the 21st~~ June, 21, 1972 concluded that "the evidence disclosed a credible narrative constituting the appellant's cardinal line of defence." The Crown desires to have the opinion of the Privy Council on the correctness of this conclusion. The facts must be stated.

The facts in the Crown's case.

The respondent was tried on an indictment charging him with the murder of his wife on ~~17th~~ March, 17, 1970. The evidence in support of the Crown's case disclosed that from 1969 the respondent and his wife commenced living apart. There were matrimonial differences. These resulted in the wife and the two children of the marriage going to live with her mother at 6 Dorchester Avenue, St. Andrew. The respondent lived at Pembroke Hall, St. Andrew. On ~~the 17th~~ March, 17, 1970, the wife returned home from work at some time between 5 ~~p.m.~~ and 6 p.m. She received a telephone call which, as the respondent subsequently

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stated, was made by him. At about 7 p.m. she left home driving her motor car and accompanied by her son Karyl aged 5 years. At about 7.40 p.m. this car was seen by a witness being driven slowly up Sunrise Drive in Kingston 8. The witness heard the screeching sound of brakes and screams coming from the car. He ran to his gate and saw the body of a woman, subsequently identified as the deceased, fall out of the right side of the car from the driver's seat into the road. The body, he said, was riddled with blood. It struggled and expired. The witness saw the respondent standing at the head of the woman. He also saw a little boy come from the car. The boy asked, "Daddy why you do that?." He heard the respondent reply "There was nothing left for me to do." The witness said further that the respondent stepped towards him. He retreated when he heard the click of a ratchet knife coming from the direction of the respondent. When he returned to the scene about two minutes later, the car, the boy and the respondent had disappeared. The body of the deceased was lying in the street.

The respondent was accosted by the police on 20th March. He was sitting in the deceased's car which was parked on a road at Cooper's Hill. The police searched and found a blood stained knife in the pocket of the car. The respondent was taken to the Red Hills police station. Under caution he said "I would like to give a statement as to how it happened." He then wrote and signed a statement in which he said that at about 6 p.m. on ~~17th~~ March, 17 he had seen his wife driving her car through the square at Constant Spring. A man was with her. At about 7.30 p.m. he

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spoke with his wife by telephone from his home at Pembroke Hall asking her to lend him her car. "She offered to pick me up which she did, at about 20 minutes to 8. 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 said to me, "Daddy why did you kill Mummy?" A man was in the vicinity; Karyl was crying. I took him into the car and drove to 6 Dorchester Avenue and left him at the gate. Then I drove into Havendale/Meadowbrook area until I found myself on the Red Hills/ Coopers Hill Road." The statement concluded, "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. I began to think of going to the Constant Spring Police Station to surrender to the authorities there, as I was not aware that there is a Police Station at Red Hills."

Medical evidence adduced by the Crown established that the deceased received eleven stab wounds by a knife, seven in the front and four in the back of the upper trunk. Most of these had penetrated vital organs and vessels. Death was due to shock and haemorrhage resulting from these wounds.

The facts in the defence.

Sworn evidence of the manner in which the deceased came by her death was not given by the defence. In an unsworn statement the respondent said that as a result of quarrels over a man he had left his wife, and continued; "while we were travelling

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in the car we quarreled about the same man who I saw driving her that evening. She flew into 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, hold 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 hold on to my testicles and squeezed me. I felt a cramping pain. I felt I was going to faint. I remember seeing the knife in the centre tray 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 Mommy?' Then I knew something had happened. The rest is as I stated to the Police."

A doctor who examined the respondent on 23rd September, 1970 was called by the defence. He gave an opinion based upon intelligence gathered from that examination, and from reading the depositions in the case, that the respondent was not insane at the time of the killing, but that he was a neurotic personality whose judgment may have been impaired and that this impairment may have been increased if his wife had admitted being with another man, had abused him, and had squeezed his testicles.

The significance of the jury's verdict

The verdicts which were left open to the jury by the learned trial judge were:

(1) guilty of murder;

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(2) guilty of manslaughter -

(a) on the basis of provocation,

(b) on the basis of diminished responsibility

or

(3) not guilty of any offence, on the ground that the respondent was in a state of automatism when he struck the fatal blows.

