

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 19/77

BEFORE:

THE HON. MR. JUSTICE HENRY J.A. Presiding  
THE HON. MR. JUSTICE KERR J.A.  
THE HON. MR. JUSTICE CARBERRY J.A.

REGINA

v

NAAMAN CLARKE

April 3, 4, 5, 12, 1978

Mr. Roy Taylor for the Appellant

Mr. H. Gayle for the Crown

CARBERRY J.A.

This was an application by Naaman Clarke for leave to appeal against conviction for murder in the St. Catherine Circuit Court on January 11, 1977. The appellant, Naaman Clarke, was charged that on the 9th day of January, 1976 he murdered the deceased Noel Clarke.

Both the accused and the deceased were prisoners serving their respective sentences in the St. Catherine District Prison, and the deceased was killed in the cell occupied by the accused.

The 9th January 1976 was a Friday and it appears that the prisoners on that date were not required to be working, but were "at large" within the confines of their particular cell block. The accused and the deceased were confined in the same cell block but their cells were on different floors. It was suggested in the evidence given by a fellow prisoner Lawrence Kay, that there was a homosexual relationship between the accused and the deceased and that because of or in spite of this there had been previous quarrels or fights between them. This was denied by the accused and there was no other evidence as to this relationship one way or the other. The accused was described as a very quiet prisoner by warders McKenzie and Tomlinson. He was much

bigger in stature than the deceased.

On the day in question the accused describes himself as reading in his cell - while the deceased was upstairs on a different floor playing a game called Ludo with the witness Kay. This witness gave evidence suggesting that on the day before the fatal incident, the accused had called the deceased who was then playing Ludo, but the deceased had refused to come to him because he was playing Ludo. The accused had, said Kay, resented this. On the day in question the deceased while playing Ludo with the witness Kay was spoken to by some unnamed person. He left the game and apparently went downstairs to the cell occupied by the accused. Soon after this as the result presumably of noise coming from that direction, the witness Kay, other prisoners and some warders, made their way to the accused's cell. There they saw the two men locked in an embrace that Kay describes as "a caressing position like two lovers holding." The deceased was bleeding from stab wounds, and there was blood on the clothes of both men.

Mr. Roy McKenzie, a warder at the prison and the first witness called for the Crown, seems to have been the first prison official on the scene. When he arrived there was already a group of prisoners including Kay standing in the passage-way and looking into the cell where the two men were fighting. The deceased at that time was leaning against one of the walls of the cell, with the accused standing over against him, and McKenzie states he saw the accused stab the deceased three times with what was afterwards found to be a small home-made knife. No prisoner is allowed to have or own such a knife, and knives are used only for eating or in the prison craft shop.

There was no evidence as to either man having been seen in possession of this or any other knife before. There was evidence, however, that the deceased worked in the prison craft shop - while the accused worked in the laundry.

Warder McKenzie ordered the accused out of his cell and he

went to the cell directly opposite and was locked in. Warden McKenzie states that before the accused left the cell he placed the knife he had in his hand into the waist band of the dying man.

The deceased was taken to the Spanish Town public hospital and died there some time later that day. He had received seven stab wounds, five of which were "jooks" a half an inch deep, and not serious, but two were deeper (about one and a half inches) and had cut the right and left mamary arteries, Dr. Saunders states that the deceased bled to death from these two wounds.

At the time of the incident the accused had little or nothing to say. The prison authorities searched both cells for the weapon and the murder weapon was found at the mortuary tucked into the deceased's waist band. No other weapon was found.

The weapon and the clothes worn by both men were taken from them and sent to the Government Forensic Laboratory in Kingston, and examined by the Chief Forensic Officer Mr. Alvin Vincent Garriques. His evidence which is of importance is referred to later on.

