JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 266/77

BEFORE: THE HON. MR. JUSTICE ZACCA - President (Ag.)
THE HON. MR. JUSTICE KERR J.A.
THE HON. MR. JUSTICE ROBOTHAM J.A.

REGINA

v

NORMAN JOHNSON

Mr. B. Macaulay, Q.C., and Mr. T. Ballantine for Appellant

Mrs. V. Hylton-Gayle (Ag. Dep. Director of Public Prosecutions) for the Crown

February 22 and 23, April 14, 1978

KERR J.A.

On February 23, 1978, we dismissed the appeal and indicated then we would put our reasons in writing. This we now set out herein.

On October 5, 1977, the appellant was convicted in the Home Circuit Court before Chambers J. and a jury for the murder of Peter Neil and was sentenced to death.

On the night of January 15, 1976, in a room occupied by one Deserine Stephens at No. 74 Spanish Town Road, Kingston, were Deserine, the deceased and one Vincent Mattis. According to Mattis, on whose testimony the case for the prosecution rested, (Deserine Stephens not being available to give evidence) he and the deceased were looking at a Race Programme, the deceased sitting on a bed while he sat on a chair. Lying on the bed was a baby, the child of the accused and one Angela Singh who occasionally slept there.

At about 8.00 p.m. Mattis said he saw the appellant chasing his girlfriend Angela around the house. Shortly after the appellant came into the room where the deceased and Mattis were and said, "all you deh with me woman", and as he said this he pushed a knife into the chest of the deceased who got up off the chair and holding his chest said, "him stab me into my heart". Assisted by Deserine, the deceased was put into a taxi cab and taken to the Kingston Public Hospital where he died that same day.

Mattis when cross-examined denied the suggestion that it was the deceased who has the knife and was fatally injured in a struggle with the appellant.

Dr. Mariappa Ramu who performed the post-mortem examination found an incised stab wound half inch by quarter inch on the left side of the chest in the fourth intercostal space passing through the pericardium, the right side of the heart, the liver and making a cut on the outside of the stomach. The direction of the wound was downwards and backwards. The cause of death was due to shock and haemorrhage as a result of the stab wound to the heart. A light weight sharp instrument such as a ratchet knife used with moderate force could have caused those injuries.

The doctor was cross-examined as to the relative positions of the accused and deceased. Demonstrations by the witness Mattis and the doctor and t doctor's opinion on the various positions as put to him were made and given before the jury. The doctor was of the opinion that Mattis' demonstration was not consistent with the direction of the wound as he saw it.

The appellant gave evidence on oath and his account of the incident differed substantially from Mattis' on every important detail. According to him he had gone to Descrine to visit Angela. In the room he saw the witness Mattis and the deceased. The deceased spoke to him and after he told him he was Angela's baby father the deceased said, "a long time me hear bout you". The appellant took up the baby and then seeing the deceased with a knife he put down the baby and as the deceased approached and stabbed at him, he held the deceased, they wrestled and fell on the verandah and thence to the ground outside still wrestling, the appellant trying to get the knife from the deceased. A friend of the deceased came and took away the knife and he left the scene. He had not the slightest idea that the knife had cut the deceased. The following day he heard of the death of the deceased.

Angela Singh called by the defence gave evidence to the effect that when the appellant came to the room the deceased was lying across the bed. The appellant took up the baby and the deceased said, "Is long time I hearing about you" - rushed for his pocket, and then the wrestling started between the appellant and the deceased. They wrestled on to the verandah and fell on the ground. During the wrestling she saw the deceased

with a knife. She did not know how the wrestling ended. Although the appellant said Mattis was in the room Angela said he was not present.

Three grounds of appeal - two original and one supplementary - were carefully argued.

Ground 1. The summing-up was not fair and in fact unbalanced in that the Judge devoted most of his examination of the evidence to all alleged weaknesses and discrepancies in the evidence for the defence and the strength of the evidence for the prosecution in particular, he failed to point out to the jury that the medical and expert evidence for the prosecution could have affected materially the credibility of the sole eye-witness for the prosecution.

Ground 2. The verdict was unreasonable and having regard to the evidence, could not be supported.

On the prosecution's case as protrayed in the evidence of Mattis it was clearly a case of murder. On the other hand, the defence as conducted and presented by the evidence for and on behalf of the defence was diametrically opposed to that of the prosecution and on its acceptance or on its raising a reasonable doubt, the appellant would be entitled to an acquittal.

