J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 164/65

BEFORE: The Hon. Mr. Justice Duffus, President
The Hon. Mr. Justice Waddington
The Hon. Mr. Justice Shelley (Acting)

R. vs G E O R G E S M A L L

Mr. F. Phipps and
Mr. K.A. Simmonds for the Crown

Mr. D. Thompson, Q.C. and
Mr. D.H. McFarlane for the applicant

8th March, 1966.

WADDINGTON, J.A.,

The applicant was convicted in the Circuit Court for the parish of St. Catherine on the 5th of October, 1965, of the offence of murder, and sentenced to death. From this conviction he has applied for leave to appeal.

The case for the Crown, briefly, was that on the 3rd of June, 1965, there was an exhibition of paint at a theatre at Guy's Hill in St. Catherine, to which certain persons were invited. The deceased, Hamlet Thompson, was employed at that theatre as an usher, and the applicant was one of the persons invited. The applicant took up a seat on the platform, but apparently, had brought his bicycle into the theatre and parked it in a passage which interrupted the free passage of persons into the theatre. The deceased asked whose bicycle it was, apparently received no reply, and he proceeded to remove the bicycle and place it outside. The applicant then got up and returned the bicycle to the place where he had previously parked it. He leaned it up on the steps of the platform, again blocking the passage of people going on to the platform. The deceased, thereupon again attempted to remove the bicycle, to take it outside, when the applicant jumped up, used words to the effect, 'Leave mi bicycle, is mi one buy it', using at the same time

/some indecent.....

some indecent language, and he went on to say that he could park it anywhere he wanted. At that stage, the deceased told him that he couldn't leave the bicycle there, as it was blocking the passage, and the deceased attempted to remove the bicycle again, when the applicant chucked the deceased, who staggered, and as he was trying to regain his position the applicant was seen to take something from his pocket, with which he struck the deceased on his right temple more than once, and the deceased then fell to the ground. The thing with which the applicant struck the deceased turned out to have been a screwdriver, which was admitted to be the weapon used by the applicant and which was subsequently found under the platform of the theatre.

The deceased was taken to the hospital in an unconscious condition. There he was found to be suffering from a small wound one-quarter of an inch in length, in the left temporal region, an abrasion over the right shoulderblade and an abrasion on both lips, on the left side. The deceased died six days later, on the 10th of June. Death was due to cerebral damage and cerebral haemorrhage, resulting from the stab wound to the left temple.

The case for the defence was, briefly, according to a statement which the applicant made from the dock, that on the day in question he went to the theatre. He said that he had left his cycle against the balcony and was sitting on a chair, and then he saw one McNeish, who was a witness for the Crown, come in, and after that Vernon Waite, also a witness for the Crown, came in, and last of all he said the deceased came in. The applicant said that the deceased did not ask whose cycle it was, but simply grabbed the cycle and spun it around, and he, the applicant, held on to the cycle and said: 'Don't mash it up man', whereupon the deceased chucked him. The applicant said that he let go the cycle and gave it up to the deceased, and the deceased put the cycle outside. He, the applicant, was then going outside to take the cycle to go

/about his....

about his business, when the deceased thumped him in his chest. At that time, he said, McNeish grabbed at him and punched him twice in his face. He fell down and when he got up the deceased grabbed him, grabbed his wristlet off his hand and then Waite took a chair and hit him over his back. He said that they were fighting him and he was trying his best to get out of their reach, but they were all around him and he was in the middle and could not get out. They pitched him backwards, and in order to scare away the men from him, he drew the screwdriver from his pocket and wielded it, demonstrating how he wielded it, and said: 'You going kill me, man', and eventually, accidentally, the screwdriver caught the deceased. He said he did not mean to kill the deceased; they were more than him, and he did not purposely kill the deceased.

The applicant called two witnesses, who, in examination-in-chief, substantially supported the statement made by the applicant from the dock.

