JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 56/89

BEFORE: **The Hon. Mr. Justice Forte, J.A.**
The Hon. Mr. Justice Downer, J.A.
The Hon. Miss Justice Morgan, J.A.

R. v. CARLWOOD THOMPSON

Delroy Chuck with **Helen Birch** for Applicant

Hugh Wildman for Crown

9th November & 11th December, 1989

FORTE, J.A.

The appellant was convicted for the offence of murder in the Home Circuit Court on the 6th April, 1989. The facts upon which the prosecution relied were as follows:

On 29th June, 1983 at about 7.00 p.m. Sergeant Bryan in the company of deceased Everton Williams, boarded a bus at Twickenham Park, the location of the Police Training College to which both were attached. When the bus reached Half-way-tree there was a quarrel between a passenger and the conductor about "change" and on reaching Cross Roads, the conductor came off the bus, went to a street vendor and came back on the bus and the argument ceased. A lady who was apparently in the company of the man, who was later identified as the accused, also came off the bus and she also returned. When the bus moved off again the appellant continued to argue with the conductor and also with the driver whom he accused of not stopping when he requested him to do so. The deceased got up, went to the front of the bus where the appellant was standing, with the lady beside him. Sergeant Bryan testified that he then heard,

the deceased tell the "parties" to "take it easy". He did not however return to Sergeant Bryan but took a seat at the front of the bus. When the bus reached Torrington Bridge he heard someone say "Lock up who? you think me fraid a police?" He did not know who said so. When the bus reached Sutton Street Sergeant Bryan got up, walked to the front of the bus, spoke to the deceased and both got off the bus, leaving the accused on the bus. Sergeant Bryan began walking to another bus, with Williams (dec'd) walking behind him. He then heard someone say "Lock me up nuh! Lock me up nuh batty boy! You want to lock me up?" He looked and saw the appellant now outside the bus. It was the appellant who had spoken these words. The deceased was then about 20 feet behind Sergeant Bryan and about 6 feet from the appellant, with his back to the appellant, but "he had pivoted his "trunk area .." Sergeant Bryan then told the deceased to "leave him and come". He began to walk away and then he heard a 'click' which sounded to him "as if a firing pin fell on an empty chamber or fell on a round which failed to go off." When he turned around he saw the appellant with a .38 snub-nosed revolver in his right hand and it was aimed at the deceased who had his bag over his shoulder and nothing in his hand. Sergeant Bryan then heard an explosion and saw a flash from the revolver, then he heard a 2nd and a 3rd shot. Williams fell on the ground and called to him saying "Help me Dudley, help me nuh."

Detective Ford arrived. He had heard the explosions and went in the direction from where they had come. He saw the appellant with a revolver. The appellant identified himself and handed over the gun. In his defence, the appellant gave an unsworn statement which will be dealt with and referred to later in this judgment.

Before us Mr. Chuck for the appellant was granted permission, and argued four supplementary grounds of appeal.

The first which was a complaint in respect of the learned trial judge's direction to the jury on the question of the honest belief of an accused in determining whether he was acting in self-defence was, during the course of his submissions, conceded by Mr. Chuck to be of no merit and he soon quite rightly, in the view of the Court, abandoned it.

He relied, however, very strongly on the other three grounds with which we now deal.

> 1. That the learned trial judge fail to direct the jury adequately on the issues of self-defence and accident and to properly relate the facts of the case to the issues.

In support of this ground, he relied on the evidence which stated per the prosecution witness Sergeant Bryan, that the appellant was moving backwards, when firing the shots, at a time when the appellant was moving towards him. He contended that the learned trial judge did not, in his summing up, when dealing with the issue of self defence allude to that evidence.

It is the view of the Court, however, that the circumstances described did not allow for any interpretation of the evidence, which arose on the prosecution case, that the appellant was in the process of retreating from an attack when he fired the shots. Indeed the defence never maintained at the trial that the appellant retreated from an attack being made upon him by the deceased. The contention of the defence did not itself admit for an interpretation that he deliberately fired at the deceased while being attacked. He instead, contended that the appellant attacked him by punching him in his face and holding on to his firearm in what he alleged was an attempt to take it away. In those circumstances, the evidence of the appellant

moving backwards, while shooting is not evidence which in the view of the Court formed part of an act of self-defence and the learned trial judge was correct in not dealing with it in that regard.

Mr. Chuck further advanced that the learned trial judge did not assist the jury by relating the directions he had given on self-defence to the two contended views - that of the prosecution and that of the defence.

