

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 27/79

BEFORE: THE HON. MR. JUSTICE KERR, J.A. - PRESIDING
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE WHITE, J.A. (AG.)

R. V. BERRIS REID

Mr. A. Gilman for the Appellant.

Mr. A. Smellie for the Crown.

May 29, 1980

KERR, J.A.

This application for leave to appeal from a conviction for murder in the St. Catherine Circuit Court before Mr. Justice Marsh and a jury, has been treated as an appeal.

There is a district called Braeton in the parish of St. Catherine and in May, 1978, there was a building site there and construction work was being done on that site. The deceased, Angus Buckley was the sub-contractor there, while the accused according to his account, was a workman who had worked on three days previous to the date of the incident which was on the 4th of May, 1978.

The eye-witnesses for the Prosecution were Fenton Dawkins and Basil Foster, both workmen at the site, and Dawkins said that at about 11:00 o'clock that day while at the site he saw the deceased near the canteen and the appellant near him, and that the appellant went up to deceased, held him, and stabbed him with a board-handle knife in the chest. He was then eighteen yards away and after the stabbing they both fell on the ground; appellant got

up, ran, and was chased by a crowd and he fell into a canal. When he, Dawkins, went up to Buckley he saw blood "chinning" from his heart, and that there was this wound in his chest from which he died shortly after. He is corroborated in every material particular by Basil Foster, who earlier that morning had gone to the home of the deceased, as was his custom, and they travelled on the bus, Foster had stopped off at home to put on a shirt and that when he arrived at the site the deceased was there. At 11:00 o'clock he witnessed the stabbing, and he gave his evidence of this in tenor and substance similar to that of Dawkins. He said, however, that after the accused stabbed the deceased and was running the crowd chased him, and that they flung stones at him and that that was the time the accused received injuries which he had.

Both witnesses were cross-examined at length and the defence was put to them to the effect that the crowd had been incensed that strangers from Kingston were coming to seek work at the site and that they and others attacked the appellant and in the course of the attack they hit him with sticks and stones and pickaxe handles and that it was in the course of the attack and the appellant in defending himself Buckley was injured. The witnesses categorically denied this. They said that as far as they saw, there was no fracas, and that there was no attack on him by anybody that day.

The appellant gave evidence. He had worked there three previous days, he had gone there to see the supervisor, Roy; that while he was there a crowd said that no Kingston man should get any work on the site. They attacked him with sticks and pickaxe handles and stones, and among his attackers were the two witnesses for the

Prosecution, Dawkins and Foster, and the deceased, that he was "cornered" at the side of the canteen and that when the deceased attempted to hit him with a pickaxe handle he took out his knife and stabbed at him to scare him off - to fend him off; and that the knife caught him. Somehow he got out of the crowd and ran. He got several blows and he did not know how he came to reach in the canal.

Constable Doran who investigated the matter said that at that time 11:30 a.m. he received a report and he went to the construction site in Braeton and there he saw the appellant, and not far from him a knife. The angry crowd of twenty or thirty accused him of killing Buckley and pointed to the knife, and that the appellant said, "A lot of them came down on me and beat me." He repeated much the same statement to the arresting Officer, Kelso Small.

The doctor who examined the dead body of the deceased, Dr. Ernel Lewis said that he died from a stab wound to the heart and that death would have occurred within a few minutes of the stabbing, and that considerable force was used.

The judge in summing-up, after a careful review of the evidence, after general directions on the burden of proof and the essential elements which constituted the offence, dealt at length specifically with the issue of self-defence. Counsel for the appellant quite properly in our view admitted that that issue was clearly and properly put to the jury, and that there was no complaint concerning that aspect of his summing-up. However, the trial judge, having dealt with self-defence, addressed the jury in the following manner:-

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"However, as I said, Mr. Foreman and members of the jury, sometimes in a trial for murder it is possible that the lesser offence of manslaughter can be left to a jury if there is evidence to support what is known as legal provocation, right? If there is legal provocation under the evidence then it would be open, sometimes either to crown counsel or the judge or both of us, to leave it to the jury as an alternative verdict in a case of murder. However, I have considered the evidence in this case and in my judgment I do not think that any question of provocation arises, either on the crown's case or on the defence....."

He went on:-

"..... In other words if you accept what the accused has said then it is not murder. If you accept what the crown says then it is murder, there is no in between, there is no provocation because the crown witnesses say that they heard no quarrel or no fuss between Buckley and the accused so where can the provocation have come from? There is no evidence of provocation on the prosecution's case and even on the defence's case, again, there is no provocation because what the accused man is saying was that when the crowd came down on him - not that he wasn't angry, he said he was scared so the dominant emotion there is not anger but fright so that it does not seem to me on the evidence in this case that there is any possibility of an alternative verdict like manslaughter....."

Then he continued:-

"I will remind you that the accused has no onus upon him to prove that he acted in self-defence, it is the crown who must prove that he did not act in self-defence....."

So the judge left to them self-defence as the cardinal issue in this case. It is the withdrawal of provocation of which complaint is being made before us today. We have given careful consideration to this and we are in entire agreement with the trial judge that the issue of provocation did not arise. The vital question was: was there an attack by the crowd on the appellant before the stabbing? The case for the Crown ^{was} that such injuries as he received

were after the stabbing and that there was no attack or threatened attack to the appellant. The appellant said that he was attacked and injured before the stabbing and was being attacked when the deceased was injured. If the jury found or were in doubt as to whether the stabbing was after or during the attack then the appellant was entitled to be acquitted.

It is clear, however, from the jury's verdict that they entirely rejected the defence as to any attack being made on the appellant before the fatal injury to the deceased and that the deceased was stabbed by the appellant without any justification whatsoever. In the circumstances, the appeal is dismissed.