JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 95/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. BALTIMORE WALKER

P. Sutherland & D. Murray for Appellant

John Moodie for Crown

22nd September, 1987

ROWE: P.

The appellant Baltimore Walker was convicted of the offence of manslaughter, he having pleaded guilty to that offence on the 8th of June, 1987 on an indictment which had charged him with murder, that he on the 25th of December, 1985 murdered Audrey Myers. The learned trial judge accepted the plea of manslaughter on facts which were outlined to him by the crown. These facts shortly put were, that on the night of the 25th of December, 1985 at about 10 o'clock, the appellant and his girlfriend, Audrey Myers, were present at a dance at the Lawrence Tavern Community Centre. It appears that the appellant went off to secure a drink for his girlfriend and when he returned she was not where he had left her, but rather she was dancing with a man. The appellant, it appears, became incensed at her going off to dance with this person and a quarrel ensued. In the course of this quarrel, the appellant, it is alleged handed over the drink to the deceased, but there was some cursing, they were quarrelling with one another and

this quarrel developed into a fight, in the course of which persons intervened and pulled the people apart. According to the crown's version the deceased picked up a bottle and then the accused held her and pulled a long knife from his waist which he pushed into her side.

The learned trial judge enquired expressly of counsel for the crown, what was the basis on which the Crown was prepared to accept the plea of guilty to manslaughter and received the answer; "on the basis of provocation." She explained that the witness for the prosecution had testified at the preliminary examination, that there was a quarrel and then there was a fight. The judge wished to find out if on those facts a jury properly directed could have returned a verdict of manslaughter, and crown counsel agreed. Thereupon the learned trial judge said he would accede to the course of action adopted by the crown and he would accept the plea to the lesser offence.

When the character witness was called by the crown he said that the appellant was for a time an apprentice mason, afterwards he cultivated and that he had no previous conviction against him. Mr. Sutherland who appears before us today also appeared at the trial and he proceeded to address the court in mitigation of sentence. He wished in the course of his presentation to add facts to what the transcript of the preliminary examination contained and he told the learned trial judge that the appellant was provoked in the sense that the deceased had flung a bottle which hit him, that she had another bottle in her hand, that apart from the deceased cursing the appellant, immediately before she was struck she had spat in the appellant's face, and these facts he wished the court to take into consideration.

We have taken note of the way in which the submissions for mitigation were received by the learned trial judge. He made it quite clear that he held certain strong views in relation to what should or should not be provocation in the Jamaican context. The learned trial judge expressed himself strongly that a man ought not to rely upon abusive language addressed to him in Jamaica as a ground of provocation; and that if someone took a partner to a dance and she was asked and accepted the company of another man to dance, that that could never amount to a provocative act. In support of his grounds of appeal Mr. Sutherland has argued that where after a plea of guilty, the defence wishes in mitigation, to give a different emphasis on facts already adduced by the prosecution, or to introduce additional facts to those upon which the prosecution had relied, then the learned trial judge, if he decided to receive those facts put forward by the defence, without hearing evidence, and if there was no substantial conflict between the two versions, it was incumbent upon the judge to take the more lenient view and to accept the accused's version so far as possible in passing sentence. He has brought to our attention and he has relied upon the case of The Queen v. Robert John Newton (1983) 77 C.A.R. p. 13 and the judgment of the Lord Chief Justice of England. The headnote of that case reads:

> "Where there is a plea of guilty but a conflict between the prosecution and the defence as to facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue, or the judge himself may hear evidence and come to his own conclusions, or the judge may hear no evidence and listen to the submissions of counsel, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted."

Now, in this particular case the learned trial judge did not hear evidence of the additional facts which were being relied upon by Mr. Sutherland in his plea of mitigation. It is clear that if a man is spat upon by his girlfriend in a crowded hall it could be an act which would cause him great embarrassment and would add considerably to any other ground on which he was relying as provocation. We are of the view that the learned trial judge could very well have accepted and applied the principle of Newton's case and to have taken the more lenient view of the facts as given by counsel for the appellant, especially as there had not been a full trial where the appellant would have had a chance to give evidence on his own behalf or to call witnesses in support.

We are of the view that the learned trial judge took a too restricted view of what amounted to provocation in the instant case, that he expressed himself in a way which would suggest that he thought that the appellant was intent on killing the deceased merely because he saw her dancing with another man without his permission. The case as presented by the prosecution and the facts added by the defence contained other events of great importance which if the learned trial judge had taken into consideration and had given sufficient weight to them, he would not, in our view, have imposed the sentence which he did of 20 years imprisonment at hard labour. He had exercised his discretion

quite properly to have accepted the plea of guilty of manslaughter and although he thought that the evidence was very thin, he so concluded because he did not give proper weight to all the circumstances which were available to him. In all the circumstances therefore, we are of the view that a sentence of 20 years imprisonment at hard labour is manifestly excessive and ought to be set aside and that the proper sentence which ought to be applied in this case is one of 12 years imprisonment at hard labour to commence upon the date of conviction and we so order.

Appeal against sentence allowed. Sentence varied to 12 years imprisonment at hard labour to commence on the date of conviction.