JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 134/82

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

REGINA

VS.

DELROY VASSELL

Mr. Berthan Macaulay, Q.C. and Mr. Bert Samuels for the appellant.

Mr. F. A. Smith, Deputy Director of Public Prosecutions and Mr. Delroy Saddler for the Crown.

February 2 & 3; and November 14, 1984

KERR, J.A.:

This was an application for leave to appeal from a conviction in St. Thomas Circuit Court before Parnell, J. and a jury in October 1982 for the murder of one Hermine Morris.

The hearing of the application was treated as the hearing of the appeal, the appeal was dismissed and the conviction and sentence of death affirmed.

We now set out herein the reasons for our decision.

The appellant and the deceased lived together for many years as man and wife and were so living at Yallahs in St. Thomas up to November 1981, when, apparently their course of love no longer running smoothly, she went to live in the home of her brother Everton Morris at Bath, St. Thomas. The appellant and deceased had three children, the eldest being Hyacinth Vassell, nearing her fourteenth birthday when her mother was killed. Shortly after going to Bath, Hyacinth and a sister joined her mother, the deceased, and the appellant on occasions visited them there.

Eye-witness evidence for the prosecution was provided by Ivy Grant, the common-law wife of Everton Morris, and by Hyacinth Vassell. At about 1:00 a.m. on January 1, 1982, the deceased, her two daughters, Ivy Grant and her two children were returning from "Watch-night" Service along the path or road leading to their home. On reaching a bend they came upon the appellant standing in the road. The deceased was in front, then the four children and Ivy Grant in the rear carrying in her hand a lighted lamp. The appellant called out and as the deceased was about to pass he held her and according to Grant she saw his hand going up and down as he stabbed the deceased. There was the smell of blood and the cry of the children. She went up and tried to rescue the deceased. The lamp went out. This was due, according to Vassell, to Grant hitting the appellant with it. In the struggle both women fell. Grant got up and she and the children ran towards the house. When going she saw the deceased lying on the ground and the appellant over her still stabbing her as she lay prostrate. Grant returned with a lamp to find the deceased's dead body lying where she fell and the appellant gone. She received cuts to her hand when she intervened. Both witnesses emphatically denied the suggestion that they were not present. Hyacinth Vassell in cross-examination said she did not like her father because he had killed her mother. Both witnesses denied the suggestion that there had been any quarrel or fuss between Morris and appellant on or about December 29 when he visited there. They neither knew nor heard of any talk about money being owed by Morris to the appellant. According to Grant all visits made by appellant were peaceful. On one occasion, he brought a pair of ballet shoes for his daughter. She had not seen Morris when she ran up to the house for the lamp. She had seen him when she was going to Church, working at the Coney Island where he was in charge. She and the deceased were good friends as children but she had not seen her for about twenty years before she came to

live at her home. She denied that the injury to her right hand had been caused earlier by a fall. The cut to her hand was bleeding when she went to the house for the lamp.

Dr. Mariappa Ramu, who performed the post-mortem in evidence enumerated and described twelve serious incised wounds on the body of the deceased all consistent with infliction with a knife, of blade about five inches long: - Two were on the left arm and two to the right arm, one over the left temporal region of the head, a stab wound four inches deep to the right side of the neck, cutting through the muscles and brachial blood vessels and entering the chest cavity, a stab wound to the right side of the chest penetrating through the second intercostal space and through the lung, a stab wound to the pit of the stomach cutting through the diaphragm and liver, an incised wound to the right side of the back one and a half inches deep, an incised V-shaped stab wound over the right side of the back of the shoulder and an incised wound to the back of the head.

Death was due to shock and haemorrhage from multiple stab wounds to chest and neck. The wounds to the back could have been inflicted while deceased was lying down.

Everett Morris in evidence said that deceased was his sister. He had not seen her for about fifteen years until she came to live at his home in November. He last saw her alive at about 7 - 8 o'clock on the night of December 31 at his Coney Island at Ginger Hill. She was then with his common-law wife Ivy Grant and the children going to Church. He denied the suggestions put in cross-examination (i) that he knew of the deceased owing money to the appellant, (ii) that he had told the appellant when he visited the children that he would not be getting them back, (iii) that he flung a stone at him the Tuesday before, (iv) that there was any fight between himself and the appellant that night and that it was while he was hitting him with a stick and the deceased with her shoes that the appellant

used a knife to defend himself. That night he was running the Coney Island at Ginger Hill. He never got any cut at any time from the appellant.

