IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 91/72

BEFORE: The Hon. President.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

REGINA vs. ERROL MORGAN

R. Alexander for the Crown.

Norman W. Hill, Q.C. with Peter Rickards for the Applicant.

Heard - 23rd November, 1972
17th January, 1973

FOX, J.A.:

This is an application for leave to appeal from a conviction for manslaughter and the sentence of ten years imprisonment with hard labour which was imposed. The applicant was tried in the Home Circuit Court on 9th and 10th May, 1972 before Zacca, J. and a jury for murder. The Crown's case rested upon the evidence of a single witness, Ezekiel Brown. Brown said that on 20th July, 1971, while he was standing with the deceased, Dennis Smith, at the corner of Waltham Park Road and Chisholm Avenue, the applicant came up to them, held Smith in his "shirt neck", took a kitchen knife from his back pocket, asked the deceased "why he go on like he is a bad man," and when the deceased did not answer, "pushed the knife into the deceased's belly, drew it across his belly and then pulled it out." Brown said further that after this the deceased called out for help and leaned back against the wall of a shop. The applicant ran away. The deceased was taken to the Kingston Public Hospital. Brown denied that the deceased had attacked the applicant with a knife. The deceased had nothing in his hand and had neither said nor done anything to the applicant. Medical evidence established that the deceased had received an incised wound on the left side of the abdomen three inches from the navel. This wound had penetrated the abdominal cavity and, taking an upward direction, had cut the aorta. The wound was about three and one half inches deep. It could have been caused by a knife such as the one which was subsequently given to the police by the applicant. Death was due to shock and haemorrhage resulting from the wound.

The applicant gave evidence on oath to this effect. At about ten or eleven months prior to the 20th July, he had an altercation with the deceased. On that occasion the deceased was armed with a stick and a knife and had attacked him. His cousin, Winston Richards came to his rescue. Richards cut the deceased in his head with a machete. Richards was arrested for wounding the deceased, but the case was thrown out - it was not tried. On 19th July, he and his brother were going home from work. They encountered the deceased on the Waltham Park Road. The deceased referred in an angry and aggressive manner to the incident involving Richards. The deceased "chucked" him several times, and assaulted him and his brother with a piece of broken bottle. Finally the deceased threatened him. The deceased said that "it is because he did not have a knife why he did not kill him that evening but he was going to look for a knife and the next night he would come and he was going to kill him." On the following day, the 20th July, the applicant made a report at the Hunts Bay Police Station, and spoke with Detective Sergeant Pusey. He was advised to take out a warrant for the arrest of the deceased. Later that day the applicant was at Chisholm Avenue. He saw the deceased with an open knife in his hand. The deceased came within four feet of him and stabbed at him with the knife. He believed the deceased was going to kill him. The deceased moved towards him with the knife. He did not run away because the deceased had a knife and was too near to him. He took a knife from his pocket and stabbed the deceased. He denied that he had attacked the deceased in the manner described by Brown, and said that Brown was not present when the incident occurred.

The substantial complaint on appeal was misdirection on provocation in the following passage in the summing up:-

> "Of course, in this case, Mr. Foreman and Members of the Jury, the evidence in so far as this is concerned, is that - the defence is that the knife was in the hand of the deceased, that is, that the deceased attacked the accused with a knife, and the evidence is that the accused retaliated also with a knife. Of course, Mr. Foreman and Members of the Jury, if you came to the conclusion that the accused was in fact provoked, that there was provocation in law because of the use of this knife, and this is open to you so to find, because the evidence is in so far as the defence is concerned that the knife was used and if you find in fact this knife was in fact drawn on the accused, Mr. Foreman and Members of the Jury,

this would be a sufficient act on which it would be open to you to say that there was provocation in law. But still, this is going to be a matter for you to find. You, as the sole judges of the facts will have to consider the evidence and say whether in fact it amounted to provocation, If you find there was this provocation and you find that the accused did in fact retaliate with this knife, of course, you ask yourselves whether this is a reasonable thing for the accused to have done. In other words, would a reasonable man have reacted in this way. If you are attacked with a knife, is it reasonable to also use a knife, to retaliate with a knife, that is, a knife for a knife?"

Mr. Hill submitted that the only verdicts open to the jury were

(1) guilty of murder on the Crown's case, and

(2) if the jury accepted or doubted the defence of self-defence, not guilty of any offence.

This was so, argued Mr. Hill, because there was no evidence from which a verdict of guilty of manslaughter on the ground of provocation was competent. The gravamen of the complaint was that the directions on provocation had deprived the applicant of the chance of an acquittal.

The law relevant to the complaint is clear. On the trial of a person charged with murder where the substantial defence advanced is self-defence, it is the undoubted duty of the judge in his summing up "to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter" (per Viscount Simon L.C. in Mancini v. D.P.P. [1942] A.C. 1 at 7). But, as the judgment in that case goes on to emphasise, the possibility of a verdict of manslaughter instead of murder must have arisen. Evidence must have been given before the jury "as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt whether this was, or was not, the case." (p. 8 ibid). If no evidence has been given which would raise the issue of provocation "it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or

jury went outside it" (p. 12 ibid). The questions in the appeal are whether the judge and the jury did go outside the evidence, and whether, as a result, injustice was done to the applicant. Mr. Hill contended in effect that by leaving to the jury the issue of manslaughter on the ground of provocation, the judge had confused the issue of self defence, had induced the jury to embark upon considerations which obscured that issue and had led them into the error of returning a verdict of guilty of manslaughter instead of an acquittal. Mr. Hill invited the Court to interpret the verdict of the jury as a finding in favour of the applicant on the issue of self defence.

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. 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 Tucker succinctly points out in Bullard v. The Queen [1957] A.C. 635 at 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." (S 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.

A final consideration which is decisive against Mr. Hill's submissions must be stated. The verdicts left with jury included one for an acquittal on the ground of self defence. On this issue, adequate directions on the law, and a satisfactory review of the relevant evidence ~~was~~ were made by the learned judge. There was no complaint on this score. By their verdict, the jury unmistakably rejected self defence. They must have been entirely satisfied that the circumstances which would have justified the fatal blow did not exist. They must equally have been satisfied, either as a result of mutations placed by them in their good judgment on the evidence for the prosecution or by particular doubt cast on that evidence by the evidence for the defence, that, in accordance with the direction that the guilt of the accused must be established beyond reasonable doubt, the appropriate verdict to return was that which they did in fact return. Even if it is said that the evidence for the prosecution does not admit of the qualifications stated above, and that as a consequence, the learned judge was in error in leaving the issue of manslaughter to the jury, that defect in the summing up would not have worked an injustice to the applicant, but would have procured for him an unwarranted advantage in that it permitted the jury to return a verdict in his favour which did not reflect the strength of the crown's case.

For these reasons, we are unable to agree that the directions of the learned judge deprived the applicant of the chance of an acquittal. The application is refused.