JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 101/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. CRAFTON TOMLIN

Jack Hines for applicant

Lloyd Hibbert for Crown

12th & 16th November 1990

GORDON, J.A. (AG.)

The applicant was convicted in the Clarendon Circuit Court held at May Pen on 19th June, 1989 before Harrison J, on an indictment charging him with murder.

There was one eye-witness to the commission of the offence. She was the mother of the deceased Mrs. Sestine Peart. Mrs. Peart said that in the afternoon of the 29th December, 1988 she was walking on the road leading from the district of Mattine to that of Overbridge in the parish of Clarendon. At about 3.30 o'clock she approached a bridge and observed her son Devon coming towards her approaching the opposite side of the bridge. She then saw the applicant and his son running towards the deceased from behind him each armed with a machete. The applicant reached up to her son and struck him one swift sudden chop in his neck from behind and Devon fell on his face and died. The applicant and his son then crossed the bridge running and passed her and she spoke to him. She made an alarm, left the scene for a short while and on her return she saw a large crowd on the scene. She observed a bag with a machete protruding from

it on her deceased son's shoulder, she took it up to take it away but returned it on being so advised. She rejected suggestions put by the defence that she was not there.

Dr. Victor Lindo performed a post mortem examination on the body of the deceased Devon Peart on the 28th January 1989. He found an incised wound to the right side of the deceased's neck ten inches long and three inches wide, the wound entered the pleural cavity and exposed the right lung. There was also an incised wound of the upper lobe of the right lung. The wound extended from the sterno-clavicular joint over the shoulder almost to the midline of the back. "It cut through the muscles of the shoulder, the muscles surrounding the shoulder joint, it cut through these muscles and cut through the upper four ribs at the back." Death was due to shock due to the extensive incised wound. Death he said could have occurred immediately or almost immediately. The direction of the injury was inwards downwards and towards the midline of the back and chest.

Corporal Donald Terrelonge said that at about 5.00 p.m. on 29th December 1988 the applicant and his son came to the Lionel Town Police Station. The applicant told him that he was walking on the Smithville to Mattine road when on reaching a bridge he saw the deceased Devon Peart with a bag over his shoulder. Peart removed the machete from the bag chopped at him twice as he the applicant retreated and as Peart continued to advance he used his, the applicant's machete to chop him once and he died.

The applicant in his defence did what has become the norm in these courts. He gave a statement from the dock in which he repeated what he had told Corporal Terrelonge at the Lionel Town Police Station. His defence was that the injury was inflicted when he was acting in self-defence.

The learned trial judge's summing-up was unassailable on its contents. It was fair, it was thorough and Mr. Hines said he could pursue but one of the four grounds filed. The ground he sought to urge in support of his application is:

> "The learned trial judge erred in his summation to the jury in that he failed to put the issue of manslaughter to the jury and the said issue of manslaughter arose on the evidence."

Mr. Hines submitted that the evidence of the attack made on the applicant by the deceased would be an act done by the deceased to the accused which would have caused and did cause a sudden and temporary loss of control rendering him not master of his mind and it would be a matter for the consideration of the jury.

Mr. Hibbert for the Crown submitted that he saw no virtue in the submission. There was no possibility of the injury being inflicted in the manner described by the defence.

In **Phillips v. R.** [1969] 53 Cr. App. Rep. 132 at 134 the test for provocation in the Law of homicide in this jurisdiction was stated in these words:

> "The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury, assuming that there is any evidence upon which they can so find, is: 'was the defendant provoked into losing his self-control?' The second, which is one not of fact but of opinion, 'Would a reasonable man have reacted to the same provocation in the same way as the defendant did?'."

