JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 21/76

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(Presiding).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Watkins, J.A.

REGINA v. WINSTON MINOTT

W. Bentley Brown for the applicant.

G.G. James for the Crown.

October 28, 1976

LUCKHOO, J.A.:

The applicant Winston Minott was convicted in the Portland Circuit Court on March 11, 1976 before Rowe, J. and a jury on an indictment charging him with the murder on June 20, 1975 of Altamont Turner. He was sentenced to death. On October 28, 1976, we refused his application for leave to appeal against conviction and promised to put our reasons therefor in writing. This we now do.

The case for the prosecution was to the effect that in the afternoon of Friday June 20, 1975, the deceased who was known as "Six" and others were playing a game of cricket at premises at 20 Red Hazel Road, Port Antonio, in the parish of Portland. The deceased resided on these premises. One of the players struck the ball into adjoining premises occupied by one Tony Cameron and the deceased went to retrieve the ball. Cameron objected to the deceased coming onto his premises to do so. In reply the deceased said that Cameron would no longer be allowed to come to his premises to have a bath. The deceased returned to his premises. At that time the applicant was seated on those premises engaged in the task of making flower pots from a material called green ferril. That material was obtained by cutting the trunks of a certain type of tree into lengths. The semi-soft matter contained in the material so obtained had to be removed in the fashioning of flower pots and the applicant was using a short machete to do this, the tip of the machete having been sharpened for that purpose. Some women who had earlier that day been engaged in a like task were standing

nearby awaiting the arrival of the paymaster. Upon the deceased returning to his premises Cameron was seen to come after him. A fuss developed between Cameron and the deceased whereupon Cameron took an icepick from his waist and stabbed at the deceased with it. At that time the deceased was holding a piece of iron. Upon Cameron stabbing at him with the ice pick the deceased, who was more powerfully built than Cameron, dropped the piece of iron he was holding and tried to wrest the icepick from Cameron. They grappled for possession of the icepick. While they did so the applicant was heard to say "If them just make one brush against me". As the applicant uttered those words Cameron and the deceased fell into the applicant's lap. Thereupon the applicant used his machete to stab the deceased. He pushed the deceased and Cameron out of his lap and while the deceased lay on the ground on his back again he stabbed the deceased with his machete. The deceased cried out "Oonu a mek the man dem kill me". Bystanders bawled "Murder" and ran away. The applicant yet again stabbed the deceased with his machete. Patricia McKenzie the deceased's girl-friend was in a nearby house on the same premises when she heard the sound of the commotion outside. She came out of the house and saw the deceased lying on the ground. As she saw the applicant was about to stab the deceased she shouted and threw a piece of ferril at the applicant. The piece of ferril struck the applicant in the forehead and the machete dropped from his hand. The deceased got up and ran. The applicant picked up his machete and pursued the deceased. The deceased mounted a wall and managed to escape further attack at the hands of the applicant. Shortly thereafter the deceased was seen to be lying on the back seat of a motor car. He was covered in blood. A trail of blood led back from the car to a nearby shop and on the floor of the shop there was a pool of blood. The deceased was taken to the Port Antonio Public Hospital. He succumbed from his injuries on his way to the hospital. Later that day Detective Sergeant of Police Troupe received a report of the incident and went in search of the applicant. The applicant was brought to him by Acting Corporal of Police James Brown. The applicant said to Sgt. Troupe "I was coming with the brother down dey because I hear say the man Six (deceased) dead." The applicant was

cautioned by Sgt. Troupe who told him that information had been received that he was armed with a machete knife which he (Troupe) would like to get. The applicant then went to the rear of the premises at No.22 Red Hazel Road and came back with a "machete knife". The applicant was then taken to the Port Antonio Police Station where he was charged with the offence of murder. He made no further statement.

A post mortem examination performed by Dr. Raju on the deceased's body disclosed the existence of the following injuries -

(1) A stab wound to the left fourth intercostal space medial to the left nipple, 1" in length and obliquely placed. There was a fracture of the fourth rib. The wound penetrated $\frac{1}{4}$" into the lower part of the upper lobe of the left lung and was 1" in length on that organ.

(2) A stab wound on the right side of the chest in its anterior aspect just above the right nipple, 2" in length, $\frac{3}{4}$" in width, obliquely placed. There was a fracture of the second rib on the right side. The wound penetrated $\frac{1}{2}$" into the lower part of the upper lobe of the right lung and was $1\frac{1}{2}$" in length on that organ.

