JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 102, 103 & 104/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

REGINA

v

ANNETTE RUSSELL
KAREN ASQUITH
PAULA SMITH

Mr. D.V. Daley for Asquith and Smith

Mr. Howard Cooke for Russell

Mr. Earl Wright for Crown

April 13th and 14th, 1988

KERR, J.A.

This is an application for leave to appeal from a conviction in the Home Circuit Court on the 22nd of May, 1986 before Mr. Justice Panton and a jury for the murder of one Judith Gurrell. The application raises questions of law, and therefore the hearing of the application is being treated as the hearing of the appeal.

The appellants were jointly charged. The appellants, Russell and Smith are cousins, and Asquith, the friend and boon companion of the cousins. All three lived in the same block of apartment at Wilton Gardens in the parish of Kingston. The case for the prosecution rests on the evidence of Miriam Gayle. According to her, about 9:15 p.m. on the 18th of June, 1986, she was on Water Street, Kingston where she saw Russell and Asquith throwing stones at the deceased and the deceased in turn throwing stones at them. Russell she knew as 'Sly

penetrated the chest cavity and punctured the upper lobe of the left lung. The depth of penetration was approximately 4"-6". Number two, was a long incised wound on the lower posterior aspect of the left forearm, and the third injury was a three-quarters of an inch stab wound on the interior aspect of the lower leg. He said a sharp cutting instrument such as a knife, would inflict those wounds. He found several abrasions and contusions on the face and body and these could have been inflicted by blows from a baton. The cause of death was due to the penetrating wound to the chest. In cross-examination, he said that the first wound would have been inflicted by the assailants standing somewhere behind the victim, and the second wound, the one to the arm was a defensive wound; in that the victim was trying to protect herself and that the third wound could have been inflicted from any position. The degree of force used to inflict wound number one was severe.

Now the cross-examination of the witness Gayle on whom the Crown's case rested was largely ineffective. It covered the details of the incident and tended to show her up as being even more credible. The rest was a number of suggestions that she was telling blatant lies on the appellants and these suggestions were categorically denied. Each appellant gave a statement from the dock setting up an alibi that they were in attendance with the injured Beverly Henry when she went to the hospital and they were there when the deceased was killed.

Beverley Henry who gave evidence said that sometime after the stone-throwing, she was on East Road when the deceased on being advised by one Cecelia Bennett to 'bun up anyone of them yuh catch. If yuh caan catch Quawku yuh catch dem shut'. The deceased then threw the acid from a bottle on her, causing severe burns to her face and back. Notwithstanding the application of water, even ice water, the burns were so severe, she had to go to the hospital. The three appellants went with her to the hospital. They returned home about 1:00 a.m. after the deceased was killed.

Before us, leave was granted to argue a number of grounds but counsel either sensitive to the observations of the court or through their own prudence confined themselves to two areas. The first area, not in terms of argument but in the manner in which we are dealing with them, was argued by Mr. Daley who appeared for Asquith and Smith and it was that the learned trial judge failed to direct the jury that it was necessary for them to consider the case against each accused separately and decide whether they accepted the evidence in relation to each of them that they were present and acting as alleged by the prosecution witness, Miriam Gayle. He complained that such directions as were given, were inadequate and that in particular to the witness Smith, that the learned trial judge failed to direct the jury that on the prosecution's case, the applicant had come to the scene after the deceased had been stabbed by the other two accused and in regard to Asquith that she had used no words indicating an intention to kill or to inflict grevious bodily arm.

The learned trial judge in his directions had told the jury:-

> "The Prosecution has to prove to you that the accused, each accused intended to either kill Judith Gurrell or to inflict serious bodily harm on her."

and later on said:-

> "Now the Defence and here I must tell you that you are to consider the case of each accused. Each accused has given a statement and you are to give each case separate consideration. However, they all seem to be saying the same thing and this depends on how you interpret what has been said. They are in effect saying Miriam Gayle is not speaking the truth. They are saying that they were not there at all when citizens were beating the deceased to death. They were with Annette Russell's mother who had been injured by the deceased with this acid and they had gone with her to the police station at Denham Town, then to the Kingston Public Hospital and apparently the Kingston Public Hospital wasn't speedy enough in attending to her injuries, so they went to the Andrews Memorial Hospital and that they got back into the area after midnight when they heard and this is what they said they heard, that citizens had beaten Judith Gurrell to death. As I say, you consider what each of them has said separately. Examine it separately.

Now, as Lord Hailsham said in the Queen v Lawerence 1981 1 ALL E.R. on p. 977.

> "The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case."

Indeed, it may be that in cases where the evidence for the prosecution and, having regard to the nature of the defence, separate, distinct and different issues are raised in respect to different co-defendants. But in this case, the case rests on the evidence of a sole eye-witness who gave evidence of a concerted attack by the three armed appellants on the deceased and therefore any directions which would suggest or give the impression to the jury that the credibility of the witness was divisible, would tend to promote or open the door to inconsistent verdicts.

We consider that the learned trial judge identified the two correlative issues for the jury; namely; (i) were the appellants present on the scene and (ii) did they together being armed, assaulted, wounded and killed the deceased. In dealing with that aspect of the case, he included in his directions on common design the following specific directions thus:-

> "Now where two or more persons attack the same person at the same time with similar weapons and with the common intention that the person should suffer grievous bodily harm, then as such persons were present aiding and abetting the other in the commission of the offence, all would be guilty even if it is uncertain who delivered the fatal blow."