Detective Vaughn Edmonson gave evidence to the effect that acting on information at about 10:15 a.m. on Friday, January 8, he went to Red Hills in St. Thomas when he saw a crowd of about fifty persons holding the appellant who was crying and who complained "dem beating me up". He took him to Morant Bay Police Station where he was detained.

The witness, Detective Mark Clarke of Bath Police Station said he visited the scene about 10:00 a.m. and saw the dead body of the deceased lying face downwards on the roadway with stab wounds to the head and body. He also saw Ivy Grant - she had a wound to her wrist and it was still bleeding. On January 9, when he arrested the appellant at the Morant Bay Lock-up for the murder of Hermine Morris and the wounding of Ivy Grant, he cautioned the appellant who said, "I am responsible for stabbing Hermine but not responsible for Miss Grant."

The appellant gave evidence on oath. He was, said he, a farmer of Yallahs in St. Thomas where he and the deceased had lived together for over fourteen years and had three children. Deceased gave him a lot of problems. When he spoke to her about her rum-drinking she would curse him. Some time in 1981 at her request he had lent Morris $500.00 and he has not repaid the loan. It was because of this that she left home in November to live with her brother. He had to report Hyacinth the eldest child to the Headmaster for not attending school when she was sent. He gave her a beating and she had left his home to live with a friend and was there when the deceased left in November. However, he subsequently took the two older children, Hyacinth and Elaine to their mother at Bath. He had gone to Bath on December 29. There when he asked Morris about the money, Morris said he was trying

to get it to give him "early." Then they had a fuss over his buying clothes for the children and Morris pushed him to the ground and refused to allow his children to leave with him. He left and made a report to the Sergeant at Bath Police Station. He returned on December 31 with shoes for his daughter. Morris attacked him with a stick and hit him in his head. He fell and Morris thumped and kicked him while on the ground. The deceased then came along with a piece of wood which Morris took from her and hit him with it. He held on to the stick and as they wrestled the deceased took her shoe and started to hit him. While he was being beaten he drew the deceased by her skirt to him and he used his little knife which he had for budding plants and stabbed her with it. Morris left for his machete and he hid in the bushes until Morris went on the road towards the Coney Island. Neither Ivy Grant nor the children were present. He could not recall how many stabs he made at the deceased. He denied that there was a crowd the day the police detained him or that he complained of being beaten. All the injuries he had were inflicted on December 31, by deceased and her brother. He went to the doctor on January 9.

In cross-examination he said the incident occurred about 8:30 - 9:00 p.m. He denied making any statement on arrest. It was in March he heard that deceased used to visit another man when he was at his field. He had come from work about 2 p.m. and made enquiries for her and he went checking but did not find her. He met her on the road and when they got home he asked about what he had heard but she denied it.

Marcus Walker of Yallahs gave evidence as to appellant's good character. He knew him for about four years as a "good behaviour man". He had passed appellant's home and heard fussing between appellant and deceased about deceased keeping another man.

Dr. Carl Frazer attached to the General Penitentiary in evidence said he examined the appellant on 28th May, 1982 (almost five months after) and found that he had tenderness of the scalp and had profuse expistaxis. He had tenderness over the lower chest and abdomen, the right scrotum, lower shoulder and right knee and had a diagnostic impression of a factured rib cage. He was limping. The injuries could have been caused by blunt instrument such as a stick. He would not be able to say when appellant received the injuries he saw. The injuries he described as moderate to severe. It was not impossible to find the symptoms he described two months after injury inflicted.

Of the many grounds argued we propose to deal only with those which merited careful consideration.

The first ground argued by Mr. Macaulay reads:

> "The Learned Trial Judge dealt with self Defence in such a way that could have led the Jury to believe that the test to determine whether or not there was self Defence was whether excessive force had been used."

He submitted that the learned trial judge in his directions on self-defence obviously had in mind the Privy Council's case of Palmer v. The Queen (1971) A.C. 814 - but that he completely misconstrued what that case decided and that the directions led the jury to believe that if the retaliation was of a nature they considered excessive then self-defence fails.

The learned trial judge after reviewing the evidence for the defence had directed the jury thus, (p. 239):

> "A man is attacked and his life or limb is put in serious danger because of this attack. You have the right to take reasonable steps to prevent yourself from an attack that may be likely to kill you or to cause serious injury to yourself. One of the first laws of nature is what is called self-preservation.
>
> Now, in looking at self-defence, you have to take into account all the relevant circumstances. First of all, it is the prosecution that will have to displace or disprove that the man was not defending himself. It is not for the accused to prove what he is alleging or what he is saying. The prosecution

> "must disprove it. Secondly, if you are left in a state of reasonable doubt whether a man charged with murder, as in this case, was defending himself or not, then, the prosecution would have failed to prove the charge and you would have to acquit him.
>
> Now, we have in Jamaica, at any rate, recently from the Privy Council in England, a ruling to the effect that where a man is charged with murder and he says that he was defending himself, the jury are entitled to look at what he did and see whether excessive force, excessive retaliation, had been used because if that is done it will destroy what he is saying, that he was defending himself. A man in defending himself just wants to use sufficient force and no more to get himself out of the danger that he apprehends."

