JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 75/83

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice White, J.A.

R. v. IVAN HARVEY

Mr. Delroy Chuck for Appellant

Miss Gloria Smith for the Crown

24th May & 20th July, 1984

ROWE J.A.

Linford Mullings died from shock and haemorrhage directly related to a stab wound two inches above the left nipple, which was three inches long, penetrating to a depth of 1½ inches in the anterior wall of the left ventricle and cutting through the whole thickness of the ventricular wall of the heart. Other injuries which the deceased received included a deep jagged lacerated wound on the right parietal region of the skull exposing the right parietal bone, a transverse lacerated wound on the mid-point of the pinna of the right ear and minor abrasions on his face, left elbow and left arm. At a trial before Gordon J., and a jury in the St. Elizabeth Circuit Court, the appellant was convicted of the murder of Linford Mullings and was sentenced to suffer death in the manner authorised by law.

Evidence was led by the prosecution that at about 5.00 p.m. on January 5, 1983 at Elderslie in St. Elizabeth, the deceased was in the act of complaining to one Bertham Waithe that the appellant had stolen his yam heads when the appellant came on the scene and on over-hearing the conversation a quarrel developed between the appellant and the deceased. In the course of the quarrel the appellant pulled a knife from his pocket. The deceased all the while had a machete in his hand and on seeing this potentially dangerous

situation, Mr. Bertram Waithe, an employee of the Elderslie Clinic, parted the two men. The deceased who was popularly known as "Annancy" in the words of Mr. Waithe "walked away", and when he had gone a few yards, the appellant who had been "standing up there" ran after "Annancy". Presumably "Annancy" turned around for Mr. Waithe said, "they were facing each other when the appellant stabbed "Annancy" with his knife so that Annancy vomited blood." The prosecution gave further evidence that the appellant then ran off into a banana-field chased by the deceased and there a fight ensued in which both the appellant and the deceased received injuries. Two relatives of the appellant were alleged to have come to his assistance during the struggle in the banana field but whatever these relatives might have done had nothing to do with the cause of death.

Ivan Harvey gave sworn evidence and called in support Dr. Roy Francis who had examined him and treated his injuries. His defence was that he and the deceased cultivated adjoining plots of land and on the morning of January 5, 1983 while he was in his tomato plot he heard the deceased accusing his brother of stealing yam heads. The appellant said that on his brother's behalf he rejected the accusation, whereupon the deceased pulled a machete from under his shirt and threatened to kill him. So ended that encounter. However, in the afternoon as the appellant was on his way to the river to bathe, he came upon his brother and the deceased, who at that time was issuing threats to kill his brother for stealing the deceased's yam heads. According to the appellant his intervention was merely to advise the deceased that he could not take such drastic action against his brother as to the appellant's knowledge his brother was not the thief. Then

followed, said the appellant, a series of events in which the deceased was the aggressor. First, the deceased threw stones at him which he managed to elude; next the deceased ran down to him, drew a machete out of his waist and "conked" him in his head with it causing a wound; then the appellant pushed away the deceased and the appellant walked away. As he did this, said the appellant, the deceased cut him in his back. At this he turned around and faced the deceased who said: "Boy you know a long time me want kill you" and suiting the action to the word, the deceased lifted his machete and chopped at the appellant. According to the appellant's version he was now up against a high bank and although he escaped the first chop, the attack was still ensuing and he now drew his knife from his pocket and when the deceased made a second chop at him, he slipped that too, and "jook" the deceased with the knife. The appellant spoke of a renewed attack by the deceased in which he received injuries to his hand and foot.

