JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 21/81

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. HOWARD MARTIN

Mr. D. Daley for the Applicant

Mr. D. McIntosh for the Crown

November 11, 1981

CAREY J.A.

This is an application for leave to appeal against a conviction for murder in respect of Howard Martin, who was tried in the Home Circuit Court before Mr. Justice Orr on the 16th and 17th of February, 1981.

This is one of those rare cases that has reached the Court of Appeal in so short a time.

The indictment against this applicant charged him for the murder of one Rupert Wisdom on the 22nd day of November, 1979. We need only outline the facts in this application because the ground of complaint was one of law. On that evening at about 7:30 the applicant, who, had been advised that one Jennifer Phillips, had used certain disparaging remarks about him, went to her home and stood by the gate. While he was there he used certain abusive words to her. The deceased who apparently, resides on the same premises came to the gate and opened it to admit Mrs. Phillips' husband and another friend. Having done so, the deceased remonstrated with the applicant telling him to move from the gate. The evidence shows that the applicant used the following words: "Mi naw talk to you bwoy - mi know Junior long time; is either him or him woman me waan fi deal with." At this point the applicant was seen to take a knife from his back pocket and plunge it into the left breast of the deceased. The medical evidence disclosed

that the blow had penetrated the deceased's heart. In the course of delivering the blow he is alleged to have used the following words: "Hold that, boy".

The applicant gave evidence on oath and the sum of his evidence was that, having been advised of the disparaging remarks by Mrs. Jennifer Phillips, he had gone to visit, presumably to gain some satisfaction in view of the remarks about him. He said that the deceased came to the gate and told him to move from the gate and he replied that he was in no argument with him. At about the same time a little girl brought what he described as a "drink bottle" to the deceased who held it in the palm of his hand, swung it and he said it "barely" hit him on his forehead. The bottle fell to the ground where it shattered among some stones. He, the applicant, then ran off - so he says - to defend himself. He found a piece of steel on the ground and turned to face the deceased, who, had followed behind him. There was a struggle to gain possession of the piece of steel, in the course of which the deceased received the injury.

Learned counsel for the applicant, Mr. Daley, has said that the summing-up was balanced and fair but he nonetheless found one ground for complaint, which is formulated in the following way:

> "The learned trial judge erred in failing to direct the jury on the issue of involuntary manslaughter, namely that if they found that the accused had stabbed the deceased without provocation and not in self-defence, but in so doing he did not have an intention to kill or seriously injure the deceased then they ought to return a verdict of not guilty of murder but guilty of manslaughter."

Now, there is no doubt that the learned trial judge did not leave the issue of "no intention to kill or cause grievous harm" to the jury. What he did leave was guilty of murder, guilty of manslaughter on the basis of provocation or not guilty on the basis of self-defence or accident. As to the possibility of a verdict of not guilty on the basis of accident, we feel that the learned trial judge was unduly favourable to the applicant, as we shall mention later.

The learned trial judge gave a correct direction, as regards intention, to the jury, and as to which no criticism has been ventured by Mr. Daley. The effect of his ground is that the learned trial judge did not leave the issue of the applicant's lack of intention to the jury and accordingly had deprived him of a chance of acquittal of murder. It is now settled that there is a clear duty on a trial judge to leave for the jury's consideration any issue that fairly arises on the facts for their consideration. In this case, if the jury accepted the Crown's case with respect to the circumstances of the killing, namely, that the applicant had pulled this knife and had plunged it into the heart of the deceased, that at the time of the act he was standing in close proximity to him and that he used the words. "Hold this, boy," - the only verdict that was open to them, it seems to us would be one of guilty of murder. No question of lack or absence of intention possibly arose in those circumstances.

The defence which was actually put forward was one of self-defence, namely, that the deceased had attacked the applicant and he was endeavouring to defend himself. We find it difficult to appreciate how accident could arise in circumstances where two men are fighting for a piece of steel and in that fight the weapon inflicts an injury on one of them, especially when the person who is injured was not the aggressor. At the very least, it would be open to the jury to consider the question of manslaughter because there would be conjunction of an unlawful and dangerous act with the absence of intention.

However that may be, in our judgment, neither on the Crown's case nor on the defence, nor on the facts as a whole did the question of lack of intent arise.

We feel we ought to emphasize, dicta in R. v. Lawrence (1981) 2 W.L.R. 524, at p. 529 of Lord Hailsham L.C. who said this:

> "It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a desquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case."

We feel these words are apt in this case. The summing up was tailored for the facts in the case. The jury were properly asked to consider in what circumstances the deceased met his death. They had to consider, therefore on the facts presented by the Crown, murder or manslaughter on the basis of provocation, and they had to consider an acquittal on the basis of the evidence of self-defence adduced by the defence. Those issues were properly, adequately and fairly left by the learned trial judge to the jury. It is no part ofthe trial judge's functions to leave to a jury remote defences or one not canvassed by the defence or arising on the facts on the off chance that his failure to do so may result in an accused being deprived of a possible chance of acquittal.

This application for leave to appeal is accordingly refused.