With this submission we cannot agree. The learned trial judge did in fact give adequate and correct directions on the law of self-defence and then towards the end of his summation, after analysing the account of the appellant, directed the jury in clear terms how to approach the evidence in relation to self-defence. He stated:

> "If you accept that there was this thing about defending self or the circumstances arose which demanded the man honestly to believe he was in danger and he acted in self-defence, that is a complete acquittal also.

We therefore came to the conclusion that there was no merit in this ground of appeal.

> 2. The verdict is unreasonable and cannot be supported having regard to the evidence."

The main thrust of the argument on this ground of appeal, was founded on the evidence of Inspector Grant who testified as to a statement which the deceased is alleged to have made to him before he died, i.e. that he (the deceased) had held unto the gunman.

The evidence was solicited from Inspector Grant during cross-examination by counsel for the defence and without any objection from counsel for the Crown. This evidence offended the hear-say rule, and not coming within any of the exceptions should have been excluded from the evidence.

In those circumstances, this Court would find great difficulty in applying that bit of evidence when assessing the weight of the evidence against the appellant. In any event, the prosecution's case and that of the defence were at great variance with each other. If the jury believed, as the verdict indicates they did, the account given by the prosecution, then subject to the considerations in respect of the withdrawal of the issue of provocation which will be dealt with later in this judgment there was ample evidence upon which the verdict could have been returned. Consequently we could find no reason, or basis for concluding that the verdict was unreasonable.

3. The learned trial judge was wrong in law in failing to leave the issue of provocation to the jury since that defence arose naturally on the evidence adduced at the trial.

It cannot be challenged that the learned trial judge did in fact withdraw the issue of provocation from the consideration of the jury.

He didso in the following words at page 104:

> "Mr. Foreman and members of the jury, in this case, I am not, let me repeat, I am not giving you any direction on provocation. Provocation in law are (sic) three things. Provocative acts, loss of self-control and retaliation proportionate to the provocative act. In this case I am I am taking it away from you. The only evidence that you have heard of provocation here is a provocative act of hitting in the head. (sic) That came from the statement of the Doctor. I am not giving you any further direction as to provocation."

The evidence for the prosecution disclosed that while the bus was on its journey into Kingston, the deceased on hearing a quarrel at the front of the bus, went there and though no one testified to hearing him speak on that occasion, apparently did say something to arouse the anger of the

appellant who was heard to say "Lock up who? You think me fraid a police!" It is however, mainly in the appellant's case that the issue of provocation arose.

The appellant's account as related in his unsworn statement from the dock was as follows:

> "..... The bus drove down East Street, came to a stop at the intersection of East Street and Sutton Street. We all got off the bus. I notice the gentleman was carrying a large travelling bag over his shoulder, which he handed to another man, and said to the man, 'hold the bus mek me deal with the bwoy and come.'
> Same time he punched me at the side of my face. I staggered. My common-law wife held on to my hand, and she was being kicked to the ground. I reached to my waist, held on to my firearm. The man grabbed on to my hand with the firearm. I said to him, 'police', and he started fighting me to take away the firearm, during which three shots went off.
> To my belief he was trying to take away the Government's gun from me and I was trying to protect it. I did not know this man. I did not know the policeman. And I am innocent of this charge."

In D.P.P. v. Camplin (1978) 2 All E.R. 168 Lord Diplock in making reference to section 3 of the [English] Homicide Act of 1957 which is similar in terms to section 6 of the Offences against the Person Act stated that that section

> "..... makes it clear that if there was any evidence that the accused at the time of the act which caused death in fact loss his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question ..... whether a reasonable man might have reacted to that provocation as the accused did."

In our view, the issue of provocation ought to have been left for the consideration of the jury.

There was ample evidence of provocative acts -- not the least of which were the punching of the appellant, and kicking his common-law wife causing her to fall .... and this obviously resulting from an argument in which both men had previously been engaged. There was, also, in our view adequate evidence upon which that jury if they rejected his defence of self-defence could have inferred that the appellant had loss of self-control when he fired the shots at the deceased. In those circumstances, we concluded that the learned trial judge fell into error when he withdrew the issue of provocation from the consideration of the jury. We cannot say that the jury properly directed would not have found that the appellant was provoked at the time. Consequently we granted leave to appeal, treated the hearing as the hearing of the appeal, and allowed the appeal. The conviction for murder was quashed and a verdict of manslaughter substituted therefor. The sentence of death was set aside and the appellant sentenced to 12 years imprisonment at hard labour.