And after a brief summary of the relevant evidence continued (pp. 240-1):

> "Now, the effect of self defence is that if you accept it you have to find him not guilty of either murder or manslaughter.
>
> If you are left in a state of reasonable doubt whether he was defending himself you have to find him not guilty, bearing in mind what I told you earlier on that under the law you have to watch and see how the retaliation was made."

Now the passage in Palmer's case to which we were referred reads, (pp. 831-2):

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or

> "punishment or
> /by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken," - per Lord Morris of Borth-y-Gest.

In that judgment the principle stated is to the effect that in defending oneself from an actual or imminent attack one was entitled to do what was reasonably necessary. However, the necessity of the moment may be such that in the emergency one should not be expected to "weigh to a nicety the exact measure of the necessary defensive action."

The particular facts of the case and especially the evidence of Dr. Ramu portray a ferocious attack by a man in unbridled passion. On the basis of the appellant's evidence the trial judge carefully left the issue of self-defence to the jury and although he did not use the ipsissima verba of Lord Morris of Borth-y-Gest, we see no material or significant difference between the directions given by him and the "conception" of "self-defence" as lucidly expounded in the passage quoted above.

Secondly, it was contended that the learned trial judge erred in his directions on provocation first that:

> ".... by directing the Jury that the first test in determining the question of provocation was whether or not a reasonable man would have lost his self control, instead of directing the Jury that if they were satisfied that a reasonable man who had lost his self control would have reacted in the manner in which the Applicant did."

In leaving the issue of provocation to the jury, Parnell, J. inter alia said, (p. 241):

> "You may think, Mr. Foreman and members of the jury, that he was not defending himself at all, but, however, sufficient provocation had been given to him. Now a human being is supposed to be frail, and the law takes that into account, so that where a man is charged with murder and it was as a result, what he did was as a result of a sudden loss of self control resulting from acts done to him by the deceased or by somebody else acting in concert with the deceased at the time or both acting together, and if it would have caused a reasonable man to lose his self control, reasonable Jamaican man, not because he is born in St. Thomas and live in St. Thomas, a reasonable Jamaican man, and that was in fact which caused him to lose his self control and do what he did - what did he do - deliver twelve wounds, if you take that view that a reasonable man would have lost his self control, that is why he gave her twelve wounds, five stab wounds, then the proper verdict would be in those circumstances, not guilty of murder but guilty of manslaughter; and here again, it would be the Prosecution that will have to disprove that he was not provoked at all."

Mr. Macaulay sought support for his contention in Phillips v. The Queen (1968) 11 J.L.R. 70.

In that case Lord Diplock said at p. 73:

> "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?"
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> In Holmes v. Public Prosecutions Director, the case which finally decided that even a sudden confession of adultery could not amount to provocation at common law, it was laid down that although the second question was also one for the jury it was nevertheless the function of the judge to make a preliminary ruling as to whether or not the provocation was such as could provoke a reasonable man to react to it in the way in which the defendant did. It was this decision, not that in Mancini v. Public Prosecutions Director which was reversed by the English legislation of 1957 and the Jamaican legislation of 1958.
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> In their Lordships' view s. 5C of Law No. 43 of 1958, in referring to the question to be left to be determined by the jury as being "whether the provocation was enough to make a reasonable man do

> "as he [sc. the person charged] did" explicitly recognises that what the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did."

And later on made the following observation at p. 74:

> "Since the passing of the legislation it may be prudent to avoid the use of the precise words of Viscount Simon's in Mancini v. Public Prosecutions Director "the mode of resentment must bear a reasonable relationship to the provocation" unless they are used in a context which makes it clear to the jury that this is not a rule of law which they are bound to follow, but merely a consideration which may or may not commend itself to them. But their Lordships would repeat it is the effect of the summing-up as a whole that matters and not any stated verbal formula used in the course of it."

The learned trial judge prudently avoided the Mancini formula. Despite the severity of the injuries he left the issue for the untrammelled consideration of the jury and in a manner that adverted the jury to the "two-fold test" for provocation, the subjective and factual question in relation to the accused as well as the objective question - "Would a reasonable man have reacted to the provocation as the accused did?"

