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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 63 & 64/84

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Ross, J.A.

REGINA vs. ANSEL WILLIAMS
GEORGE SAMUELS

Mr. K.D. Knight & Mrs. V. Neita-Wilson for Appellant Williams

Mr. D. Chuck for Appellant Samuels

Mr. F.A. Smith & Miss V. Grant for Crown

October 23, 24, 1985 & April 7, 1986

ROSS J.A.

The hearing of these applications for leave to appeal from a conviction for murder in the Westmoreland Circuit Court is being treated as the hearing of the appeals as the grounds of appeal include questions of law.

The charge against the appellants was that on the 13th day of June, 1983 they murdered Roy Hewitt.

At the time of the death of Roy Hewitt he was living in the district of Whitehall near Negril in the parish of Westmoreland, about two and a half chains away from the home of the appellant Ansel Williams and, about a quarter of a mile from the appellant George Samuels. Staying with the deceased was his girlfriend Yvonne Morgan who related that he left home at about 6.00 a.m. and shortly after he left she heard his voice calling out as if he was in trouble. She dressed hastily and rushed out on to the road, looked in the direction from which the voice was coming and saw the two appellants beating the

deceased with an iron pipe. This was taking place in the road and the appellants at the same time took the deceased from the road into an adjacent cane field belonging to the appellant Williams. She called out to them and one of them threw a stone and hit her; because of this she went back to her yard.

Yvonne Morgan's evidence was supported by that of another eye-witness, Delroy Campbell, who lived about one and a half chains from the home of the appellant Ansel Williams. He said that on the morning in question, at about 6.00 o'clock, he heard the voice of Williams coming from the direction of his home and the voice was saying "See the man here, see the man here." After this he left home and came out on the road at Williams' gate. There he saw Williams holding the deceased across his shoulders from the back, and Samuels in front of the deceased with a piece of iron pipe which he was using to strike the deceased; at the same time Williams was telling Samuels to break the boy's hand and feet. The beating went on for about ten minutes after which Williams released the deceased who fell on his face. At this stage Williams told Samuels to go for his machete; Samuels went over to Williams' yard and came back with a machete, but told Williams "the man is dead already, so it need no machete."

After this a large stone was used by the appellants more than once to drop on the back of the deceased as he lay on the ground.

The witness Campbell estimated the weight of the stone to be about 50 pounds. However, he later pointed out the stone to the police, it was produced as an exhibit and its weight estimated at about 25 pounds.

Soon after, Detective Darby, a police corporal attached to the Negril Police Station, came on the scene and he was stopped and spoken to by Williams. The witness Campbell at the same time pointed to Williams and told Detective Darby in the presence and hearing of Williams that "they are killing a man and he pointed over to a canefield." On going over to the canefield the detective saw the body of the deceased about ten yards from the main road. Roy Hewitt was unconscious, blood was coming from his mouth, he had a wound on one foot and there were bruises all over his body.

There is no evidence as to exactly when the deceased died. The incident took place on the 13th, he was taken in an unconscious condition to the Savanna-la-mar hospital and on the 14th the appellants were arrested and charged for murder, but it is clear from the medical evidence to which I will refer presently that Roy Hewitt died on the same day on which he received his injuries. The post-mortem examination of the body was done by Dr. Mario Blanco on 24th June, 1983; on his external examination of the body he found bruises and excoriations practically all over the body and a vertical cut over the left parietal bone of the head. On his internal examination he found a collection of fresh blood and clots on both sides in the parietal area, resulting from the rupture of the blood vessels of the brain. Death was caused, Dr. Blanco said, by compression of the stem brain and the cardio-respiratory centres due to bilateral subdural haematoma due to a hit in the head by a blunt instrument with a strong degree of force. The injuries he found were consistent with the deceased having been beaten by persons using a piece of iron pipe or a stick and death from the blow to the head would have occurred within minutes.

From the above it will be seen that the case of the Crown was that the deceased had been brutally beaten to death by the two appellants.