A trial judge must bear these principles in mind and examine the evidence presented to determine whether there is material which satisfies these criteria to make provocation an issue for the jury's determination. In **R. v. Hart** [1978] 27 W.I.R. 229 this court reviewed the cases in which provocation was raised as an issue on appeal and among the cases reviewed

were Phillips v. R. (supra) and Lee Chuen v. R. [1963] 1 All E.R. 73. Lee Chun Chuen's case has a third element in addition to the two-fold test laid down in Phillips v. R. Lord Devlin at page 79 in Lee Chun Chuen's case said:

> "..... The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. ..."

Kerr, J.A. in R. v. Hart at page 238 puts it thus:

> "..... What is required is evidence of a provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to 'a sudden and temporary loss of self-control'. If there is such evidence then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the two-fold test as laid down in Phillips v. R. [1969] 2 A.C. 130, [1969] 2 W.I.R. 581, 53 Cr. App. Rep. 132.

In R. v. Fabian Moses S.C.C.A. 98/89 (unreported) delivered 18th June 1990 Campbell J.A. delivering the majority judgment said:

> "Lee Chun Chuen (supra) therefore continues to be good law so far as the need for a credible narrative of events suggesting a provocative act and loss of self-control before a judge becomes obliged to leave the issue of procation to the jury. This court has said as much in R. v. Hart (supra) without using the expression 'credible narrative of events.'

Mr. Hines has, since the close of submissions, indicated by letter that he thinks the court would find of "inestimable assistance" the case of Regina v. Andrel Vassell [1972] 12 J.L.R. 656. R. v. Errol Morgan [1972] 12 J.L.R. 1033 - 1036:

In Vassell's case the applicant entered the home of the deceased and inflicted on him several stabs with a knife. There was evidence that the deceased had recently taken on the former girlfriend of the applicant. The applicant's defence was that he was held by the deceased and that injuries intended for him were inadvertently inflicted upon the deceased by his own brother. The Court of Appeal held that the issues of self-defence and provocation should have been left for the consideration of the jury and a retrial was ordered.

The headnote to Morgan's case is:

> "On the trial of a person charged with murder where the substantial defence advanced is self-defence it is the duty of the trial judge in his summing-up to deal adequately with any other view of the facts which might reasonably arise out of the evidence and which would reduce the crime from murder to manslaughter. It is also the duty of the trial judge to leave with the jury not only those defences which the evidence asserts but also those which the evidence may have left in doubt."

In that case the Crown's case was that the applicant made a sudden unjustified attack on the deceased on the road using a knife. The applicant gave sworn evidence in which he recounted a series of attacks made on him by the deceased over a period of time and a threat to kill him when next they met. On the occasion of the incident he was attacked by the deceased who was armed with a knife and he drew his knife and acted in self-defence. He was convicted for manslaughter.

On appeal it was argued there were only two verdicts open to the jury, guilty or not guilty of murder and that there was no evidence on which a verdict of manslaughter was competent.

In dismissing the application Fox J.A. delivering the decision of the court said at pages 1035H - 1036C:

"In considering these submissions, it is important to appreciate that the same evidence which may have been adduced in support of an unsuccessful defence of self-defence may be relied upon, in whole or in part, to show provocation sufficient to reduce the crime from murder to manslaughter. **Mancini v. D.P.P.** [1943] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 58 T.L.R. 25; 28 Cr. App. Rep. 65 does not lay down a view to the contrary. The attack upon an accused may not have been of sufficient violence to justify action in self-defence. But, as Lord Tucket succintly points out in **Bullard v. The Queen** [1957] 3 W.L.R. 656; [1957] A.C. 635 at p. 643, 'Conduct which cannot justify may well excuse'. An assault may be unlawful and of such a kind as was likely to deprive an ordinary person in the circumstances of his self-control though not to endanger him to the extent which would justify action in self-defence. Such an assault upon an accused would amount to provocation, and the question would then arise for determination by the jury - 'whether the provocation was enough to make a reasonable man do as he did'. (c.3C of the Offences against the Person (Amendment) Law 1958). It is also important to realize the full implications in the right of a jury to accept or reject the whole or a part of the evidence of any witness. This right entitles a jury to consider that an account of an incident has been incomplete or was exaggerated, but that, although unacceptable in its entirety, such an account enables conclusions of fact which depart substantially from the line pursued at the trial by the prosecution or the defence. Finally, it is essential to understand that the defences to a criminal charge which must be left a jury are not only those which the evidence confidently asserts, but as well those which the evidence may have left in doubt.

