J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 124/75

BEFORE: The Hon. Mr. Justice Swaby
The Hon. Mr. Justice Watkins (Ag.)
The Hon. Mr. Justice Henry (Ag.)

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REGINA v. JOHN SPENCER

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Mr. G. James and Mrs. S. Lewis for the Crown.

Mr. K. St. Bernard and Mr. D. Harrison for the applicant.

July 1, 2, 5, 8, 1976

HENRY, J.A. (Ag.):

This is an application for leave to appeal against a conviction and sentence of imprisonment for 10 years imposed on the applicant for manslaughter in the Home Circuit Court on November 11, 1975. The applicant, having been refused leave to appeal by a single Judge on three grounds set out in his application, sought and obtained leave to abandon his original grounds and to argue supplementary grounds to the following effect:

1. That the learned trial judge at the conclusion of his summing up left the jury with the impression that they were obliged to convict the applicant and the only question for them to decide was whether that conviction ought to be for murder or for manslaughter.

2. That the learned trial judge failed to direct the jury adequately on the defence of accident and compounded his error by inviting the jury to speculate.

3. That the learned trial judge erred in propounding the theory that the deceased fired his gun in self defence, there being no evidence to support this theory, and even if that theory could be supported by the evidence the difficulties inherent in it were not pointed out to the jury while the defence of self defence which was properly open to the applicant was left to the jury in disparaging and unfair terms.

4. That the learned trial judge erred in leaving to the jury the issue of provocation, there being no evidence on which that issue could properly be left to them.

5. That the verdict is unreasonable and cannot be supported having regard to the evidence.

In so far as the first ground is concerned we see no merit in it. It seems clear that in the portion of the summing up against which complaint is made the learned trial judge was merely indicating to the jury that if they felt sure that the applicant was guilty of an offence but they were in doubt as to whether that offence was murder or manslaughter they ought to convict of the lesser offence of manslaughter.

In so far as the second ground is concerned the main burden of the applicant's complaint is that in dealing with the defence of accident the learned trial judge failed to remind the jury of various portions of the evidence favourable to the applicant and supporting his defence of accident. In considering this ground it is important to look at the pattern of the summing up and to bear in mind that the defence of accident was the only defence put forward by the applicant. It was therefore, as far as he was concerned, the principal issue for the jury's consideration.

The learned trial judge in his summing up first of all dealt with the usual preliminary matters. Then he proceeded to deal with the ingredients of the offence of murder and set them out in detail under six heads. Having done so he turned to the evidence in a general way relating to the premises in which the deceased was killed and the tractor which brought about his death. He then dealt with each of the six ingredients of the offence of murder and referred to evidence in respect of each. The first ingredient - the death of the deceased - was dealt with separately. The next two ingredients "That it was the accused who killed" and "That the accused killed him deliberately and that it was not by any accident that he came to his death" were dealt with together. The learned trial

judge commenced to do this with the words "Now, let us deal with that aspect of the evidence which really is the important aspect in the case." He proceeded to deal with care and great particularity with the evidence of the relevant prosecution witnesses Mr. Anderson and Miss Sullivan pointing out the discrepancies in their evidence, and the way in which the jury ought to deal with discrepancies. He reminded the jury of the unsworn statement by the accused and of its implications and finally left the issue to the jury in these terms (p. 31):

> "You will have to say, Members of the jury, what you make of it. If you believe the accused that he jumped off the tractor when he was shot at by the deceased and the tractor went on by itself and pinned the deceased, if you believe that, then he is not guilty, and you must find him not guilty. And if you are not sure whether it occurred in that way or not, you must also find him not guilty. The Prosecution must make you feel sure on the evidence that it did not occur in that way. So if you either believe the accused or you are not sure, you must acquit him because it would be an accidental killing."

It is true that on page 28 of the summing up the following words appear:

> "Miss Sullivan said the deceased's body was propped up in a semi-sitting position when she saw it after the incident and you will have to speculate. Did the deceased fall and the bucket got into his throat after? Did it get into his throat and he fell? What about the height of the bucket, was the bucket raised? If it was raised, why? All these matters you will have to consider in deciding the issue."

It seems to us that while the use of the word "speculate" may be unfortunate the learned trial judge was merely indicating to the jury questions which they could ask themselves in deciding this particular issue. He had earlier indicated other questions at pages 10, 11, 16 and 22 for their consideration. This he was entitled to do. The defence of accident in our opinion was adequately and fairly left to the jury. In our view this ground of appeal also fails.

In considering the third ground it is necessary to consider the evidence disclosed by the summing up of the learned trial judge. From that evidence it appears that the applicant had been employed by the deceased as a tractor driver. On the afternoon of the incident the tractor was parked in front of the verandah at a distance of about 12 - 14 feet. (The distance from the witness box to the entrance door of Court I). The deceased wished to have the tractor parked elsewhere and in consequence of this there took place what is variously referred to by the witnesses as a conversation, an argument and a quarrel lasting according to the witness Anderson for some 15 minutes. It appears that the deceased declined to give the applicant his wages until the order of the deceased as to parking the tractor was carried out.

