JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 119/91

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. v. DERRON WILLIAMS

Delroy Chuck with Mrs. Valerie Neita-Wilson for Appellant

Miss Paula Llewellyn for Crown

8th June & 21st July, 1992

FORTE, J.A.:

On the 8th June, 1992 having heard the submissions of counsel, we treated the application for leave to appeal as the hearing of the appeal, quashed the appellant's conviction for the murder of Karen Masters committed on the 4th February, 1991, set aside the sentence, entered a verdict of manslaughter, and ordered that he serve a sentence of twelve years imprisonment at hard labour, to commence forthwith.

The appellant had been convicted for murder, in the St. Catherine Circuit Court before Courtenay Orr, J., sitting with a jury. The facts hereunder summarized were very simple.

The deceased and the appellant had at one time enjoyed a romantic and intimate relationship which produced a baby, who at the time of the incident was only seven months old. On the night of the incident, it appears that the deceased had left the baby unattended and had gone off to a dance with friends. The appellant on discovering this, waited by the road-side for the return of the deceased. The prosecution contended that as she returned in the company of friends at about 12.30 in the

morning, the appellant jumped from behind a stall on the roadside, held unto her, took an unopened ratchet knife from his trousers pocket and began "pulling" her away. Her friend Carlene Wright in whose company she was, and who was the main witness for the prosecution, then ran to summon the mother of the deceased, and returned to the scene to see the appellant still holding and pulling the deceased, but with the ratchet knife now opened in his hand. The witness started, in her own words, "to make up noise" entreating the appellant to release the girl. The only response he gave was to say, "Mi a talk to mi baby mother, me donc want anybody hear what mi a seh." The witness, nevertheless, continued with her pleas, making sufficient noise to attract the attention of other residents in the area, causing them to come unto the street. They too pleaded with the appellant to release the girl, but to no avail. Instead, according to the witness Wright, he "take the knife and push in Karen belly, and then him shub Karen give the crowd" and say, "See her deh oonu can have her." The deceased then fell and was heard to say "Lord oonu see 'Lara' stab mi." By this time the appellant had run away. The deceased was thereafter taken to the hospital where she succumbed to her injury. Det. Sgt. Neville Grant, arrested the appellant on the 5th March, 1991, on a warrant for the murder of Karen Masters, and on being cautioned the appellant is alleged to have said "She cut me and me stab her."

In his defence, the appellant gave sworn testimony in which he maintained, that having discovered that the deceased had gone off to a dance leaving their baby, he waited for her to return. When he saw her returning in a group of friends, she turned in the direction of "her boyfriend house". Consequently, he got up, went to her and said "Yeh gal, give me the baby for yuh nah take care of her." She replied saying if he wanted the baby he could go to her yard and take her. He

attempted to hold her, but she took out a board handle kitchen knife from a pocket of her dress, and using it, cut him on his neck and ran off. He ran after her and held her, and tried to take the knife from her, but in that struggle, they both fell, he on top of her. He got up looking for the knife, when he heard her say "Yuh see how you mek the knife stab mi." At that time, he saw the mother of the deceased coming with a bottle in which he believed there was acid, and being fearful, he ran away.

He denied that he had stabbed the deceased and that he had waited on her, in order to harm her. He maintained that he was waiting, so that he could take away his daughter.

Before us, Mr. Chuck argued several grounds of appeal, only two of which required serious consideration. They are as follows:

> "1. That the Learned Trial Judge failed to adequately direct the Jury on the law relating to Self-Defence: pp 50, 54.
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> In support thereof, inter alia:
>
> (i) There was strong and reasonable grounds for the accused to believe that the crowd was hostile and an attack was imminent.
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> (ii) The Learned Trial Judge related the cut to the throat of the accused by the deceased to the defence of Accident, and failed to relate same to that of Self-Defence: p. 54.
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> 2. That the Learned Trial Judge erred in law in withdrawing the issue of provocation from the jury, when on the evidence of both the Crown and the Defence, there was material for the jury's consideration.
>
> In support thereof, inter alia:
>
> (i) There was evidence from the Crown witness that a crowd was advancing on the accused: pp 14, 20, 21, 22, 52.

" (ii) That it was a reasonable inference that the crowd was hostile to the accused and that there was an impending attack: p. 52.

(iii) That it is the evidence of the Crown that the accused wanted to talk to the deceased in private about 'the baby', and was being prevented from doing so by the witness and the crowd: pp. 20-22.

(iv) That on the Defence the deceased was armed with a knife which she used to cut the accused at his neck: pp. 32,33.

