JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 160 of 1973

BEFORE: The Hon. Mr. Justice Edun, J.A. (Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. v. LENFORD PRYCE

Mr. Ian Ramsay for the applicant.

Mr. J.S. Kerr, Q.C., Director of Public Prosecutions with Mr. Morris for the Crown.

15th, 16th, 17th May, 1974
5th July, 1974

EDUN, J.A.:

The applicant was convicted of the murder of Delroy Stewart and was sentenced to death. He seeks leave to appeal against the conviction.

The case for the Crown is that on March 1, 1973, about 7 p.m., Mondell Stewart was walking West along the Southern side of Eleventh Street going towards his home. He stumbled, then he heard the voice of Joy Wynter, the common law wife of the applicant. She was then at her gate. There was talking between them about liquid being spewed from a bottle upon her and her baby. After the talking was finished, Mondell turned towards the gate of his yard, across the same street. He met his wife Jean on the street, they spoke and then Jean went towards Joy Wynter's gate. Anthony Stewart, Mondell's brother, appeared on the scene and was talking to Joy at her gate. Mondell turned back to where his wife was and was speaking to her when he felt his wife push him. He fell on the sidewalk, looked up and saw Joy with a knife. He got up quickly and went towards Joy who was then standing in front of Jean, outside the gate. He hit at Joy with his fist but it did not catch her. Anthony at that stage held on to Mondell, spoke to him and with Jean, Anthony took him over to his house. Mondell changed his clothes and said he was going to the movies with his wife. He was waiting for her at the gate of his yard. Whilst there Anthony again spoke to him.

Mondell was going towards Joy's gate when the applicant rushed from behind a parked car with a machete in his right hand. Mondell started going backwards when the applicant rushed at him with the machete. A chop caught him on his chin. He held on to Joy with his left hand. The applicant stood up for a few seconds then came towards Mondell again. Mondell took up a stone and threw it at the applicant. The stone caught the applicant somewhere in front of him and then Mondell ran Westwards in Eleventh Street. He stopped, looked back but did not see the applicant.

After chasing Mondell, the applicant turned back. Victoria Stewart, a sister of Mondell and Anthony, was standing with her 15 year old nephew Delroy Stewart near to the sidewalk. The applicant after giving up chasing Mondell, chopped at Victoria, the chop did not catch her, she ran East. He then chopped at Delroy who ran in Mondell's direction. The applicant caught up with Delroy, chopped Delroy in the head whilst Delroy was still running with his back towards the applicant. Delroy dropped in the street and the applicant was going to chop him again when some people shouted "No, no!" The applicant then turned towards Jean, chopped at her but she escaped injury.

Delroy was taken to the hospital and was seen by Dr. Wells about 9.45 p.m., the same night. Delroy was deeply unconscious and had an eight-inch laceration on the head extending from the left temporal bone across and backwards to the right occipital area. Delroy was prepared for surgery but he died about 11.20 p.m. The doctor saw the applicant at the hospital on March, 2, and found him suffering from an area of tenderness on the left side of his abdomen and he was passing blood from his urine. In evidence, the doctor said that the tenderness could have been caused by a blow with a stone and the injury could affect the kidn resulting in the passing of blood in the urine. He saw no other inju on the applicant.

Anthony Stewart, Victoria Stewart and Mansfield Honegan gave evidence supporting in the main the case for the prosecution as r above. The prosecution claimed that Mansfield Honegan was an witness but the defence claimed that Honegan was a close frien Stewarts and Joy Wynter had carried Honegan's name to the po

incident between them. All the eye-witnesses for the prosecution denied that Mondell had a gun or that Delroy bent down to pick up the gun when the applicant chopped Mondell thus causing the gun to fall on the ground or that after the applicant chopped Delroy, Victoria picked up the gun and ran away with it into her yard.

Detective Alton McLeish said that after he received a report about 9.30 p.m., he later saw the dead body of Delroy Stewart at the hospital. On Eleventh Street he saw two separate spots of bloodstains about one chain apart. He saw no broken bottles when he went there. When he arrested the applicant, charged him with the murder of Delroy Stewart, cautioned him, he said: "Me noh chop anyone."