For the defence the appellant Samuels made a statement from the dock in which he denied being present when the deceased was injured or being in any way involved in the incident, as he had arrived at the scene shortly before Detective Darby came up.

On the other hand, the appellant Williams gave evidence on oath to the effect that he was solely responsible for the injuries to the deceased, but that he had acted in self-defence, and the appellant Samuels was in no way involved in the incident.

He related that on the early morning of 13th June, 1983 he was working in his canefield adjacent to his house when he heard a sound behind him; he turned around to see the deceased approaching him with a knife with which he was stabbed over his left eye. The wound started to bleed and he stepped back, the deceased struck at him again with the knife, and he held the hand of the deceased with the knife. There was a struggle by the two men which lasted for some time. During the course of the struggle he asked the deceased why he had come there to fight him, and the reply by the deceased was to the effect that he was going to kill the appellant because the latter had taken his name to the police station. During the struggle or "rassling," as the appellant called it, they fell several times and got up and continued to struggle or wrestle. The appellant at some stage managed to grab a stick which he used to hit the deceased several times until the deceased fell, and the appellant then moved away out to the road, where soon after he saw Detective Darby and made a report to him.

The appellant Williams further told the court of an incident which occurred between the deceased and himself about three months prior to the deceased's death. He said that one day he was at home resting after work and the deceased and

another man came there. He came out, saw them in his yard and asked why they were there. The deceased replied that he had come to kill him (the appellant). Both the deceased and the other man were then armed with machetes and the deceased launched a fierce attack on him with his machete, chopping at his head and feet. He was barely able to block the blows with his machete until a neighbour who was passing called to them and the attack ceased and the deceased went away. A report of this incident had been made by the appellant to the police.

When questioned as to his reasons for hitting the deceased with a stick the appellant Williams told the court that it was because the deceased attacked him with a knife - he had to continue hitting him with a stick to keep him off. When the deceased was coming at him with a knife he felt afraid - he said in examination-in-chief:

> "I have to hit him to keep him off, your honour, I was so fright at the time I hitting him.
>
> Q. How you felt when you saw him coming to you with the knife?
>
> A. I was feeling - I telling you ma'am, I could'nt even - I was so fraid, I was so fraid."

Again in cross-examination the record shows the appellant Williams speaking of his fear:

> "Q. Did you hit the hand with the knife?
>
> A. Sir?
>
> Q. The one that held the knife, did you hit that one first?
>
> A. Well, your honour, please, I could'nt really remind, for you see I was so fright.
>
> Q. So you hit him in the chest?
>
> A. I hit him sir, beat him, sir.
>
> Q. Where?

"A. To him body, sir

Q. Where on his body, man?

A. Maybe up here and down the other part. You see I was so fright.

Q. You hit him over here - the chest?

A. I know I make the hit, sir, I don't know where it ketch him, where it deliver.

Q. You were there, you were seeing where you licking the man.

A. I was so fraid, you honour please.

Q. So fraid?

A. Yes sir, I was fraid of the man.

Q So you hit him several times with the stick?

A. I hit him sir. The last hit what I know ketch him in the head."

From the above extract it seems that what this appellant was saying is that the deceased attacked him with a knife, he feared for his life, and after they had wrestled and he was unable to take away the knife, he grabbed a stick and struck the deceased several blows resulting in the deceased falling to the ground. Throughout the attack the appellant feared for his life and defended himself with a stick. Throughout the trial the defence of the accused was self-defence. There is nothing in the evidence to suggest that the appellant was moved to anger; he was quite emphatic that the only reason for his actions was his fear and there is no evidence from which any inference can be drawn that he was angry and could possibly have lost his self-control. If the appellant had not explained the reason for his actions no doubt it might perhaps have been open to the jury to infer that at some stage of the allegedly unprovoked attack by the deceased he became angry and lost his self-control. But on the evidence as it stands there is no basis for such an inference to be drawn; there is no evidence to suggest that he lost his self-control as a result of the attack, and this is not surprising in the light of his clearly stated reaction at the time.

