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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 106/90

COR: THE HOH. MR. JUSTICE CAREY, P. (AG.)
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

KENNETH LEVY

Paul Ashley for Appellant

Lancelot Clarke, Jnr. for Crown

November 11 and December 3, 1991

CAREY P. (AG.):

On 11th November 1991 when we heard submissions in this matter, we treated the hearing of the application for leave to appeal a conviction for murder in the Portland Circuit Court before Cooke J. and a jury, as the hearing of the appeal. We allowed the appeal, quashed the conviction, set aside the sentence and substituted a verdict of guilty of manslaughter. We imposed a sentence of ten years imprisonment at hard labour and directed that the sentence commence to run from 28th September 1990.

We granted the appellant leave to argue the following ground of appeal:

> "1. The learned trial judge erred in law by:
>
> (a) mis-directing the jury as to the nature of the defence and consequently left the issue of accident and not self-defence for their consideration; and

> "(b) failing to leave the issue of provocation for consideration by the jury and thereby denied the the appellant/defendant the opportunity for a verdict of manslaughter."

The prosecution case was, that shortly after midnight on 21st April 1990 the appellant who lives at Canewood, Portland with one Pamela Robinson, the mother of three children who live with her, entered the children's room, armed with a table-leg, with which he dealt the children severe blows severely injuring two but injuring the youngest, Courtney Laungrine aged seven years, mortally. He also dealt Miss Robinson several blows to her body causing her to flee the home.

The medical evidence disclosed that Courtney Laungrine had died from respiratory arrest due to brain system injury resulting from a skull fracture. The blow or blows caused massive intra-cerebral bleeding. Although the motive for the crime appeared to be sexual jealously, when the appellant was arrested, he complained that the eldest of the children Jane Chisholm who lived at the home, was rude to him and he had hit her. We would point out that none of the children was his.

In his defence, he stated on oath that Jane had attacked him with a machete and in defending himself with the table-leg, a blow had caught the little boy instead. He explained the injuries to the other members of the family by saying that he lost control of himself.

This was a plain case of murder on the Crown's case. Issues of accident or self-defence or provocation could only arise on the defence case. The only issue from a defence perspective which the trial judge left for the jury's consideration, was accident and as to this Mr. Ashley contended that the principal defence was self-defence. He said that the trial judge's characterization of the defence as accident was to use the term in the layman's sense of an unexpected non-intentional, non-deliberate act and not in the strict legal sense.

He complained that because the cardinal line of defence was not put to the jury, the appellant had been deprived of a fair chance of a clear acquittal.

We find these submissions somewhat unreal in the light of the facts of this case. In our view, this was a classical case of accident properly so called. On the evidence which the appellant gave, he was engaged in doing a lawful act, that is defending himself against a felonious attack launched on him by Jane Chisholm, in the course of which a blow directed at fending off the machete, missed and hit the unfortunate seven year old.

The trial judge recounted the appellant's explanation which he properly labelled accident. It was wholly unnecessary, in our view, to go on to define accident. The victim's death was attributable to an accidental blow delivered by the appellant. It is of course true that the appellant was defending himself and had he killed his attacker, that would have been justifiable accident. There could be no possibility of confusion in the minds of the jury by reason of the learned trial judge's directions which were simple, clear and correct. This ground, therefore, fails.

The second arrow to counsel's bow was directed at the trial judge's failure to leave provocation to the jury. He argued that the trial judge thereby deprived the appellant of a verdict of manslaughter. Counsel for the Crown frankly admitted that the trial judge should have left manslaughter to the jury.

At p. 160 he withdrew the lesser charge in these terms:

> "I am not going to tell you anything about, for example manslaughter or anything which could reduce murder to manslaughter because in this case it is either guilty of murder or not guilty of murder. There is no in between so the directions I am giving you now in law in respect of murder is within the context of this particular case."

It is plain from this quotation that the trial judge was of opinion that there were no facts capable of amounting to provocation in the case. There is absolutely no doubt that provocation did not arise on the prosecution case, but we take the view it arose on the defence version of events that fateful early morning. According to the appellant, when he went to the children's room to fetch matches and pushed the door, Jane Chisholm, the eldest of Pamela Robinson's three children whom he cared for, let loose a flow of indecent language. When he remonstrated with her, her reply was:

> "Yuh know sey mi cook fi yuh sometime yuh know. And the only reason mek mi nuh get fi kill you bumbo claat long time a only because mi can't get wha fi put in a the food and kill yoh bumbo-claat."

After this, he said, she became "a roaring lion." He pointed out to her that he had treated all the children like his own and never knew he was harbouring an enemy in his bosom. She threatened to kill him in one way or another. He remonstrated with her and she grabbed a machete saying she was going to chop off his r... head tonight. This conduct on the part of the appellant's ward was totally ignored by the trial judge. But it could not we think be ignored. It formed part of the appellant's defence. The jury might have taken the view that self-defence did not arise because he could have used other means, for example, relieving her of the machete, but that provocation did arise. This conduct was capable of amounting to provocation because the words were hurtful and showed rank ingratitude. At all events, this conduct should be placed before the jury with directions on provocation. We would also mention that the appellant told the police when he was arrested: "A Jeanie a fiesty with me and me lick her."

It is settled law that a trial judge is obliged to leave provocation or any other defence which fairly arises on the facts. This princple is too well known to require authority but if one is required, see R. v. Porritt, 45 Cr. App. R. 348. Lord Diplock in D.P.P. v. Camplin,

67 Cr. App. R. 14 at p. 19, dealing with the test of provocation, said this:

> "... if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not of law: Whether a reasonable man might have reacted to that provocation as the accused did."

For these reasons, we allowed the appeal and made the order which we have already indicated.