At his trial the accused gave evidence to the effect that the deceased Noel Clarke had threatened to harm him for spreading a rumour that he (Noel) was a homosexual. The accused says that on the fatal day the deceased came to his cell where he was reading and repeated his threat. That the deceased went away and returned some time after with the witness Kay, repeated his threat, entered the accused's cell held him in his shirt and "jooked" at him with a knife. He had wrestled with the deceased for the knife trying to save his own life. They had both rolled over on to the floor of the cell, he had managed to get the knife away from the deceased and to stand up. The deceased had still came at him and he had been forced to "jook" at him to hold him off "because he was acting violently - want to kill me".

He had not meant to kill Noel Clarke, and inferred that if the deceased got serious stab wounds it was "accidental" and probably while they were rolling over on the floor wrestling for the knife.

It should be observed that the suggestion that Kay had accompanied the deceased to the accused's cell and taken some part in the attack on the accused was never put to Kay during his cross-examination.

Be that as it may, the accused alleged that in the fight he himself got three cuts from the deceased - on the chest, in the leg and on his finger while trying to get away the knife.

None of the eye-witnesses took note of these injuries - nor did the accused at the time complain of them. But it is fair to say that there was so much blood from the deceased Noel Clarke around that they might have been overlooked in the events of the day. What is of importance is that Mr. Garrigues the Chief Forensic Officer gave evidence that on the clothes of the accused there was blood of two different blood groups and that there was blood both on the outside (presumably from the deceased) and on the inside. He stated ... "in my opinion one man was cut and he bled from the inside out. The blood on the outside could have come from the other victim".

The summing-up of the learned trial judge was fair and for the most part accurate. If warder McKenzie's evidence of seeing the accused three times stab the deceased when the latter was leaning against the wall and "out of action" was accepted, then the stage of self-defence had passed and that defence was no longer available. In the event the accused had got possession of the knife, disarmed his assailant and being a much bigger man there was no necessity to stab the deceased.

This still, however, left the issue of provocation. It would be provocation for the deceased to enter the accused's cell and attack and cut him with a knife. There was an onus on the prosecution to negative provocation by producing evidence. No such evidence was produced. No witness saw the

start of this incident and it did occur in the accused's own cell - his "home" so to speak. The accused had alleged provocation, and alleged that he too had been cut. The Chief Forensic Officer's evidence offered independent support in that two different groups of blood had been found on the accused's clothing and no effort had been made to displace that evidence, as for example by showing that the accused had received his injuries on some prior or other occasion. No one saw the start of this incident and it did occur in the accused's own cell. What was the deceased doing there?.

Though it appears to us that the learned trial judge summed up on the whole in favour of manslaughter, he left it open to the jury to convict of murder if they should draw the inference that it was the accused who had the knife all the time. There was in fact no evidence on which such an inference could have been based. Neither man had been seen with a knife before.

In dealing with this aspect of the matter the learned trial judge in fact directed the jury:-

"if you should say, we believe Mr. McKenzie as to what he said he saw, but we are not sure as to how it started, whether it is the accused who had the knife, or the deceased who had the knife, but when Mr. McKenzie came it was the accused who had it stabbing the helpless man, then in those circumstances you could say manslaughter, because you would have had the accused's story as to who had the knife, and unless you are sure that it is the accused who had it all the time, then that issue as to what happened earlier on would not be determinable in favour of the crown."

In the circumstances we agree with Mr. Taylor for the applicant that the proper verdict in this case ought to have been a verdict of manslaughter.

We have treated the application for leave to appeal as the appeal. The appeal against the conviction and sentence for murder is allowed, and the conviction and sentence set aside and a conviction for manslaughter entered instead. As to sentence this has occasioned us some concern. The accused is already serving a long sentence which has now some eight years left to run.

While "provocation" may mitigate the offence, we must also consider the effect of such a killing on the other inmates of this prison community, and it must not appear to have gone unpunished.

In our view the proper sentence for this offence should be seven years, and this should be served after this applicant's present term has expired.

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