(3) A stab wound in the anterior abdominal wall left lumbar region $1\frac{1}{2}$" in length obliquely placed $\frac{3}{4}$" deep in the subcutaneous tissue.

(4) An incised wound 3" in length 1" in depth on the anterior lateral aspect in the upper left forearm, obliquely placed.

(5) An incised wound on the lateral aspect of the left forearm longitudinally placed 5" in length and $\frac{1}{4}$" in depth.

(6) A fine punctured wound 1 cm. in diameter $\frac{1}{2}$" deep on top of right shoulder joint.

(7) A fine punctured wound in third right intercostal space behind the anterior axillary line 1 cm. in diameter and 1" in depth.

In the opinion of Dr. Raju the first five injuries listed above were inflicted by the same instrument - a sharp weapon like a machete - and the last two injuries listed were inflicted by a different instrument. Death was caused by haemorrhage and shock. The first two injuries listed above were fatal injuries.

The case for the applicant is best told in the words of the applicant who made an unsworn statement -

> "My name is Winston Minott. I live at 10 Ackee Lane. I was at 20 Red Hazel Road working when I saw two men fighting. I beg them not to drop into my lap and they tumble down into my lap. I used my right hand ease them out of my lap. I feel something hit me into my head. I fell backways, my tools drop out of my hand. I saw "Six" get up and run. I run after him to see where he was going; he run out of my sight. This is the end of my story."

A number of grounds of appeal were urged by Mr. Bentley Brown on behalf of the applicant. It was submitted that the learned trial judge was in error in withdrawing the issue of self defence from the jury (Ground 3). It was contended that when the deceased and Cameron fell into the applicant's lap in the course of their struggle for possession of the icepick which Cameron had sought to use on the deceased's person there was created in the applicant's mind a reasonable apprehension of danger as to the safety of his life and that that thereby constituted a sudden attack necessitating lawful self defence. In our view the issue of self defence was not raised either on a consideration of the case for the prosecution or on consideration of the case for the defence. The learned trial judge was right in withdrawing the question of self defence from the jury.

Next it was submitted that the learned trial judge misdirected the jury as to what Dr. Raju had said in evidence and had wrongly distorted the evidence of the witnesses in relation to what they said they observed during the course of the incident (Ground 4). We have examined with care the directions given by the learned trial judge on these matters and are satisfied that the directions which have been impugned are substantially in accord with the transcript of the evidence as given by the witnesses and that consequently no injustice could thereby have been occasioned the applicant.

Ground 5 (which relates to an application to call fresh evidence as to the mental condition of the applicant prior to the date of the offence charged) was abandoned at the hearing.

Ground 6 which relates to the alleged failure of the learned trial judge to give adequate directions on the question of discrepancies in the evidence is wholly without merit.

Ground 7 which alleges misdirection on the issue of provocation left to the jury is also wholly without merit.

The first ground of appeal which alleges that the verdict is unreasonable, perverse and not supported by the evidence given at the trial is likewise wholly without merit.

Mr. Bentley Brown who said that his second ground of appeal was his strongest submitted in that regard that a special plea in bar of Autrefois Acquit was available to the applicant on November 13, 1975, when the applicant was tried jointly with Cameron on the same indictment, the then trial judge had received and recorded a unanimous verdict of "Not Guilty" of murder and "Guilty" of manslaughter in respect of the applicant. Mr. Brown contended that the then trial judge fell into error in instructing the jury to retire again to reconsider their verdict in respect of the applicant whereupon the jury retired for five minutes and later returned with a verdict of guilty of murder against the applicant. Thereafter, the then trial judge declined to accept that verdict and proceeded to discharge the jury ordering that the applicant be retried on the indictment. In the circumstances Mr. Brown submitted, the trial of the applicant before Rowe, J. is a nullity.

Mr. Bentley Brown has agreed that the special plea of Autrefois Acquit was not taken at the trial before Rowe, J. He has admitted that that plea was not overlooked by him at the trial before Rowe, J. but rather that he deliberately decided against such a plea being entered on arraignment. The reason he has given for making such a decision is in our view incomprehensible. It was stated by Mr. Bentley Brown in this way. The applicant was alone arraigned before Rowe, J. on the indictment charging murder, Cameron at the earlier trial having been acquitted of murder and convicted and sentenced in respect of a verdict of guilty of manslaughter. When the applicant was alone arraigned on the original indictment he (Mr. Brown) observed that the indictment still showed two persons as accused, namely, the applicant and Cameron, and enquired whether the Crown wished to have the indictment amended.