(v) That on the Defence there is evidence that could amount to provocation in that:

(a) The accused did not like the fact that the deceased had left the baby and gone to dance: pp. 29, 30, 41, 42.

(b) She was going to sleep with her boyfriend pp. 31, 42.

(c) She told him to take the baby, knowing full well he could not go for the child because of the relationship between the deceased's mother and himself: pp. 32, 43, 36, 37, 38. "

GROUND 1

There was no allegation in the defence that the appellant at any time believed that the residents would have attacked him nor was there any evidence to support that they were about to do so.

In spite of the wording of ground 1, Mr. Chuck confined his argument, to a complaint that the directions of the learned trial judge on the law of self-defence was inadequate, as he failed to direct the jury that if the appellant, had a honest belief that he was being attacked, then he was justified in defending himself. This of course is the test laid down in

Solomon Beckford v. R. [1987] 3 All E.R. 425.

The contention of Mr. Chuck is correct. The learned trial judge directed the jury thus:

> "... Self-defence is lawful when it is necessary to use force to resist or defend yourself against an attack or threatened attack and when the amount of force used is reasonable. What is reasonable force depends on all the facts including the nature of the attack, whether or not a weapon is used and if it is, how and what kind of weapon it is and whether or not the attacker is on his own. But you must recognize that a person defending himself cannot be expected to weigh precisely the amount, the exact amount of defensive action which is necessary. If therefore you were to conclude that the defendant did no more than he instinctively thought that is necessary, you should regard that as very strong, that the amount of force was reasonable and necessary, because it is for the prosecution to prove the defendant's guilt, it is for them to satisfy you that you feel sure that the defendant was not acting in self-defence."

However the question is whether the directions omitted by the learned trial judge was necessary in the circumstances of this case. The appellant in his sworn testimony at no time alleged that there was any mistake of fact as to whether the deceased attacked him with a knife. On the contrary he maintained that the attack in fact occurred, and indicated in support of this that he had received a cut to his throat. In relation to the words attributed to him by the investigating officer i.e. "She cut me and mi stab her", if believed by the jury, these words clearly indicate a real attack rather than a belief that the appellant was being attacked. In both circumstances therefore, either from the Crown's case or that of the appellant, the evidence does not leave room for a finding that the appellant by a mistake of fact, honestly believed that the deceased was attacking him. That being so, though it may have been desirable so to do, there was no necessity for the learned trial judge, to give the directions, which

Mr. Chuck contends were mandatory. See **R. v. Thomas** S.C.C.A. 105/86 (unreported) this court Rowe, P., stated at page 6:

> "It would be putting an impossible strain upon a trial judge to require him in all circumstances of self-defence to say: 'Well although the accused has described the attack made upon him in graphic detail, if you reject that account, you must nevertheless consider whether he honestly believed that those circumstances he so graphically described existed, even if he was mistaken'."

For these reasons, we find this ground fails.

GROUND 2

The appellant contends that the learned trial judge fell into error, when he withdrew the issue of provocation from the consideration of the jury. That he did so, is indisputable, for he said to the jury:

> "Mr. Foreman and members of the jury, having looked at this evidence I do not see here anything that could amount to provocation, so I will tell you nothing more about it ..."

Mr. Chuck sought to point out several circumstances which he submitted were provocative acts and which consequently required the jury to determine the issue of provocation. Miss Llewellyn for the Crown readily conceded the validity of this contention, and in our opinion correctly so.

Though not agreeing that all the circumstances contended for by Mr. Chuck, amount to evidence of provocation, we are of the view that there was sufficient evidence of provocation, arising on the evidence, to require the learned trial judge to leave that issue for resolution by the jury. On the Crown's case, it is alleged that the appellant upon being cautioned, maintained that he had been cut by the deceased. In his defence, he also maintained that the deceased had drawn a knife from her pocket, and had cut him on his throat. In our view, if the jury believed that the deceased had cut the appellant with a knife, and in the circumstances where he was remonstrating with her for having left

their baby inadequately protected, that would have been evidence of a provocative act, and consequently the jury would be required to consider whether the prosecution had discharged its burden of proving that the killing was unprovoked. (See **R. v. Hart** [1978] 27 W.I.R. 229; **Phillips v. R.** [1969] 2 A.C. 130). Unhappily the learned trial judge withdrew this issue from them, and consequently the appellant was deprived of a chance to be convicted for the lesser offence of manslaughter on the basis of provocation. We therefore allowed the appeal, and made the orders earlier referred to in this judgment.