On this evidence, the issues of self-defence and provocation quite clearly arose. The learned trial judge directed the jury on the Law of self-defence, and no objection has been taken by Counsel on behalf of the applicant to his directions on that issue. It is, however, on the learned trial judge's directions as to the issue of provocation that substantial objection has been taken.

Two grounds of appeal have been urged on behalf of the applicant. Firstly, it is urged that the learned trial judge failed to direct the jury, in putting the applicant's case for self-defence, that if the prisoner did enter into a contest with an unarmed man without intention to use a weapon, but did use it in the heat of passion, in consequence of an attack on him, that would reduce the offence to one of manslaughter. Mr. McFarlane argued this ground of appeal, and, if I understand his arguments correctly, his main complaint is that the learned

/trial judge...

trial judge did not deal adequately with the question of the intention on the part of the applicant either to kill or to cause serious bodily harm. It was his submission that even on the facts of the case as led by the prosecution, it was for the Crown to prove intent positively, and that that proof should not merely be of matters from which it would have to be assumed that the intention existed.

We have considered this submission very carefully, and it is our view that there is no merit in this ground. The learned trial judge had made it quite clear to the jury that it was for the Crown to prove affirmatively that the applicant, in inflicting the injuries on the deceased, did so either with the intention to kill, or to cause serious bodily harm. This ground of appeal, therefore, fails.

The second ground of appeal was that the full effect of provocation was not clearly outlined to the jury by the learned trial judge; that the learned trial judge in directing on provocation merely referred to provocation by the deceased and failed to direct the jury on the effect of a concerted attack by three assailants together with previous circumstances of aggression, and that he thus virtually withdrew a verdict of manslaughter from the jury.

In his directions to the jury on the Law of Provocation, the learned trial judge said this:

> " What is provocation therefore that will reduce murder to manslaughter? Provocation is some act, or series of acts, whether by words alone, or by conduct alone, or by both, by the dead man to the accused which would cause in any reasonable man and actually did cause in the accused a sudden temporary loss of self-control. Therefore you ask yourselves in this case after an analysis of the facts and the circumstances, did the dead man do anything at all to the accused, whether by words alone, or by conduct alone, or by words and conduct....

" and conduct together that would make any reasonable man lose his self-control to do what he did? In other words, was the dead man acting towards him, whether by words that made him angry, or by conduct which would make him lose his self-control and stab him with the screwdriver?

You see, therefore, you must consider what the dead man was doing to him, if he did anything at all, and after that you must consider if that is what the dead man was doing to him, whether a reasonable man should have lost, or may have lost, his self-control by reason of that. And then you ask yourselves, therefore, did this accused by reason of what the dead man was doing to him lose his self-control and did what it is alleged he did?

In those circumstances if he was provoked in this manner, and he killed the deceased by reason of having lost his self-control by reason of the provocation the dead man was using upon him, then, of course the crime of murder is reduced to manslaughter."

Then he went on to say, it would be necessary for the jury to review the facts and circumstances of the case, and he referred to the statement made by the accused from the dock and continued:

" On the other hand the accused by his statement from the dock, and his two witnesses are alleging that the deceased man and other persons so attacked him that you as a jury should either believe his case - his witnesses, or that you should be in reasonable doubt about it and say either that he was acting in self-defence and therefore he killed the deceased, in which case he would not be guilty of any offence; or that the dead man was provoking him and provoking him to the extent that he lost

/his self-control.....

" his self-control, in which case even though he killed the deceased he would only be guilty of the offence of manslaughter and not murder."

Learned Counsel for the applicant has drawn the attention of the Court to thirteen instances in which the learned trial judge related the issue of provocation only to things said and done by the deceased to the applicant. No where in the summing-up did the learned trial judge tell the jury in this connection that they should also consider the question of any provocation which may have been offered to the applicant by the other two men, McNeish and Waite, who were alleged to have been attacking the applicant in concert with the deceased.