At the hearing of the appeal leave was granted by the Court to argue supplemental grounds of appeal, the first of which was:

> "The learned trial judge withdrew from the jury a verdict of manslaughter which was open to the jury on the evidence adduced at the trial."

It was submitted by Mr. Knight that on the evidence given by the appellant, the question of provocation would arise. This evidence, he pointed out, was to the effect that the deceased approached the appellant in his field, wounded him with a knife and threatened to kill him. For the defence of provocation to reach the stage where the learned trial judge has to leave provocation to the jury three things must happen:

(1) the act of provoction;
(2) the loss of self-control;
(3) retaliation.

When the appellant said that the deceased came into his field and, unprovoked by the appellant, the deceased used his knife and cut him as well as threatened to kill him, that was an act of provocation, Mr. Knight submitted. He went on to say that the evidence that the appellant hit the deceased several times with a stick is evidence of acts which the jury could have found to be acts showing a loss of self-control, and at the same time, retaliation. Provocation having been raised on the evidence as an issue to be left to the jury it was the duty of the learned trial judge to have left it to the jury, and in withdrawing the issue from the jury he erred.

In his reply Mr. Smith submitted that on the evidence there is no credible narrative of events suggesting that the three elements of provocation - the act of provocation, the loss of self-control and the retaliation were present, there is no evidential basis for provocation, as the burden of Williams' evidence is that he did what he did because he was afraid.

In his summing-up at p. 221 the learned trial judge said:

> "Now on the Crown's case there is nothing that I can leave to you in regard to self-defence or provocation, nothing whatever."

He then went on to direct the jury on the issue of self-defence raised by Williams, after which at p. 222 he said:

> "The Court of Appeal has said on many occasions that where a man puts up the defence of self-defence and is relying on it, and where the judge takes the view that the material is not one in which he should leave the question of provocation, that he should then refuse to leave the issue of provocation which would bring about a verdict of manslaughter. This is simply a case where the man is saying that he was defending himself on this early morning from the deceased. ....."

There is no rule of law which requires that in every case where self-defence is raised by the defence that the trial judge must leave provocation for consideration by the jury. Whether he should do so or not will depend on the particular facts of the case before the jury. Here the prosecution's case was that the deceased was held and beaten to death by the appellants, whereas the defence was that one appellant was not involved at all while the other had only struck the deceased in self-defence after the deceased had come to his yard and cut him with a knife. In putting the case to the jury, the learned judge directed them that if they accepted the account given by the appellants, or, were left in doubt by it, then it was their duty to acquit them.

In the leading case of Palmer v. R. (1971) 12 J.L.R. 311 the learned trial judge directed the jury on self-defence but did not leave manslaughter for their consideration; the jury returned a verdict of guilty of murder. Application for leave to appeal was refused by the Court of Appeal. By special leave the appeal was heard by the Privy Council and dismissed.

In the course of his judgment Lord Morris set out extracts from the summing-up and said:

> "Their Lordships conclude that there is no room for criticism of the summing-up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that if they consider that excessive force was used in defence then they should return a verdict of manslaughter. For the reasons which they will set out, their Lordships consider that there is no such rule."

Then later in the judgment after referring to several cases cited, Lord Morris went on to say:

> "A consideration of the above cited cases does not lead their Lordships to conclude that in the present case there was any necessity to leave manslaughter to the jury. Nor do their Lordships consider that a jury should have any difficulty in deciding whether an accused person has acted in self-defence or may have done so. If the jury are satisfied by the prosecution beyond doubt that an accused did not act in self-defence <u>then it may be that in some cases (of homicide) they will have to consider whether the accused acted under the stress of provocation.</u>"
>
> (emphasis supplied)

It is clear from this that while there may be cases where self-defence is raised that the trial judge will leave provocation for the consideration of the jury if they reject self-defence, it is not a rule that in every case where self-defence arises for consideration that the trial judge should also leave provocation for the jury to consider.