The applicant in his defence made an unsworn statement. He said that on the night of March 1, about 6.45 p.m., he was lying in bed. His wife and baby were standing at the gate talking to a neighbour. He heard a noisy sound at the gate and bottles and stones crashing on the house. Then suddenly he heard his wife shout out: "Murder, murder, help". He realised she was in danger and went out to the yard. He took up a machete in the passage and was going towards the gate. He saw Mondell Stewart, and Jean Stewart kicking up his wife. He saw Victoria Stewart, Anthony Stewart and Delroy Stewart and they were all standing there in a hostile manner. Mondell then attacked him with a gun in a rag, palming the gun in the middle of the hand, inside the rag. Mondell pushed it towards his belly and said: "I want to kill you blood cloth long rass cloth time". He then believed that Mondell was going to shoot him and then he licked him with the machete. Mondell then held up his face, the gun fell out of his hand. Delroy Stewart who was a few feet away took up a big stone and hit him on his left side. After that, Delroy rushed on the left side and stooped down to pick up the gun. He licked at Delroy with the machete and after hitting him with the machete he ran. Victoria Stewart then ran and picked up the gun and ran with it into her yard. The applicant maintained that he chopped at these men to defend himself.

He started to feel pain all over his body and felt nervous. He held up his belly and his wife and other people rushed him to the hospital where he was admitted. He was passing blood in his urine.

When he was charged with the murder of Delroy Stewart he said he did not kill anybody.

Witness Samuel Walker gave supporting evidence on oath, on his behalf. So did Joy Wynter; and about the incident which occurred before the applicant came out of his house, she said she was at her gate with a baby in her hand. Mondell Stewart came down the street with a bottle of beer in his hand and spewed it on her after he shook it up. It wet up the baby, a Miss Mur and herself. Mondell then dressed back a little from her gate and threw the bottle at her. It did not catch her but hit on the fence and broke. He went back to a bar which was to the East of her and on her side of the road, took another beer and spewed it on her again. She said to him: "See how you are looking trouble." He asked her if she thought she could carry police on him like how she carried police on Mansfield Honegan. Mondell said he was going to kick her in her blood cloth. He went up to her and flung the bottle at her again but it did not catch her, it hit the fence and broke. He then kicked her in the stomach. Anthony Stewart, Jean Stewart, Victoria Stewart and Delroy Stewart came up. Anthony said he wanted to speak to her and was drawing her from her gate. Miss Mur said: "Don't leave your gate," and Anthony said: "Anything you get you going take it." Anthony then took Mondell across the street to his home. Jean Stewart was at her gate. Mondell came out about three minutes after; he had a rag in his right hand. He came to her gate and said "I going to kill your rass." Mondell kicked her. Jean also kicked her. She fell back in the yard and bawled for murder loudly. It was then that the applicant came out of the house with a machete in his hand.

In the remaining part of her evidence, she supported the applicant's version as to how Delroy came to his death at a spot not too far from her gate. The learned trial judge in his summing-up left the issues of self-defence and provocation to the jury. In the grounds of appeal before us, learned attorney for the applicant argued four grounds. On grounds 1 and 4 we did not call upon the learned Director to reply. On ground 1 learned attorney submitted that in all the circumstances of the case a verdict of murder was unrelated to the facts and at the highest a reasonable verdict ought to have been a verdict of manslaughter.

If learned attorney was referring to the doctrine of "Chance-Medley" which signifies the casual killing of a man, not altogether without the killer's fault, though without an evil intent, that doctrine or expression is now obsolete: see R. v. Semini (1949) 1 K.B. 405. The common law formerly dealt leniently with an accused who started the fight himself, as long as the fight had been conducted on roughly equal terms. See 1 East P.C. 241. Cases cited in early editions of Archbold's Criminal Pleading Evidence and Practice were to be regarded as illustrations of what the courts had at one time accepted as sufficient to reduce a killing from murder to manslaughter but they are no longer applicable. The facts in the instant case, so far as established by the witnesses for the prosecution, are diametrically opposed to the facts related by the defence. If the jury accepted the case for the prosecution, as they have done, a verdict of guilty of murder is in our view reasonable and warranted.

On ground 4, learned attorney urged that no allocutus was made or given before the learned trial judge sentenced the applicant to death, there was an error "in substantia". After the verdict was given and the proclamation made, the learned trial judge passed sentence of death. It was then that the Registrar made or gave the allocutus. Defence attorney was called upon or addressed to by the trial judge and the reply by attorney was: "My Lord, there is nothing I can say to assist your Lordship in any way." The learned trial judge then said: "I formally repeat the sentence. The sentence of the Court is that you suffer death in the manner authorised by law." It is obvious to us that the record of sentence had not yet been signed. Learned attorney had nothing to say. The sentence in law was mandatory. We see no error "in substantia" or otherwise, in what took place. See R. v. Porter (1961) 3 W.I.R. 551.

