JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 192/2000

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R. V. DAMION THOMAS

Deborah Martin for appellant

Janiece Nelson-Brown for Crown

7th April & May 21, 2003

HARRISON, J.A.

The appellant was convicted in the St. Catherine Circuit Court on the 16th day of November 2000 for the murder of Christopher Watson on 28th July 1999 and sentenced to imprisonment for life, and it was ordered that he be not eligible for parole before having served twenty-five years. We heard the arguments, treated the application for leave as the hearing of the appeal, allowed the appeal, quashed the conviction for murder and set aside the sentence of imprisonment for life. We substituted a verdict of manslaughter and imposed a

sentence of twenty years imprisonment at hard labour to commence as from 16th February 2001. As promised these are our reasons in writing.

The facts are as follows. On the 28th July 1999 prosecution witness Norman Cameron, a correctional officer, on duty at the St. Catherine Adult Correctional Centre heard a shout at about 11.00 a.m. and saw the appellant an inmate who was facing him, going towards another inmate, who was backing away. The latter inmate fell to the ground and the appellant, with a knife in his hand kneeled and stabbed the fallen inmate repeatedly in the area of his chest. The witness shouted to the appellant "Damion," and ran towards the open yard where the appellant was. The appellant with the knife ran passing the witness, towards his cell block. The witness followed, asking the appellant for the knife. The appellant went to the prosecution witness Colin Green (another correctional officer,) who was working in the said cell block and handed to the said witness a ratchet knife with blood on it and said:

> "Mr. Green see the knife yah, a just tek it and kill a boy round so."

Asked if he killed an inmate the appellant said:

> "Yes boss ... yes I kill him, him style me up as a batty man and mi deal with him case."

The witness Green, took the appellant to prosecution officer Winston Anderson, (also a correctional officer,) in the overseer's office. The appellant said to the witness Anderson:

> Godfather, Godfather, a boy dis me and me haffi stab, stab him up ... Him call me batty man and talk

> seh him f... me a Half Way Tree jail so me just stab stab him up."

The inmate who was stabbed by the appellant was the deceased Christopher Watson. The latter was taken to the Spanish Town Hospital where he died. The cause of death was multiple stab wounds inflicted with a sharp instrument such as a knife, with a moderate to severe degree of force. The post mortem examination report revealed that three stab wounds were to the left side of the deceased's chest penetrating his left lung. There were two other stab wounds to his left forearm.

Det. Inspector Michael Phillips was called at the Correctional Centre at about 1.00 p.m., having seen the body of the deceased at the funeral home in Spanish Town. He received a report and the said knife and cautioned the appellant. On being told of the allegations against him, the appellant replied:

> "Mi never stab nobody."

He was arrested and charged.

The appellant gave evidence in his defence. He said that, at the prison, he was a high-risk prisoner and so was always escorted. On that day he had been escorted back to his cell and locked up. Warders later came and beat him and accused him of stabbing an inmate. He was taken to the overseer's office where he was beaten. The police came and he told them that he knew nothing about it. He stated that the authorities were all against him because they had cut off his hair, which he wore as a Rastafarian, and he complained about it and also about the general conditions to the United Nations, and, to the local and

foreign human rights bodies. A witness for the defence Gervain Crossman said that on the day in question he heard a shot and saw "about 25 warders" running behind the appellant beating him with batons. He saw an inmate lying on the ground and the witness Cameron whom he had previously been talking to about God, took up a knife from the ground.

Miss Martin for the appellant argued two grounds of appeal, summarized:

> "(1) That the Learned Trial Judge erred in law in leaving to the Jurors the offence of murder when the Crown's case at its highest, established the offence of manslaughter.
> Alternatively, it is submitted that the verdict of guilty of murder is unreasonable and cannot be supported having regard to the clear provocation included in the foundation of the Crown's case.
>
> (2) That the Learned Trial Judge failed to give the Jury full and adequate directions in law on identification having regard to the defence of alibi raised by the Appellant; instead, he made a brief reference to the issue of identification at the end of his summation to the Jury during which he undermined its relevance to the instance case.
> That this failure to direct amounted to a non-direction in law."

