

NAL

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 192 OF 1999

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)**

REGINA vs. HENRY WILLIAMS

Arthur Kitchen for the appellant

Herbert McKenzie for the Crown

October 30 and December 4, 2000

BINGHAM, J.A.:

The appellant was charged and convicted on an indictment for murder in the Circuit Court for the parish of Hanover after a hearing lasting two days. He was sentenced to imprisonment for life and ordered to serve twenty years before becoming eligible for parole.

His application for leave to appeal against his conviction and sentence having been considered by the single judge he was granted leave to appeal in respect of the conviction.

After hearing the submissions of counsel, we allowed the appeal quashed the conviction and set aside the sentence. We entered a verdict of guilty of manslaughter and imposed a sentence of twelve years at hard

labour. We ordered that the sentence should commence as from February 9, 2000. At the time of delivering our judgment, we promised to put our reasons into writing. This we now do.

The Facts -- the prosecution's case

The appellant and the deceased's father were not on good terms. On the day of the incident, February 18, 1999, the father sent the deceased and two of her brothers to a nearby bush, where he had some cows to move them. While there, the appellant came on the scene and there was an argument between the deceased, her brother and the appellant over where he had tied one of the cows. The appellant who was armed with a machete was heard to remark using an expletive that, "A long time I after your father and mi want to kill him." The two brothers ran off same time. They were then unarmed. They left and spoke to their father. The father sent them back with a bigger brother, Troy, and the deceased to catch the cow. The deceased caught the cow and while she was leading the cow with the rope in her hand the appellant used his machete to chop her in her neck almost severing it. She held unto her neck and went to lie down by the river bank where she died shortly after she received the chop.

The Appellant's Case

On the day in question, there was an argument between the younger brother of the deceased and the appellant as to where he had tied one of the cows in the bush. This brother named Kamar left and returned with his two elder brothers and his sister, the deceased. Troy said to him "he is not in any war with you." Troy then walked passed him, while the other two

brothers and the deceased stood facing him. While talking to the three of them facing him he was suddenly held from behind by Troy and a struggle developed between the two of them. While this was taking place, the deceased came upon him with a machete and chopped him in his forehead. All three brothers and the deceased were armed with machetes. He (the appellant) was also armed with a machete. During the struggle with Troy the appellant kept wielding his machete in order to ward off the deceased and the other two brothers. This action kept them away from him for a while. They then advanced on him again and the deceased was then seen to move away from the area of the struggle between Troy and himself. He was then bitten in his back and then he heard one of the brothers remark, "You chop my sister." Troy and himself then fell to the ground. At that stage they agreed to discard their machetes. They both released their hold on each other and the incident ended at that stage.

Given the prosecution's case, the killing of the deceased would have resulted from a chop to the neck with a machete held by the deceased and done with considerable force in circumstances in which the act was unprovoked and not done in self-defence, with the requisite intention to kill or cause grievous bodily harm thereby justifying the verdict of murder to which the jury came.

On the appellant's account in his unsworn statement, the act resulting in the chop to the neck of the deceased would have been done in self-defence during an armed attack made on the appellant by the deceased and

her brothers. Given the nature and extent of the force used, however, the defence of provocation also arose on the unsworn statement of the appellant.

Learned counsel for the appellant sought to challenge the conviction on three grounds. These read as follows:

- "1.** The Learned Trial Judge's directions on the burden of proof were inadequate as he failed to tell the jury specifically that there was no onus on the Appellant to prove anything. The said failure amounted to a misdirection in law, and thereby deprived the Appellant of a fair trial. (Page 130, lines 15 to 20; Page 134, lines 11 to 13; Pages 151, line 8 to Page 152, line 7; Page 153, line 11 to Page 154, line 13).
- 2.** The Learned Trial Judge's directions on self-defence were inadequate and confusing and must have operated to the prejudice of the Appellant. (Page 131, lines 21 to 25; Page 134, lines 11 to 13; Page 152, line 2 to Page 155, line 19).
- 3.** The Learned Trial Judge failed to leave the issue of Manslaughter for the consideration of the jury, on the basis of either provocation or lack of intent, as the said issue was raised in the Appellant's unsworn statement. (Page 123, line 24 to Page 126, line 3; Page 124, lines 17 & 18; Page 125, lines 13 to 19).
- 4.** The sentence was manifestly excessive in view of the antecedent history of the Appellant and all the circumstances of the case."

Having examined these grounds of complaint, we found no merit in respect of grounds 1 and 2. The directions of the learned trial judge on burden of proof and self-defence we found to be quite proper. We found that there was merit in respect of the complaint on ground 3.

An exhaustive examination of the summation by the learned judge disclosed that there was an absence of any directions to the jury in respect of provocation in law and the effect of an intention or the lack of it on the part of the appellant to kill or cause grievous bodily harm.

On the facts of the case previously outlined, it was clear that both self-defence and provocation were live issues for the consideration of the jury. Although the cardinal line of the defence put forward on behalf of the appellant was one of self-defence, it was nevertheless incumbent on the learned trial judge as the judge of the law in directing the jury to deal adequately and fairly with all issues which arose on the evidence including the appellant's defence as contained in suggestions put to the eyewitnesses for the prosecution as well as whatever material was contained in the unsworn statement of the appellant. The appellant in his unsworn statement stated that he had been chopped in the forehead by the deceased shortly before she received the fatal blow to her neck with his machete. On the medical evidence this blow which almost severed the neck would have required a severe degree of force, thereby justifying the jury's rejection of the defence of self defence advanced on behalf of the appellant.

Despite this, there remained the issues of provocation and lack of intent as material issues requiring the assistance of the learned trial judge in leaving these issues for the consideration of the jury. It is trite law that what may not justify the circumstances of the killing may well excuse it. Given the unsworn statement of the prisoner, both provocation and lack of intent to kill or cause grievous bodily harm were material issues arising thereon and the

learned trial judge was under a duty to deal properly with these issues. This he failed to do. What is significant is that at the end of his summation the learned trial judge sought the assistance of counsel in the matter. From the transcript the following dialogue followed:

"HIS LORDSHIP: Well, Mr. McKenzie, anything?

MR. MCKENZIE: I was wondering, m'Lord,
perhaps whether or not
provocation...

HIS LORDSHIP: No. Mr. Ho-Lyn?

MR. HO-LYN: No, m'Lord."

As previously mentioned, provocation remained a live issue at the end of the evidence in the case. The failure of the learned trial judge to give the jury any direction in law on what was a most material issue in the case, amounted to a misdirection based on a non-direction thereby resulting in a miscarriage of justice, thus depriving the appellant of a possible verdict of manslaughter. Having failed to leave manslaughter to the jury, based on provocation, we therefore came to the conclusion that the conviction for murder could not stand.

We, therefore, for the reasons that have been stated, came to the decision which has been set out at the commencement of this judgment.