According to Miss Sullivan the applicant attempted to snatch his pay envelope from the deceased. Neither Anderson nor the applicant mentions this. It is not in dispute however that the applicant went to the tractor and started to drive it in the direction of the verandah on which the deceased was standing. According to the applicant and Anderson it was necessary to do so in order to park the tractor at the position requested by the deceased. Mr. Anderson however after the tractor moved off ran and fell from the verandah and he heard the sound of gun shots after he fell. Miss Sullivan also ran from the window where she was standing and according to her she ran when the tractor hit a column of the building and it was after she ran that she heard an explosion. According to the applicant when he started to move the tractor the deceased fired a gun at him, he jumped off the tractor and ran leaving the tractor. In any event the tractor came to rest on the verandah, killing the deceased. Having regard to the distance of 12 - 14 feet which the tractor had to travel before it reached the verandah and the speed of 15 m.p.h. of which it was capable, it is perhaps not surprising that there are discrepancies in the evidence as to the precise sequence of events in relation to the firing of the gun.

On that evidence the learned trial judge left the issue of self defence to the jury and counsel for the applicant concedes that he was correct in so doing. Complaint is however made of the manner in which this issue was left and of the fact that in leaving the issue the learned trial judge left to the jury for their consideration the possibility that the deceased may have been acting in self defence without directing them on the difficulties inherent in this. The gravamen of the first part of the complaint is that, with reference to the defence of self defence the learned trial judge said "It might sound fantastic but I have to leave it to you for you to make up your mind whether in all the circumstances that is how you feel." The matter is, it is argued, made worse when the learned trial judge proceeded to suggest to the jury that they might find that what was "more reasonable" was that the deceased was defending himself when he fired the shot. In the context in which it occurs it seems to us that the word "fantastic" may have been used to describe either -

(a) the fact that a judge was required to leave to a jury a defence which was not put forward by the accused; or

(b) the concept of both parties (accused and deceased) acting in self defence at the same time; or

(c) the idea that acquittal would in circumstances of self defence be the correct verdict for a deliberate killing; or

(d) the suggestion that the accused may have been acting in self defence.

No objection could validly be taken to the use of the word "fantastic" in any but the last case. It was open to the jury to conclude that the defence of self defence was being categorised as "fantastic" and although we are by no means convinced that this was the intention of the learned trial judge it seems to us that we ought to consider the passage in the summing up on this basis. Certainly this would be a very strong word to use in relation to a defence put forward

by an accused person but self defence was never advanced by the accused. It was an issue which the learned trial judge properly left to the jury in the light of all the evidence before them and in particular the unsworn statement of the accused. It is clear however that if the jury accepted the evidence of Miss Sullivan as to the time when she heard the explosion, "fantastic" would not be too strong a description of the suggestion that the accused was acting in self defence if he drove the tractor into the deceased. Mr. Anderson's evidence as to the time the shots were fired is equivocal. The jury may however have concluded that his somewhat precipitate retreat from the verandah was indicative of the apprehension he felt at the manner in which the tractor was being driven towards him. Having regard to the pattern of the summing up when the jury came to consider self defence they would have considered why the accused started driving the tractor, rejected the defence of accident and concluded that the accused was deliberately driving the tractor (vide p.31) "If you reject the accused's statement that he jumped off and ran away and he doesn't know how it happened ... then you will have to consider whether it occurred in circumstances of self defence." If however they had rejected accident and if having regard to all the evidence they had concluded that the applicant had not started driving the tractor with the mere intention of parking it but for a more lethal purpose then it may well have sounded far fetched if not fantastic to suggest that they would have to consider whether the accused was defending himself with the tractor after the deceased fired shots at him while the tractor was being driven towards the deceased.

A trial judge is always entitled to comment provided he leaves the issues fairly before the jury for their determination. The learned trial judge went on to indicate not only what appeared to him to be a more reasonable view but the suggestion by Crown

Counsel that the firing was involuntary as well as Defence Counsel's suggestion that the deceased did not run because he was there shooting at the accused. Ultimately he left the issue for the jury's determination with the usual direction as to the burden of proof. It does not seem to us in all the circumstances that the learned trial judge can be regarded as unfair to the accused in the way in which he dealt with the issue of self defence. In so far as self defence by the deceased is concerned it seems to us that the learned trial judge was justified in leaving this for the jury's consideration in the light of all the evidence and in so far as it is argued that he did not deal with inherent difficulties in this theory, we are of the view that the learned trial judge dealt with this matter fairly and adequately. In our view this ground of appeal ought also to fail.

The fourth ground relates to the issue of provocation. It was argued:

(a) that there was no evidence that the applicant was angry;

(b) that there was insufficient evidence of acts or words by the deceased which could possibly cause a loss of self control in the applicant.

It is true that none of the witnesses said that the applicant was angry but there was evidence that the deceased was angry, there was evidence of the argument between them, there was evidence that the deceased was withholding payment of his wages from the applicant until he complied with the deceased's request as to the parking of the tractor and there was evidence as to the reaction of Mr. Anderson as to the manner in which the tractor was being driven by the accused. It seems to us that on this evidence it was eminently a matter for the jury to decide whether in their opinion the applicant was angry. If the jury concluded that the accused had lost his self control it was equally for them to determine whether that loss of self control was in consequence of such acts of the deceased as were

disclosed by the evidence. It seems to us that the learned trial judge was fully justified in leaving the issue of provocation to the jury and indeed would have been remiss had he not done so. We do not consider the observations made in R v Leary Walker as applicable to the facts of this case.

Finally, having regard to the summing up and the evidence referred to therein the verdict of the jury cannot be said to be palpably wrong or unreasonable.

We see no good reason for interfering with the sentence imposed. It must be assumed, particularly in the light of the directions at page 51 "As I told you manslaughter would only arise in the case of legal provocation", that the jury's verdict was based on a finding of provocation. The evidence however does not indicate that the provocation was so great as to justify a sentence less severe than that imposed. We therefore refuse the application and confirm the conviction and sentence.