On ground 2, learned attorney for the applicant submitted that the learned trial judge "confused the directions on self-defence by putting forward the proposition of action in self-defence which becomes not self-defence because of excessive force." He referred to the following sentence in the last paragraph on page 154 of the summing-up:-

> "You must consider the nature and the extent of the force on the accused and the force used by him to repel it having regard to all the circumstances of the case because if

excessive force was used the act might not have been done in necessary self-defence and the plea of self-defence will not avail the accused."

He also referred to Palmer v. R. (1971) 55 Cr. A.R. 223 where it has been laid down that in every case where the issue of self-defence is left to the jury, there is no rule that the jury must consider that if excessive force was used in self-defence, they should return a verdict of guilty of manslaughter. He contended that the direction containing the passage he referred to, is contrary to the decision of Palmer v. R. (supra) and the mention of the use of excessive force must have had a disastrous effect upon the minds of the jury when they considered the verdict of manslaughter on the ground of provocation. He urged that if a man killed because he believed on reasonable grounds that he was in imminent danger of death or really serious bodily harm, no question of excessive force would arise; the case for the defence is that the killing of Delroy Stewart occurred because the applicant had reasonable grounds to believe Delroy Stewart would have shot him if he retrieved the gun.

The learned Director for the Crown submitted that the direction complained of, had nothing to do with the use of excessive force in self-defence which related to a verdict of manslaughter. The issues of self-defence and provocation were dealt with in the summing-up separately and distinctly and the use of the term "excessive force" did not in any way affect the directions on provocation.

We are of the view that the circumstances of the case as a whole made it a duty of the learned trial judge to assist the jury on two aspects of self-defence, thus:-

1, there was an attack by a combination of the Stewarts coupled with actual violence used by Mondell upon the applicant, and

2, if Mondell had a gun and Delroy attempted to retrieve it, then the applicant had reasonable grounds to believe he was in imminent danger of death or really serious bodily harm.

On p. 154 of the summing-up, the learned trial judge said:-

"In self-defence, members of the jury, there must have been an attack upon the accused and as a result of this attack the accused must have believed on reasonable grounds that he was in imminent danger of death or serious bodily

injury. The force used by the accused must have been to protect himself either from death or serious bodily injury intended towards him by the deceased or by any other person acting in conjunction with the deceased or from reasonable apprehension of it induced by the words and conduct of the deceased or any of his attackers, even though they might not in fact have intended death or serious injury."

Lower down on the same page, he said:

"If a man whipped out a gun to shoot you and you felt he is going to carry out - carry through his action it would be idle for you to wait to see if he started to pull the trigger.

... If the attack is so fierce that to retreat would expose you to danger to life or serious bodily injury, there is no obligation to retreat. There is no duty to retreat where a forcible or atrocious crime is manifestly attempted against you. You must consider the nature and extent of the force on the accused and the force used by him to repel it having regard to all the circumstances of the case because if excessive force was used the act might not have been done in necessary self-defence and the plea of self-defence will not avail the accused."

Having regard to the particular facts and circumstances of the case, we fail to see how the use of the term "excessive force" is wrong, irrelevant or confusing. We have carefully examined the summing-up as a whole and having regard to the separate and clearly distinct ways in which the learned trial judge dealt with the issues of self-defence and provocation, we fail to see how the mention of the term "excessive force" in the context it was used would have a disastrous or any effect at all upon the minds of the jury when they considered the question of provocation.

On ground 3, learned attorney for the applicant submitted that the specific directions on provocation were not sufficiently clear and may have misled or confused the jury. He contended (a) that the aspects of intentional and unintentional killing were referred to by the learned trial judge but he failed to relate the particular circumstances of the case so that the jury might correctly understand and apply the law. He relied on the decision of R. v. Ronald Harvey (1972) S.C.Cr.Appeal No. 97 of 1972. And (b) that when the learned trial judge stated that

the formulation of a desire for revenge negatived a sudden and temporary loss of self-control, he did not go on to relate the facts in respect to the time when the intention to kill or to cause really serious bodily harm arose.

Learned Director for the Crown, submitted that the reasons for decision in R. v. Ronald Harvey are clearly distinguishable from the judge's directions in the instant case and although the learned trial judge in this case defined manslaughter in the terms of unintentional killing, when the summing-up is read as a whole, the jury could have been left in no doubt as to the law applicable to a verdict of manslaughter on the basis of provocation.