Our attention was directed to the case of Fowler v R., (1960), 2 W.I.R. 503, in which it was clearly laid down that a direction such as was given in the instant case was in effect a misdirection, as in circumstances of this nature if provocation is directed to an accused by others acting in concert with the deceased, such provocation must be taken into consideration in deciding whether or not provocation in law has been established. In that case, Hallinan, C.J., said at p.505:

" Now the appellant did not deny that he had stabbed James Brown. He as much as admitted doing so when he admitted stabbing all about him, But the fact that Spence saw the appellant stabbing Brown while Brown was in a defenceless position does not exclude the possibility that the appellant was at that very moment labouring under such previous provocation as had caused him to lose his self-control. It is a serious misdirection to tell the jury and to repeat it that if they accepted Spence as to what he saw through the window and if the old man was not provoking the appellant at that moment, then the verdict must be murder.

The appellant had given evidence of a concerted attack upon him by several people including the /deceased.....

" deceased, James Brown. The jury had to consider not merely whether the appellant received provocation at the time that Spence saw him over the deceased on the floor, but prior to that time and whether such provocation, if received, was so recent and so strong as to deprive an ordinary man of his self-control."

The learned Chief Justice then referred to the facts in the case of R. v Hall, 21 Cr. App.R.48, and continued:-

" In the present case the judge, by his directions as to what the jury must do if they accepted what Spence said he saw at the window, virtually withdrew a verdict of manslaughter from the jury in circumstances in which it should still have been open to them to find manslaughter. The appellant's evidence might still have raised a doubt in their minds whether the appellant had been subjected to a concerted attack upon him by the people in Brown's house including the deceased himself, and whether, when he fatally injured the deceased, the appellant was so affected by this provocation that he as a reasonable man would still not have regained his self-control."

The circumstances and facts of the instant case are somewhat similar to the case which I have just cited, and indeed, it is conceded by Counsel for the Crown that the learned trial judge misdirected the jury in his directions on the issue of provocation.

It has been submitted by Counsel for the Crown, however, that in spite of this misdirection this Court should apply the proviso and dismiss the appeal, the submission being that no miscarriage of justice has been caused, as no reasonable jury could have come to any other conclusion even if they had been properly directed on this issue.

Learned Counsel has referred the Court to several

/instances.....

instances of discrepancies and inconsistencies in the evidence of the witnesses for the defence, and has submitted that no reasonable jury could have accepted the evidence of those witnesses to the effect that there had been any attack on the applicant prior to the stabbing. That, however, was a matter entirely for the jury, and we cannot say exactly what they accepted or what they rejected. The jury quite obviously from their verdict rejected the defence of self-defence, but as the directions to them on self-defence made it quite clear that there were certain qualifications - certain things that were necessary for them to be satisfied with before they could find that self-defence was established, for instance, a reasonable apprehension by the applicant of threat to his life, or serious bodily harm, and that it was incumbent upon him to endeavour to avoid retaliation in self-defence, it may very well be that the jury may have felt that although there was some attack previously to the stabbing, it was not an attack of such a nature as warranted the use of the force which the applicant employed and they may very well have rejected self-defence on that basis, but still have felt that there was something in the defence that the applicant had been attacked by these three men. McNeish said that he had punched the applicant after the stabbing had taken place, but it might very well be that the jury having been told by the learned trial judge that so far as the issue of provocation was concerned they were only concerned with things said and done by the deceased to the applicant, they may have brushed aside any question of any harm or any attack by McNeish and Waite previously to the stabbing.

For these reasons, we do not think that this is a case in which we should apply the proviso. It is our view that there was a fatal misdirection on the issue of provocation which deprived the applicant of a chance of being convicted of the lesser offence of manslaughter, and in the circumstances, we shall treat the application as the appeal, and will allow the appeal by quashing the conviction and setting aside the sentence

/of death and...

of death and substituting therefor a conviction of guilty of manslaughter.

The Court has given anxious consideration to the question of the appropriate sentence to be imposed in this case, and in all the circumstances of the case considers that a sentence of ten years imprisonment at hard labour will meet the case.