JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 114/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

REGINA

VS.

FITZROY MARSHALL

Lord Gifford, Q.C. for the Applicant

Miss Paulette Williams for the Crown

October 20, 1992

CAREY P. (AG.):

In the St. Catherine Circuit Court held on the 24th of September 1991, this applicant was convicted before Mr. Justice Courtney Orr sitting with a jury of a charge of murder. He was sentenced to death. He now applies for leave to appeal that conviction.

Having regard to the grounds of appeal which were filed and the opening of Lord Gifford, we requested learned Crown Counsel to state whether or not she could support the conviction for murder. She has candidly intimated that having regard to the circumstances of this case she was quite unable to do so. We entirely agree with the course she has adopted.

This was a rather distressing case in which the deceased, an elderly man, of some sixty summers or more, died on the 3rd of February 1990. He lived in a district called Deeside in St. Catherine with his wife, also very old, and the applicant attended on them to give them assistance. It appears from the evidence that there was some promise by the old man that, if the applicant cared for him, upon his

death, whatever was left, belonged to him. On the night of the 3rd of February 1990, a neighbour was awakened by a curious sound. He heard the deceased calling out:

> "Imagine you a beat me out of the little house."

The neighbours rallied around and came to see what occurred. In the event, they found the body of the old man by a breadfruit tree in a sitting position - he was dead.

The medical evidence showed that on external examination of the body, there was a one and a half inch contusion at the lower left lateral chest which was associated with a fracture to the underlying 10th and 11th ribs. The fractured ribs lacerated the spleen. That in turn, caused significant abdominal haemorrhage. The doctor gave his opinion as to cause of death in these terms. He said:

> "... the cause of death is due to a blunt force injury to the left chest involving the abdomen."

That was the sum total of the medical evidence. Cross-examination focussed on matters which were wholly irrelevant. For our purposes, we are quite unable from the evidence adduced, to say what was the degree of force used which resulted in the death of Mr. Samuels.

Having regard to the concession of learned counsel for the prosecution, the Court is minded to substitute a verdict of manslaughter, the learned trial judge having wholly withdrawn that from the jury. We would point out that the learned trial judge, having given proper directions on the need to prove an intention to kill or to cause him serious bodily harm, continued thus:

> "Now members of the jury, he told you, if you accept that evidence, then you would not find any difficulty in saying that whoever hit poor Mr. John Samuels must have intended to cause him at least serious bodily harm or death and that would be sufficient intention to satisfy the requirement of murder."

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There was no direct evidence of the manner in which the injury suffered by the victim was inflicted. The medical evidence merely showed blunt force. The victim could have been pushed and fallen against some object, or he could have been hit, the fact is that the degree of force used was not known. A witness spoke of hearing a sound and the victim calling out, but no attempt was made to identify that sound, as suggestive of a blow or a fall. This aspect of the medical evidence was never explored. Then it cannot be forgotten that this was a frail old man. In our judgment, the trial judge ought properly to have left for the jury's consideration the issue of intention.

The only important issue which remains is that of sentence. It always occasions difficulty. The circumstances of this killing are not easy to apprehend. It would appear from the manner in which the case was put that there was some suggestion that the applicant would benefit if he maintained the victim and his wife and that presumedly he wished to abbreviate that time lag. Howsoever that might be, it is plain on the evidence and we agree with Lord Gifford that something occurred that night, which must have been wholly unpremeditated. Nevertheless, a life has been taken. Mr. Samuels was entitled to live out his life and to die peacefully in his bed and not violently at the hands of some impatient young man who tended to violence.

The appropriate sentence which we propose to impose is one of ten years imprisonment at hard labour. In the result, the application for leave to appeal is treated as the hearing of the appeal. The appeal is allowed, the conviction quashed and a verdict of manslaughter substituted. A sentence of nine years imprisonment at hard labour is imposed.