Thereupon Rowe, J. said that that was not necessary. In view of this ruling by Rowe, J. he (Mr. Brown) felt it would be futile to have the special plea of Autrefois Acquit entered and so the applicant pleaded not guilty and the trial proceeded upon that plea to the indictment. Before the matter came on for hearing we made enquiry of the judge who presided at the first trial as to the circumstances in which he decided to discharge the jury from returning a verdict in respect of the applicant. Mr. Brown was informed by us at the hearing what the judge related in answer to our enquiry and he confirmed that the events that took place at that point of the trial were as related by the judge.

It would appear that what transpired at the first trial when the verdicts were being taken was this. A verdict was first taken in respect of Cameron. The foreman of the jury in answer to the Registrar's questions said that a unanimous verdict had been reached in respect of Cameron - not guilty of murder; guilty of manslaughter. No dissenting voice was raised as to the accuracy of the foreman's announcement of the verdict in respect of Cameron. In respect of the applicant the foreman announced that a unanimous verdict had been reached - not guilty of murder; guilty of manslaughter. As the trial judge was recording this verdict in his minute book counsel for the Crown attracted the trial judge's attention to the fact that several members of the jury had risen from their seats and were protesting the verdict as announced in respect of the applicant. Thereupon, enquiry of the foreman by the trial judge indicated that the foreman himself was unsure as to whether he had correctly announced the verdict of the jury in so far as that verdict affected the applicant.

Indeed Mr. Bentley Brown has stated that confusion among the jurors reigned at this point. The trial judge accordingly requested the jury to retire to resolve the matter in so far as the applicant was concerned. The jury accordingly retired to the juryroom and five minutes later returned to the Courtroom. The foreman in answer to the Registrar announced that the jury had unanimously arrived at a verdict of guilty of murder in respect of the applicant. The trial judge himself required to be assured by the foreman that he had correctly stated the verdict of the jury and enquired of the foreman whether the

verdict announced by him was that of all members of jury. Thereupon the foreman appeared to be in some doubt and consulted with the jurymen or some of them. When again questioned by the trial judge as to the accuracy of his announcement the foreman remained silent. As Mr. Bentley Brown observed again confusion reigned among the jurors. It was in these circumstances that the trial judge declined to accept the several verdicts announced by the foreman in relation to the applicant and ordered that the applicant be retried on the indictment.

Mr. Brown's argument is that the jurors' dissent only became visible (at least to him) after the foreman had announced a unanimous verdict of guilty of manslaughter and that he did not observe any dissent when the verdict of not guilty of murder had been announced in respect of the applicant. In any event he contended that it was improper for counsel for the Crown to have attracted the trial judge's attention as to what was proceeding among the jurors when the foreman announced the verdict in respect of the applicant. We are unable to agree with Mr. Brown's view of the matter in any of these regards. Clearly it was the duty of the trial judge to ensure that the verdict announced as that of all of the jurors was indeed so and it is hardly credible that if the first announcement of a unanimous verdict of not guilty of murder was accurate the further retirement of but five minutes could have the foreman announcing a verdict of guilty of murder even assuming the later inability of the foreman to clarify the unanimity or otherwise of that latter verdict. In the circumstances we cannot say that the trial judge was wrong to ask the jury to retire in order that it might be ascertained what in fact their verdict was.

Our view in this regard proceeds upon the factual position as ascertained from enquiries we made of the trial judge in the first trial and the accuracy of which was assented to by Mr. Bentley Brown. However, the further point which arises is - can this ground of appeal be urged where the plea was never made at the trial, the more so as the plea was deliberately omitted to be made? Where such a plea is made it is for the jury sworn to try that issue on the evidence adduced in support of the plea to say whether the plea has or has not been made out. If the plea succeeds that is the end of the matter. If the plea fails

the trial proceeds on a plea of not guilty. The Court of Appeal ought not to be put in the position whereby instead of reviewing the jury's decision on the evidence adduced it is required to hear the evidence as if it were the jury empanelled to try the issue and to make a decision thereon.

In the circumstances stated above we are of the view that the trial before Rowe, J. is not a nullity for two separate and distinct reasons -

(i) no attempt was made to lay the foundation for a plea of Autrefois Acquit at the trial before Rowe, J. and indeed that plea was never made;

(ii) in the circumstances which as we have ascertained existed when the verdicts were announced by the foreman of the jury at the first trial, the trial judge was right not only in declining to take those verdicts as the verdicts of the jury in so far as they related to the applicant but also in exercising his discretion in discharging the jury without taking a verdict in respect of the applicant.

This ground of appeal must therefore fail.

In the result we refused the application for leave to appeal.