In our view, the main reason for setting aside the verdict of murder and substituting a verdict of manslaughter in R v Ronald Harvey (supra) was stated in the reasons for judgment of the Court of Appeal by Smith J.A. (as he then was), as follows:-

> "Where on a trial for murder a verdict of guilty of manslaughter is open to a jury on the ground of provocation, it is unnecessary, and indeed futile, to define manslaughter to the jury. Having defined it in the terms that the learned trial judge did in this case it is necessary to qualify that definition by telling the jury that if the killing was intentional but resulted from provocation the crime committed was nevertheless manslaughter. If manslaughter arises on the ground of lack of intention as well as on the ground of provocation and it is thought necessary to define manslaughter on that account, care must be taken to qualify the definition and the bases on which a verdict of manslaughter may be returned. That was not done in this case and, in our judgment it was an omission which amounted to a serious misdirection."

In the instant case, the learned trial judge in dealing with the law as to murder said at pp. 148, 149:-

> "..... To amount to murder the killing must have been the result of a deliberate and voluntary act on the part of the accused, that is to say, it must not have been done by accident: it must have been intentional, that is to say, the act which results in death must have been done with the intention to kill or to inflict really serious bodily harm. But a deliberate and intentional killing

is not necessarily murder in law. A killing done under provocation is not murder but manslaughter and such a killing done in lawful self-defence is no offence at all .... Secondly they (the Crown) must prove that it was the accused who killed him by a voluntary and deliberate act. They must prove that at the time he did the act he intended to kill or to inflict serious injury to him. The intention must be proved by the Crown like any other ingredient of this offence, and the only practical way of proving a person's intention is by inferring it from his words or his conduct. In the absence of evidence to the contrary you are entitled to regard the accused as a reasonable man, that is to say, an ordinary responsible person capable of reasoning; and in order to discover his intention in the absence of any expressed intention, you look at what he did; and if you find he did it, you ask yourselves if as an ordinary responsible person he ought to have known that death or really serious bodily harm must have resulted from his action. If you find that he must have known as a reasonable man that such would have been the result, then you may infer that he must have intended that result, and that would be satisfactory proof to establish a charge of murder.

What was the actual intention of the accused? And trying to discover it, you take into account any spoken word or action as to his intention or lack of intention ....."

And at p. 150 he continued:-

"Now I told you earlier on ... that intentional and deliberate killing is not murder if it is done under the stress of provocation, it would be manslaughter only, which is a lesser charge than murder.

Manslaughter is the unlawful killing of another without the intention to kill or to cause really serious bodily harm. It is put this way: it is the unlawful and dangerous act committed against the person of another resulting in his death. It is not sufficient that the act is unlawful, it must be such an act as an ordinary, reasonable person would recognise must subject the other person to at least the risk or likelihood of some injury resulting therefrom even though it may not be serious injury.

Now as I have told you, if you find legal provocation exists then that would have the effect of reducing the charge of murder to manslaughter ....."

At pp. 151-152, he continued:-

"Now in so far as provocation goes, the first essential is that the accused must have lost his self-control and whilst in that state committed the act by which the deceased was killed. The loss of self-control must have been the result of provocation whether by things done or by things said or by both together and it need not necessarily flow from the deceased ..... Now you have to consider provocation too in the light not only of what Delroy might have been doing to him - hitting him with a stone - but also in the light of what happened previously between the Stewart family on the whole and the Pryce family, because you must remember she was at the gate and he was in bed so it is a reasonable inference for you to draw that he could have heard from his house what was going on at the gate. What was done or said to provoke the accused must have been sufficient to make a reasonable man lose his self-control and do as the accused did ..... If the accused was not suffering from loss of self-control at the time then there would be no legal provocation. If though he was suffering from loss of self-control, what was done and or said, taking everything into account, was not enough to make a reasonable man do as he did, then, again, there would be no legal provocation. It is only if both exist together that there can be said to be legal provocation sufficient to reduce the charge of murder to manslaughter. Circumstances which induce a desire for revenge means that the person had time to think and that negatives a sudden and temporary loss of self-control which is the essence of provocation ....."

Towards the very end, at p. 186, the learned trial judge said:

"If you should find that he was not acting in self-defence and he was not provoked in the legal sense and that he voluntarily and deliberately inflicted that injury on Delroy Stewart intending at the time either to kill or to cause really serious bodily harm, then he would be guilty of murder. On the other hand, if you find that he inflicted that injury whilst he was not acting in self-defence, and that he did so voluntarily and deliberately intending to kill or to cause really serious bodily harm, but at the time when he did it he was acting under the stress of provocation, then he would be guilty

not of murder but only of manslaughter ..."