Miss Martin argued that the defence of provocation arose on the evidence in support of the prosecution's case, and therefore the learned trial judge ought to have upheld the no-case submission at the close of the prosecution's case, directed the jury to return a formal verdict of not guilty of murder and called upon the accused to answer to a charge of manslaughter. Alternatively, he should have (so) directed the jury during his summing-up, to return the formal

verdict of not guilty of murder and consider the offence of manslaughter. She argued further that the defence being one of alibi, the issue of identification arose. The learned trial judge dealt with it in a "cursory manner" instead of the specific warnings as required in ***R v. Turnbull*** [1977] Q.B. 224; [1976] 3 All E.R. 549.

Where provocation arises on the facts of a case as a matter of law, its effect is to reduce the offence of murder to manslaughter. Provocation is defined in section 6 of the Offences against the Person Act. It reads:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

The burden is on the prosecution to prove that the accused was not acting under provocation. It is the jury who must consider whether or not the accused was acting under provocation. Whether or not the accused was acting under legal provocation is a question of fact for the jury. Section 6 of the Act supports this. A trial judge has no power to direct a jury at the close of the prosecution's case to return a verdict of not guilty of murder due to the evidence of provocation, which is unchallenged as contended for by Miss Martin. That would amount to a usurpation of the function of the jury. Miss Martin conceded

this latter point early but argued that the directions on provocation were otherwise deficient.

If a jury finds that from the things said or done or both, that the accused was acting under provocation or, if they are in doubt whether or not he was, then they should find that he was in fact acting under provocation and their verdict would then be one of not guilty of murder but guilty of manslaughter.

The Court of Appeal dealt with the said issue in ***R. v. Lumumbo Rankine*** (unreported) SCCA No: 61/2000 delivered on 31st May 2001. Bingham, J.A. on page 8 of the judgment said:

> "... the learned judge did not tell the jury that if they were in doubt as to whether the accused was provoked or not they should find that provocation in law was made out and return a verdict of Manslaughter. His failure to so direct the jury was a fatal omission and amounted to a non-direction of a material nature rendering the conviction bad."

He relied on ***R. v. McPherson*** [1957] 41 Cr. App. R 213, the headnote of which reads:

> "Where on a charge of murder provocation is relied on by the defence, the jury should be directed that the onus of proving absence of provocation remains throughout on the prosecution and that if the jury are left in doubt whether the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner."

The duty of a trial judge, therefore, in such circumstances is to direct the jury that:

(1) if they find that the accused was acting under legal provocation, or
(2) if they are not sure that he was so acting, that is, they are in doubt, they should find that he was in fact so acting,

and, in either case their verdict would be one of not guilty of murder but guilty of manslaughter.

In the instant case the learned trial judge, in his directions to the jury on the issue of provocation, on page 278 of the transcript said:

> "The prosecution, as I told you, must also prove that the killing was unprovoked. And for our purposes, provocation has a special meaning. Provocation, I have to tell you, is some act or series of acts done or words spoken, ~~which~~ causes in the defendant a ~~sudden~~ and temporary loss of ~~self-control~~ and which would cause a reasonable person to lose his self-control and to behave as the accused did. Therefore, you will have to consider two questions; firstly, did the allegedly provoking conduct, the words cause the defendant to lose his self-control? And secondly, would that conduct have caused a reasonable person to lose self-control and behave as the defendant did? In considering that second question, you should take into account everything said and done. According to the effect it will have on your opinion.
> A reasonable man is a person having the powers of control to be expected of an ordinary person of the sex and age of the defendant; a 19 year old man in his position. Remember the words that the witness said were used which we are going to look at more closely. You are to say, whether those words could have the effect of causing the accused to lose his self-control and secondly; if the words would have caused a reasonable person to lose his self-control and behave in the way the accused did."

And on page 282:

> "Now, you will recall what I said to you in relation to provocation, whether those words in fact, if you find that those words were in fact said whether they would have had the effect of causing Damion Thomas to lose his self-control. Nineteen-year-old incarcerated Jamaican male and he is saying this man is styling him as a batty man. Would those words cause a reasonable – you must also go on to consider if those words would cause a reasonable person to lose his self-control and behave as Damion Thomas did, if you find in fact, if you believe that in fact he said those words and he inflicted the injuries."