In the case of <u>R. v. Hart</u> 27 W.I.R. 229, Kerr J.A. reviewed and considered the dicta and reasoning in a number of cases including <u>Roberts v. R.</u> (1942) 28 Cr. App. R. <u>Lee Chun Chuen v. R.</u> (1963) 1 All E.R. 73 and <u>Phillips v. R.</u> (1969) 2 A.C. 130 and after quoting with approval the following statement from <u>Bullard v. R.</u> (1957) 42 Cr. App. R. at p. 7:-

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

Continued thus:

> "Our concern here is with the existence of the issue and not with the probability of the jury finding provocation. Therefore the question is: 'Was there evidence sufficient to raise the issue for the determination of the jury'."

In that regard the case of R. v. Norman Johnson (1978) 25 W.I.R. 449 is instructive:

> "The applicant was convicted for murder. The sole prosecution eye-witness V.M. stated that the applicant entered a room where the deceased and V.M. were and said 'all you deh with me woman' and forthwith stabbed the deceased in the chest. The applicant's account was that it was the deceased who approached and stabbed at him, that he held the deceased, they wrestled and eventually fell to the ground still wrestling. While they were on the ground a friend of the deceased took away the knife and he was unaware that the knife had cut the deceased. His witness supported his account but, unlike the applicant, denied that V.M. was in the room.
> The trial judge left the issues of self-defence and provocation to the jury but finally withdrew the issue of provocation in response to the request of counsel for the applicant.
>
> Held: (i) that the issue of self-defence was properly left to the jury.
>
> (ii) that the issue of provocation did not arise but since it was ultimately withdrawn there was no real cause for complaint."

In the course of his judgment, Kerr J.A. said at page 503:

> "It is the duty of the trial judge to leave to the jury all issues that arise on the evidence whether specifically raised or not. The principle has been reiterated and restated in so many reported cases as to be considered trite. The duty is often a very fine one as it arises even when such evidence is slight or tenuous. Illustrative of this is the case of Thompson v. R. (1960) 2 W.I.R. 265 in which it was held that on the trial of a person for murder it was the duty of the judge to deal adequately with any view of the evidence which might show that the crime committed was manslaughter and not murder. In a case where the reality or existence of the issue is doubtful, it is to be expected that a cautious judge would err on the side of the accused."

Then at page 504, Kerr, J.A. said:

> "We found it exceedingly difficult to say that there was evidence of provocation at all sufficient to satisfy the law on that subject."

In the instant case the issue raised by the defence was simply self-defence, namely, that the deceased had attacked and wounded the appellant with a knife and during the attack the blows inflicted by the appellant were to fend off the deceased. There was not the slightest suggestion of any loss of self-control. On the contrary, the appellant's evidence was to the effect that he was being attacked by the deceased with a knife when in fear for his life he inflicted the injuries resulting in the death of the deceased. If this account is accepted or if it raised a reasonable doubt the appellant would be entitled to an acquittal and those in effect were the directions given to the jury by the learned trial judge.

There is no room for provocation on the prosecution case. This therefore is not a case where the jury had "to consider whether the accused acted under the stress of provocation." In our view the verdict of the jury is explicable only on a rejection

of the evidence of the appellant and an acceptance of the evidence of the prosecution witnesses.

This ground of appeal therefore failed.

There were other grounds of appeal filed which were considered but found to be without merit.

I turn to the appeal of George Samuels: The grounds of his appeal were that the trial was unfair and the verdict was unreasonable. Mr. Chuck did not deal with these grounds in any detail. Instead, he asked the Court to consider the position of Samuels in the event that his co-appellant Williams was found by the Court to be guilty only of manslaughter and not murder. At the trial the appellant Samuels' defence was an alibi and the jury by their verdict rejected it. His only hope of success in his appeal depended on his co-appellant succeeding in having his conviction on the murder charge reduced to manslaughter; in that event Mr. Chuck submitted that Samuels' conviction should also be reduced to manslaughter. When that failed there was nothing further to be said on behalf of the appellant Samuels.

The appeals will therefore be dismissed and the convictions and sentences affirmed.