It is true that the learned trial judge defined manslaughter and at a point where he was continuing to deal with the verdict of manslaughter on the ground of provocation. From the extracts of the summing-up referred to above, in our judgment, the learned trial judge made clear the distinction between intentional and unintentional killing and that the verdict of manslaughter resulting from provocation could only be based upon intentional killing. It is clear too that the lack of intention to kill or to cause really serious bodily harm was related to the chopping of Delroy Stewart in the head and the reasonable inference to be drawn therefrom. We are not inclined to direct a trial judge what words he must use and where his words should be placed in dealing with the issues of any case. But we will be ever vigilant to examine and regard the summing-up as a whole and among other things determine whether the vital issues were fairly put and that they were resolved without misdirections or confusions.

The evidence discloses that when the applicant was arrested, charged with the murder of Delroy Stewart and cautioned, he said: "Me nuh kill anyone." In his statement at the trial, he concluded by saying that he did not run down and chop them; he chopped at those men to defend himself. At the end of the judgment in Palmer v R (supra), it is stated thus:-

> ".... In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then that matter would be left to the jury."

At the end of the summing-up in the instant case, at page 186 the learned trial judge said:-

> ".... So if you should reject or if you should find that he was not acting in self-defence, then it would mean that you would have to go back and consider all the evidence and say whether the Crown has satisfied you so that you can feel sure that he is guilty of either murder or manslaughter. If you should find he was not acting in self-defence and he was not

> provoked in the legal sense and he voluntarily and deliberately inflicted that injury on Delroy Stewart intending at the time to kill or to cause him really serious bodily harm, then he would be guilty of murder."

From all the circumstances of the case, the learned trial judge was justified in defining manslaughter and to direct the jury on such a verdict based on a lack of intention to kill or to cause really serious bodily harm. It may well be that they have found no serious problem in that respect.

It is true also that the learned trial judge said that the formulation of a desire for revenge negatived a sudden and temporary loss of self-control. But he was not eliminating provocation as a line of defence. The criticism is that he did not go on to relate the facts in respect to the time when the intention to kill or to cause really serious bodily harm, arose. It may well be that the applicant had the desire for revenge from the time he rushed out of his home armed with a machete but then again, urged learned attorney for the applicant, if the intention to kill or to cause really serious bodily harm arose from the intervening incidents, the defence of provocation was still available to one who killed in hot blood.

One of the reasons for allowing provocation to reduce murder to manslaughter is that a man's action was beyond his control because of a sudden and temporary loss of self-control. But it may well be that a man may set out with a desire for revenge; for that purpose arm himself with a weapon likely to kill; in such circumstances as a reasonable man he would expect some resistance, yet he nevertheless pursued his victim and killed him. In our judgment, the nature, degree and the effect of the resistance from the victim upon the assailant become questions of fact for due consideration by the jury. When, therefore, the learned trial judge in the instant case said: "The formulation of a desire for revenge means that the person had time to think and that negatives a sudden and temporary loss of self-control ...." he was saying that a desire for revenge (a conscious state of mind) which subsisted to the point of killing must be taken into consideration

to determine whether there was "a time to think" or a "sudden and temporary loss" of self-control.

In our view, the jury could not have failed to appreciate their task because the learned trial judge had shortly before making the statement relevant to a desire for revenge, made it quite clear:- "If the accused was not suffering from loss of self-control at the time then there would be no legal provocation." If the applicant had formulated a desire for revenge when he set out from his house with a machete merely upon hearing "the happening" of something (as the witnesses for the Crown put it), there was up to that stage, the happening of nothing more than a provocative incident. It is helpful at this stage to state what Lord Devlin said in the Privy Council case of Lee Chun-Chuew v Reginam (1963) 1 A.E.R. at p.79:-

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of those three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements."

However, the text of the summing-up goes on, in unmistakable terms to inform the jury that if the applicant "... voluntarily and deliberately intended to kill or to cause really serious bodily harm, but at the time when he did it (i.e. the killing) he was acting under the stress of provocation, then he would be guilty not of murder but only of manslaughter." (words in brackets, ours). Again we fail to see any misdirections or confusion.

For the reasons given, we refuse the application for leave to appeal.