And on page 324:

> "You look at the words used quite a few times in this case to say whether in fact those words could amount to provocation as I have explained it to you. Whether the words could have the effect of causing the defendant to lose his self-control, and whether the words could have caused a reasonable person to lose his self-control and behave in the manner that the defendant did."

At no time did the learned trial judge tell the jury, in respect of the issue of provocation, that if they were not sure or if they were in doubt whether or not the accused was acting under legal provocation, they should find that he was so acting and accordingly find him not guilty of murder but guilty of manslaughter.

The omission of the learned trial judge to so direct the jury, is a failure to recognize that if a doubt exists in the jury's mind it means that the prosecution has not discharged its burden to prove to the satisfaction of the jury that the accused was not acting under legal provocation. If the probability exists that the accused may have been acting under legal provocation, the defence of

provocation is proved , and the appellant would have been entitled to be acquitted of the offence of murder but convicted of the offence of manslaughter. The failure to so direct the jury is a non-direction which deprived the appellant of the chance to be acquitted of the charge of murder on the ground of provocation.

In support of ground 2, Miss Martin argued that because the defence was also one of alibi, the issue of visual identification arose requiring a ***Turnbull*** direction to the jury of the learned trial judge.

The words allegedly used by the appellant as his reason for the killing to support the issue of provocation in his favour, are inconsistent with a defence of alibi, which implies, "I was not there. It was not I." Although, the appellant told the police officer, two hours after using the said words to the other prosecution witnesses Green and Anderson, "Mi noh do it," the issue of identification did not arise on the prosecution's case.

Giving evidence, in his defence, the appellant said that he was taken to his section, to his cell and "locked down" and while he was there -

> "... Warders came on the section and start to beat me ... accused me say I stab an inmate ... say a long time mi fi dead ... after they beat me they brought me to the Overseer's office."

That evidence disclosed that the appellant was taken by warders directly from his cell to the overseer's office, supporting a denial of involvement in the killing and the defence of alibi. Such evidence left no room for any act of the appellant

being seen running in the open yard albeit with a knife, towards his cell block, and being chased by the prosecution witness Warder Cameron, as the latter stated in evidence.

The defence witness Gervain Crossman stated in evidence, in cross-examination that he saw the appellant while being chased and beaten by about "25 warders", run from the section where his cell is located, through a gate and "... go round to the (overseer's) office." This evidence contradicts the account given by the appellant, in respect of a running and chase, and supports the evidence of the prosecution witness Cameron, in that respect.

It is the duty of a trial judge to leave for the consideration of the jury every issue which fairly arises on the evidence, even though the defence is not relying on it: (***R. v. Mair*** (1995) 48 WIR 262; ***R. v. Stanley McKenzie*** (unreported) SCCA No. 62/91 delivered 11th March 1992).

In the instant case, at the urging of counsel for the Crown, the learned trial judge directed the jury on the issue of identification. The transcript, at page 324, reads:

> "Mr. Brown: M'Lord, I wondered if anything on identification should be said, in the context of the case if anything on identification should be said."

The learned trial judge as a consequence at page 325 said:

> "Now, I am to tell you, Mr. Foreman and your members, remember I said one of the very vital areas of the case is whether in fact this accused man was the person who inflicted the injuries on Watson as he lay on the ground. Identification is always an important part in most cases. What you have to

> remember is that persons, even when they know a person they can make mistakes, and a lot of mistakes have come about as a result of people who are honestly thinking, 'well, yes, this is the man who I saw doing it' and they go and they swear and they say, 'yes, this is the man who did it' and, in fact, it has turned out that people are mistaken in those circumstances. But what is the evidence in this case? The evidence in this case is that 'I never lost sight of the man from the time, the duration of the incident. From the time of the backing off and the fending to the time of the handing over I never lost sight of him'."

We were of the view that the issue of visual identification did not "fairly arise" on the evidence in the case. In that respect the learned trial judge was more than generous to the defence, in giving directions to the jury on the issue of visual identification and its dangers. In any event, the directions were adequate in all the circumstances. Ground 2 therefore fails.

At the time that the appellant committed the offence, he was an inmate in the institution, serving a sentence for a conviction of murder recorded against him four years previously.

For the above reasons, we allowed the appeal, and imposed the sentence, as previously stated.