In his directions, the learned trial judge made it overwhelmingly clear to the jury that if they decided to acquit of murder, and were considering whether to convict of manslaughter, they could so convict either on the basis of provocation, or diminished responsibility, or both, and that they would be asked to indicate their findings in this precise manner if they should decide to convict of manslaughter. The jury returned a verdict of guilty of manslaughter on the basis of diminished responsibility only. They must therefore have found that the fatal blows were struck by the respondent consciously, without provocation, and with an intention to kill, but whilst the responsibility for his actions was impaired as provided by the statute. It is on the evidence as a whole and in the context of this finding that the proportions of the Director's complaint which he desires to make before the Privy Council must be ascertained.

Is the point of law of exceptional public importance?

In a murder case, the sufficiency or otherwise of evidence to raise up the issue of self-defence is obviously a matter of public importance. The critical question in this application is

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whether this public importance is, in addition, exceptional. In considering this question the first point to notice is the absence of direct evidence that the respondent struck the blows,

(a) under the apprehension of death or serious bodily injury as a consequence of the squeezing of his testicles;

(b) with the intention of averting that death or injury, and

(c) because no other avoiding action was open to him.

In other words, there was no direct evidence of self-defence. As to whether that defence arose as an issue to be considered by the jury, would therefore depend upon the capability of the relevant circumstantial evidence to support legitimate inferences of the three essential elements in self-defence which have been indicated above. In allowing the respondent's appeal, this Court has concluded that that circumstantial evidence was so capable. At the same time, it must be recognized that a contrary conclusion is possible. This is not a case in which the learned trial judge forgot to leave self-defence to the jury. In his considered and expressed opinion, that defence did not arise on the evidence. Such also must have been the view at the trial by learned Counsel on both sides. In seeking to discharge its burden of proof, the prosecution was content to rely upon evidence, the totality

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of which seemed sufficiently to negative self-defence. The defence accepted that position. Self-defence was raised neither by distinct evidence to that effect, nor by suggestions or submissions to that end. Learned and experienced Counsel who appeared for the respondent at the trial could never have considered it to have been his duty to suppress a defence which in his considered opinion then, fairly arose on the evidence, in order that, if that defence was not left to the jury and in the event of an adverse verdict, the point could subsequently be taken on appeal. A considered opinion by Counsel of the validity of the particular defence which was sucessfully argued on appeal must have been arrived at after the trial. This view of the evidence by the judge and by Counsel at the trial, shows that the conclusions in relation to the three elements of self-defence of which the circumstantial evidence in the case must be capable, are not clear cut and precise. In fact it is fair to say of these conclusions that they could as well be judged legitimate inferences from the facts as conjectures concerning those facts. It is this obvious difficulty in applying the test relevant to determine the sufficiency or otherwise of evidence, which emphasises the public importance of the point of law in this case. It is the potential significance of the decision as a guide in future cases where the evidence is of a like quality which makes that public importance exceptional.

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Is it desirable in the public interest that a further appeal should be brought?

We answer this question in the affirmative for the reason that as the supreme court in this jurisdiction, the Privy Council is in a position to give decisive answers to two controversial points which arise in this application. The first is the point of law which has already been discussed. Involved in an answer to that point could be a judgment as to the objective evidential value of an unsworn statement by an accused at his trial which is in addition, materially inconsistent with a previous voluntary statement given by him to the police three days after the events it purported to describe. In this country where, even though it is not yet universal, it has nevertheless become the standard practice to keep the accused out of the witness box, it would be higly in the public interest to have a pronouncement of the Privy Council on the evidential consequence of that practice in this particular case. This consideration goes also to the extent of the public importance in Jamaica of the case.

The second point requires an answer to the question whether even if self-defence did arise on the evidence it was correct for this court to have declined to apply the proviso. In determining this question the Privy Council will be able to give further consideration to the implications in the order of this court for a retrial, and to make such finally authoritative ruling on a difficult point as the justice of the case requires. For these reasons, we grant the application.

This is a majority decision of the court.