These propositions give a simple answer to the complaint on appeal. It was open to the jury to take the view that the applicant was not speaking the truth when he said that his life was imperilled by an attack upon him such as he described, but that he was, or, (to embrace the position of doubt,) could have been, unlawfully assaulted in circumstances which afforded provocation sufficient to excuse, though not to justify the blow which killed the deceased. The probability of this view was distinct. It would have

> "constituted a grave miscarriage of justice if the applicant had been deprived of his right to have the issue of manslaughter left with the jury."

We have cited with approval the judgment of Fox J.A. but we found these cases unhelpful to the cause advocated by Mr. Hines. Each case is determined on its peculiar facts and there is no similarity between the facts in these cases and in the one before us. The applicant Morgan gave sworn evidence and his narrative provided material for the course adopted by the trial judge. In **Regina v. Wayne Spence** S.C.C.A. 202/88 (unreported) dated 18th June, 1990 Rowe, P said:

> "If a defence is raised in the unsworn statement although it is unsupported by any evidence, that is to say sworn testimony or documentary evidence that defence must be left to the jury but the weakness of the supporting fact base must be highlighted."

The statement made by the applicant did not contain material from which a defence of provocation could be gleaned. It is idle to speculate what would have happened had he given sworn testimony. In **Solomon Beckford v. R** [1987] 3 All E.R. 425 the Privy Council frowned on the practice in Jamaica of accused persons raising the issue of self-defence in unsworn statements. The practice has nonetheless continued unabated.

The evidence . the learned trial judge had before him was that the deceased was chopped from behind. In his statement from the dock the applicant said that when he was chopped at by the deceased he, the applicant, stepped "to the right" (i.e. his the applicant's right and the deceased's left) and then he chopped the deceased. Mr. Hibbert submitted that it was impossible for the injury to have been inflicted in this manner. Indeed the learned trial judge had invited the jury to demonstrate in retirement the postures testified to by Mrs. Peart and spoken of by the applicant so as to determine for themselves which of the two accounts could be believed.

This was a case in which two diametrically opposed accounts were given to the jury. No background for the attack was ever essayed in the course of the trial and the stark facts as presented left no room for areas of doubt. If the jury believed or were in doubt that the deceased chopped at the applicant, they were invited by the trial judge to say that the applicant was entitled to retaliate in the way that he did and also to the benefit of a verdict of acquittal. In our view it would have been incongruous for the trial judge to have gone on to say that although what the deceased was alleged to have done to the applicant entitled the applicant to a clean acquittal, they could nevertheless convict the applicant of manslaughter on the self-same evidence.

Where there was no question of the nature of the retaliation, as in this case, and the only question was whether the applicant had an honest belief that he was under attack or that there was an imminent attack upon him, if the jury on a consideration of the whole of the evidence were satisfied so that they felt sure that the prosecution's version was correct and they rejected the assertions of the applicant, there was no room for manslaughter. The prosecution's case rested upon a ferocious attack from behind upon an unsuspecting victim. The eye-witness evidence was doubly supported by the medical evidence as to the extent of the injuries and as to the position from which it was delivered. The jury then faced with these two diametrically opposed accounts, from the prosecution and from the defence, were entitled to reject the defence on the overwhelming evidence from the prosecution and to find the offence of murder. Had the learned trial judge

embarked in this case upon the impossible task of giving directions on manslaughter on the ground of provocation, the applicant would have been justified in a complaint that his defence had been eroded.

The application for leave to appeal is refused.