JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 25/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A
THE HON. MISS JUSTICE MORGAN, J.A
THE HON. MR. JUSTICE GORDON, J.A (AG.)

REGINA v. EUCLID MIGNOTT

Paul Ashley for Applicant

Carol Malcolm for Crown

20th May and 27th June, 1991

GORDON, J.A (AG.)

The applicant was indicted and tried in the Circuit Court Division of the Gun Court in Kingston on 15th February, 1990 for the murder of Gladstone Bailey on 2nd July, 1976. He was convicted of manslaughter and he sought leave to appeal the conviction and sentence of eight years hard labour imposed by Bingham, J. On the 20th May, 1991 we heard the application, refused leave to appeal and affirmed the conviction and sentence and ordered that the sentence should commence on 15th May, 1990. We now fulfil our promise to put our reasons in writing.

The evidence on which the prosecution relied was given by Rupert Bailey and Kenneth Francis. Both men were at Mr. Francis' home at Mount Zion in the parish of St. Andrew at about 4.00 p.m on the 2nd July, 1976 playing a game of cards when they were alerted by a loud noise coming from the main road nearby. They ran to the embankment overlooking the road and on looking down they saw the applicant and the deceased holding on to each other. The applicant demanded his release and the deceased accused him of interfering with his niece.

The applicant protested his innocence. Mr. Francis using strong language interspersed with expletives ordered them to remove from the vicinity of his home. They released each other and moved to opposite sides of the road. The witnesses saw the applicant pull a gun from his waist and he walked away down the road. Mr. Francis called a warning to the deceased who by then had set off in the direction the applicant had taken. The witnesses then heard a gunshot explosion coming from the direction the applicant had taken and on rushing to investigate they saw the applicant running away, and the deceased staggering and clutching his chest. Mr. Bailey ran off in pursuit of the applicant and Mr. Francis held the deceased but he fell to the ground at his feet. The deceased bled from what appeared to be a gunshot wound to his left chest. He died on the spot.

The witnesses had known the applicant by the name 'Popsie' for some three to six months before. He lived in the district of Mount Zion with one Levita at a Miss Dot's home. This information they obligingly supplied the police but it was not until January 1989 - 12½ years later - that the applicant was arrested and charged at Old Harbour in St. Catherine.

In his sworn testimony in defence the applicant said he was not called Popsie, he never lived in Mount Zion at any time, and he never had a girlfriend name Levita. He was never involved in a fight with Gladstone Bailey. In 1976 he said he lived in Old Harbour.

The prosecution witnesses agreed that the deceased was at all times unarmed and the learned trial judge in his summation to the jury withdrew self-defence and gave strong directions on provocation. As he developed his charge, he finally withdrew from their consideration the issue of Murder. This left Manslaughter as the only issue for their consideration.

The sole ground of appeal urged by Mr. Ashley was formulated thus:

"1. By insisting that the evidence presented by the prosecution amounted to provocation in law and subsequently withdrawing the charge of murder for their consideration, the learned trial judge erred in law, usurped the function of the jury and effectively coerced them into returning a guilty verdict."

Mr. Ashley submitted that it was the prerogative of the jury alone to find as a fact that provocation arose on the evidence on the law as outlined by the learned trial judge. The learned trial judge usurped the functions of the jury when he withdrew from their consideration the issue of murder. While he conceded this enured to the benefit of the applicant, it made a finding of a verdict of manslaughter inevitable once the jury accepted the identification evidence. This course he said deprived the applicant of a fair chance of acquittal.

The passage on which Mr. Ashley based his complaint is at page 42 of the transcript. This is what the learned trial judge said in his charge to the jury:

"But, of course, on the evidence as I say, it is the Prosecution who must negative provocation and on this evidence, in my opinion, provocation clearly arises and never been negatived. As a matter of law, I am going to exclude from your consideration, the question of murder, so when you come to the courses open to you, you will find the accused not guilty of murder, so I am just leaving to you manslaughter based on provocation, or not guilty. Either guilty of manslaughter based on provocation, or not guilty of any offence."

Mr. Ashley further submitted that these directions made the trial a nullity and the conviction should be quashed.

Miss Malcolm submitted that while it could be said that the learned trial judge usurped the functions of the jury he was entitled to give his opinion based on the evidence and he left

to the jury a verdict of guilty or not guilty of manslaughter. In this the judge was concerned with the interest of justice and the directions were highly beneficial to the applicant.

We did share Mr. Ashley's views. Viewed as a whole the summing up left the issues fairly to the jury and the directions extracted above were very favourable to the applicant. There is no doubt that there was not before the jury any evidence to suggest that the applicant was acting in self-defence. It did not arise on the prosecution's case and the applicant's denial of even knowledge of the district of Mount Zion removes entirely from the case any vestige of self-defence. There was, however, evidence of a credible narrative of events to justify a verdict of manslaughter. This narrative arose on the prosecution case and the learned trial judge dealt fairly with it at page 41, he told the jury:

> ".... at the time of the shooting you don't have any evidence that the deceased was armed in any way, but you have evidence based on the definition that I have given you, of conduct on the part of the deceased which is capable of amounting to conduct of a provocative nature, in law."

Again at page 45 he charged them:

> "....it is the prosecution who must negative provocation, but on the evidence, as I said before, there is evidence which amounts to provocation in law. It hasn't been negatived, and in the circumstances, if you accept the evidence given by the prosecution witnesses as to identification and as to the circumstances the facts and circumstances for which the prosecution is asking you to draw the inference that it was the accused who fired this fatal shot, based on that, you can find the accused guilty of manslaughter. Of course, if you don't believe the witnesses or

> "what they say leaves you in a state of reasonable doubt, you must find the accused not guilty of anything."

The jury had first to decide the issue of identification if that decision favoured the applicant it would lead to a verdict of acquittal. They decided against the applicant and this made a conviction inevitable. It was Murder or Manslaughter but the judge having withdrawn Murder from their consideration, they returned the only verdict open to them. The applicant had the benefit of very favourable directions given by the learned trial judge and they returned a verdict justifiable on the facts.