Gordon J., invited the jury to return a verdict of not guilty if on the evidence the prosecution failed to negative self-defence. In explaining the law as to self-defence, the learned trial judge clearly had in mind the decision of the Privy Council in Palmer v. Queen (1971) 12 J.L.R. 311, as he used language very similar to that of Lord Morris of Borth-Y-Gest in Palmer's case. Mr. Chuck criticised the summing-up as being too general, too ritualistic and as suffering from the defect that the jury were not told that even on the Crown's case the issue of self-defence arose as there were circumstances therein which could have led to the appellant's reasonable apprehension of danger to his life. In support of his argument Mr. Chuck said that it was significant that the deceased had a machete in his hand when the men were parted, and that although the evidence was that the deceased

walked away for some yards, the appellant could nevertheless reasonably have apprehended that the deceased was taking this line as a prelude to a further attack upon him. He referred us to the decision of this Court in R. v. Thomas Hamilton (1967) 11 W.I.R. 309 but we were unable to derive any assistance from this decision which concerned the use of excessive force in the purported defence of one-self.

Directions by a trial judge on the law as to the reasonable apprehension of danger are apposite in cases of a threatened attack as opposed to those in which a real attack is made. A passage from Owens v. H.M. Advocate 1946 S.C. (J) 119 which was approved by the Court of Criminal Appeal in R. v. Chisam (1963) 47 Cr. App. R. 130, succintly sets out the law that:

> "Self-defence is made out when it is established to the satisfaction of the jury that the (accused) believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact."

At no time was the appellant saying in the course of his defence that he feared that the deceased was retreating so as to be better able to attack and that that motivated him to make a pre-emptive strike. It would have been speculative and misleading for the learned trial judge to adopt such a line of reasoning and only the ingeniousness of Counsel could account for the criticism of the summing-up on this ground. As the summary of the facts above indicate, the appellant's defence was of a fierce machete attack upon him preceded by threats to kill, and this in answer to the Crown's case that the machete in the deceased's hand was not being used as an offensive weapon prior to the appellant drawing the knife and that at the intervention of a citizen the

men were parted and the deceased walked away. Such aggression as there was on the prosecution's case came from the appellant.

In returning a verdict of guilty of murder the jury must have rejected self-defence and as we found no fault with the directions of the learned trial judge on that issue, the appellant could in no circumstances be acquitted.

Although we did not find effectual the submissions of Mr. Chuck regarding the directions of the learned trial judge on the issue of self-defence, we were nevertheless constrained to give anxious consideration to the fact that on the evidence the issue of provocation was relevant, and whether it was adequately dealt with in the summing up.

Gordon J., had correctly directed the jury that:

> "For the provocation to arise there must be a loss of self-control by the accused man; that loss of self-control must be as a result of something said or something done by the deceased, and that such things said or done, must in your opinion be sufficient to have caused a reasonable man to lose his self-control and act as the accused man did."

The learned trial judge recognizing that he had a duty to assit the jury by indicating the pieces of evidence which gave rise to the issue of provocation, went on to give this further direction:

> "The allegation is an accusation in public of praedial larceny - stealing of yam heads."

And then he posed for them the question:

> "Is that sufficient to make a reasonable man lose his self-control and do as the accused did?"

Now, in so far as the evidence adduced by the Crown goes, the accusation of praedial larceny was the only possible provocative evidence. But the appellant had given sworn evidence of a sustained physical assault upon him accompanied by threats, and he did have injuries on his body. Could it be said that in rejecting the defence of self-defence the jury must necessarily have rejected the evidence of the appellant in every particular? Surely the learned trial judge should have had in contemplation that if the jury accepted or was unsure of any portion of the appellant's evidence as to what occurred before the fatal injury was inflicted, that evidence, although insufficient to provide a justification for the killing might amount to acts of provocation. As Counsel for the Crown so properly conceded the evidence of the appellant contained matters which truly ought to have been left to the jury as acts of provocation for their eventual consideration.

The scheme of summing-up adopted by the learned trial judge on the issue of provocation must have led the jury to believe that notwithstanding the evidence of the appellant the only material from which they could obtain acts of provocation was the evidence of the prosecution. This was an error. We cannot properly say that if the jury had been adequately directed on the acts of provocation culled from the totality of the evidence that they would inevitably have rejected the defence of provocation.

For these reasons we quashed the conviction of murder and substituted a verdict of manslaughter for which we imposed a sentence of twelve years imprisonment at hard labour.