We are of the view that in so doing the directions were custom-built to make the jury understand their task in relation to this particular case. We found no merit in this ground of appeal.

Certain other grounds were not pursued and we now come to the ground that is common to all the appellants, namely, that the learned trial judge erred in withdrawing from the jury the issue of manslaughter. The learned judge, perhaps, was influenced by the nature and conduct of the defence which was clearly an alibi by each appellant. Mr. Cooke, however, submitted that there was sufficient evidence to raise the issue of provocation and that the cases show that even if the specific issue raised was inconsistent with provocation, if that issue can clearly be said to arise in the evidence, it was the inescapable duty of the judge to leave that issue to the jury. He cited a number of cases in support of that proposition including the cases of Bullard v The King 42 Cr. App Reports at page 1. Bullard's case was considered by this Court in the case of the Queen v Hart 27 W.I.R. at p. 235 where the following passage was quoted with approval.

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and, whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

The judgment in Hart went on to say that the concern of the Court of Appeal "is with the existence of the issue and not with the probability of the jury finding provocation". In the English case of the Queen v Gilbert, 66 Cr. App Reports at p. 242, Lord Dilhorne went even further when he said:-

> "In the light of section 3 of the Homicide Act 1957 these passages require to be qualified to the extent that since the passage of the Act of 1957, if there is evidence on which a jury can find the accused was provoked to lose his self-control, the issue of provocation must be left to the jury. This must be done even though in the judge's opinion no reasonable jury could possibly conclude on the evidence that a reasonable person would have done so and that on the evidence a verdict of manslaughter would be perverse."

We are reluctant to go that far. Nor is it necessary for the purposes of this case. Mr. Cooke, who carried the burden of argument on this ground, and, whose arguments were adopted by Mr. Daley, referred to certain bits of evidence which he asked us to say was sufficient to raise the issue. First, he referred to the earlier fight for which there is no clear evidence of how it started and then he referred to the deceased throwing acid on Beverley Henry, the mother of one of the appellants, the aunt of another and apparently the elderly friend of the third defendant; that the burns from the acid were serious, and when shown to the three appellants they cried thus evidencing their distress. He submitted that those two incidents taken together were sufficient acts of provocation and that the manner of the attack shortly after by the three appellants on the deceased was some evidence that they had lost their self-control and that in those circumstances on the authority of Hart and Gilbert, the issue ought to have been left to the jury. He cited to us the case of R v Walters and Walters (1971) 12 J.L.R. 448 as illustrative of the issue of provocation for the determination of the jury arising even when an alibi was pleaded.

We have given our serious consideration to this argument and to the reply of counsel for the Crown whose arguments, though attractive, were really submissions more for the jury. He said that at the outset, the appellants were the aggressors and that the evidence lent itself to the inference that they acted in revenge. While that may be one view of the evidence, the other view is also tenable and it depends on which view of the evidence the jury would take. He also referred that there was sufficient time for cooling but all the cases show that the question of time for cooling is essentially a matter for the jury. In our opinion, there was sufficient evidence to raise the issue of provocation for the determination of the jury and therefore, the judge influenced by the nature and conduct of the defence, erroneously withdrew that issue from the jury. For these reasons, we are constrained to allow the appeal, to set aside the conviction for

Mongoose' and had known her for over ten years and Asquith for a period of five years. She inquired the reasons for the fight and was informed by the deceased that the appellants were fighting her because she had made some complaint about Russell to her Russell's boyfriend. The witness, as peacemaker, advised deceased to go home and the deceased ran up Water Street and across an open lot pursued by Russell, who had armed herself with a machete. The witness left and returned sometime later to Water Street where she saw Beverley Henry, the mother of Russell and the aunt of Smith. Beverley Henry apparently was complaining to the crowd that the deceased had thrown acid on her, causing burns to her face and body. The crowd went down Fifth Street and to a place called 'pound-a-month'. There, two men beat the deceased, one of them using what appeared to be a soft-ball bat. The two men left the deceased and the witness went and ministered unto her and took her into the Hugh Sherlock's School yard. While there, Russell came and threatened to throw acid on the deceased from a bottle because, said the appellant, deceased had burnt her mother. A youth took away the bottle and the witness went to get a taxi for the injured deceased. She returned in time to see Russell armed with a knife, and Asquith with an ice-pick attacking the deceased. She was able to see them clearly as the place was well lit with electric light. She saw Russell run from Water Street and stabbed and kept stabbing at the back of the deceased and Asquith who had the ice-pick also stabbed at the deceased saying, 'you fe dead'. A boy tripped the deceased to the ground and the appellant Smith came up and stabbed deceased as she lay on the ground. Then from the mouth of the deceased came a 'whole heap of blood'. Russell then said, 'dead gal'. The deceased was taken into the taxi to the Kingston Public Hospital but when she got there, she was pronounced dead.

Dr. Royston Clifford who performed the post-mortem examination, said he found three external stab wounds. The first, was a long incised gaping wound on the upper left posterior chest. The wound