Secondly, that the learned trial judge -

> "..... failed to direct the Jury that even if the Applicant had an intent to cause serious bodily harm or even to kill that fact did not destroy the "defence" of provocation. This omission might have had the Jury to believe that once they were satisfied of an intent to kill, murder was proven."

He sought support for this ground of appeal in R. v. Bunting (1965) 9 J.L.R. 95 and R. v. Sydney Campbell (1973) 12 J.L.R. 1160.

In R.v. Sydney Campbell at p. 1162 this Court approved of the proposition in R. v. Clifford Humphrey (1951-55) 6 J.L.R. 27

that the issue of provocation may arise where a person does intend to kill or to inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation and quoted with evident approval the following passage from R. v. Bunting (1964-5) 8 W.I.R. at p. 278:

> "In a case where provocation arises as a defence to a charge of murder it is proper and indeed necessary for the trial judge to tell the jury that murder is not established unless an intent to kill or to cause grievous bodily harm is proved, but the converse proposition, namely, that the accused is guilty of murder if such an intention is proved, is not necessarily correct. For where the intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation the accused is guilty not of murder but of manslaughter."

Fox, J.A. who delivered the judgment of the Court then went on to say - (12 J.L.R. pp. 1162-3):

> "Nowhere in his summing up did the learned trial judge explain these important subtleties in the law of provocation. On the evidence, accidental killing, self-defence and provocation arose for consideration. These issues were properly left with the jury. We cannot say that if the law of provocation had been fully explained the jury would inevitably have brought in a verdict of guilty of murder. On this ground alone, therefore, the conviction for murder must be quashed."

Unfortunately the judgment does not include the directions of which complaint was made so that a helpful comparison could be made with the directions in the instant case. We do not read in Sydney Campbell's case nor in any of the judgments referred to herein as imposing a duty on the judge to include in his directions on provocation reference to the mens rea in murder. In our view these cases emphasize a self-evident truth - namely, that it is only after the inculpatory essential elements in the offence of murder, (including the specific intent) have been proved that the exculpatory issue of provocation arises for consideration of the jury because provocation is a defence

only to murder. More positively the cases indicate that on a charge of murder the issue of provocation arises for consideration of the jury where the intention to kill arises from a sudden loss of self-control due to provocation and the judge in such a case is obliged to leave that issue to the jury.

Phillips v. The Queen was not referred to in R. v. Sydney Campbell. In our view, where the Mancini formula is avoided, it is wholly unnecessary to give such directions as Mr. Macaulay urged as requisite. Accordingly the directions of the learned trial judge, on provocation were fair, clear and favourable to the defence.

There were other grounds critical of the judge's comments on the evidence. The learned trial judge in advising them of the respective functions of judge and jury said, (p. 209):

> "I as judge am also entitled, although some people think that it only exists in theory - the judge is entitled to express his views but some think the judge should not exercise that right. If I do throughout the summing-up exercise the right of commenting on the facts and expressing my view you are under no duty to accept any view put forward either by counsel or myself unless you agree with it."

We have considered these comments; it is enough to say that they were within the competence of the trial judge and could not in any way affect the jury's consideration of the important issues which arose for their determination.

The following ground of appeal was argued by Mr. Samuels:

> Ground 6:
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> "The Learned Trial Judge's refusal to allow learned counsel for the defence to cross examine on a matter which was vital to the defence prejudiced the defence of the Applicant and its presentation to the Jury."

This ground referred to the trial judge declining after enquiry to allow counsel for the defence to put a suggestion to the witness Detective Mark Clarke. It happened in this way. The witness had given evidence of the appellant being

handed over by a mob armed with sticks and machetes and of the apparently distressed condition of the appellant and his complaint that the people were beating him. He was cross-examined by defence attorney and re-examined by the attorney for the crown. The judge then asked him a few questions in which he again spoke of the hostile crowd of about fifty people. It was then attorney sought permission to put for the first time the formal suggestion that there was no hostile crowd. Counsel could give no reason for omitting it from cross-examination but said he desired to make a formal suggestion "which would be only as to the question the judge had asked .... so I only ask that it be noted." Three times the witness had spoken of a crowd and the defence attorney's cross-examination challenged the witness' statement that the appellant complained of any injury. Therefore the suggestion was clearly intended to be a formal challenge. This ground of appeal seeks to make "a mountain out of this mole hill" and there is no real merit in it.

For these reasons the appeal was dismissed and the conviction and sentence affirmed.