As regards the evidence of Mattis as to how the stabbing took place and the opinion of Doctor Ramu based on the direction of the wound the jury had the benefit of the demonstrations. The direction of a wound depends upon the relative position of victim and assailant, the direction of the thrust, any last minute shift in position by either assailant or victim, indeed so many variables and the difficulty of a witness accurately describing the action having regard to the often kaleidoscopic nature of such action, that it is essentially a question of fact for the jury and in this case the matter was properly left as an open issue for their consideration. We found no merit in Grounds 1 and 2.

We however, gave careful consideration to the supplementary Ground which was amended at the end of the appellant's Attorney's arguments in keeping with the submissions which he eventually made and which ground in the end reads:-

> "The learned trial judge's directions on (a) self-defence and (b) provocation were unnecessary, and may well have led the jury into confusion, when such defence did not arise on the evidence."

RE: (a) Self-defence:-

Mr. Macaulay contended that the issue specifically raised was accident and that by leaving self-defence to the jury there was an implied rejection of accident, since self-defence involves intentional conduct and accident negatives or is incompatible with intentional conduct and its consequences. With due respect to the attractive presentation of the argument, the distinction is more specious than practical, more illusory than real. A person in defending himself may kill his attacker either intentionally or unintentionally. In either case if in the moment of crisis he used no more force than was reasonable necessary, the plea of self-defence would be open to him. A summing-up is to a great extent conditioned by the nature and conduct of the case and the issues raised by the evidence as tendered by the prosecution and the defence. Issues may overlap; one issue may incidentally involve another; the lines of demarcation between one issue and another may wittingly or unwittingly be blurred by the evidence as presented by the defence and/or raised in cross-examination; or there may be the rare occasion where defences apparently incompatible have been raised.

In the instant case on the account given by the appellant and his witness, it is conceivable that the jury may be of the view that the appellant in the emergency of the moment deliberately turned the hand of the deceased against him. It would not only be fair but of advantage to the appellant that the jury should be made aware than even in such circumstances the complete exculpatory plea of self-defence would be available to him. This the learned trial judge did in the following manner:-

Page 63:-

> "Members of the Jury, the accused having put up a defence supported by a witness, if you accept his version as being the true version, namely that he was attacked with a ratchet knife, or he was approached menacingly by the deceased with a ratchet knife, and they wrestled for that knife and that during that wrestling for the knife either the deceased was accidentally cut in the wrestling or the deceased during the wrestling, in falling, the knife went into him, that would amount to a mischance or accident in which case the accused would be defending himself and could not be found guilty of any offence.

Again, in a case of murder an accidental killing while doing a lawful act is no offence so far as murder is concerned, and a lawful act would include a person reasonably or having reasonable grounds to fear that his life was in danger and he was defending himself against that attack, in which case you would have to acquit him".

Page 65:-

"The killing must be deliberate, that is to say it must not be the result of an accident, an accidental killing during a legal self-defence is still an accident and would be no offence at all so far as this charge, a charge of murder, is concerned".

Page 72:-

"Of course, if it was an accident, as I told you in defending one's self, then he must be acquitted. If it was in self-defence then you acquit. Well, if you find that the defence of accident or self-defence gathered from the evidence for the defence has been negative by what is presented by the crown, and you must be sure that you are accepting the right facts as presented by the crown, and that that accepted fact negatives the defence, then you consider whether the crown has proved that there was a deliberate wound by the accused on the deceased in the absence of self-defence".

Page 89:-

"Then, members of the jury, if you find in those circumstances that there was no wound inflicted by the accused but it was an accidental result - resulting in the accident - because of this wrestling from an attack by the deceased, then again, an accidental killing is no offence as far as murder is concerned.

So, members of the jury, we are coming now to the end. In considering your verdict, members of the jury, if the killing was accidental while the accused was not acting unlawfully and dangerously and according to the accused's story you could not find that he was acting unlawfully and dangerously, if you believe his story, and that the killing was not deliberate or you are not sure whether it was accidental, in such circumstances you must acquit. If the killing was not accidental and the accused acted in self-defence using no more force than was reasonable necessary in self-defence, as I have explained, then again, acquit".

In the totality regardless whether or not the learned trial judge accurately categorised the issue he left this vital aspect of the defence to the jury in an easily comprehensible manner. Although the general directions on self-defence because of certain irrelevancies may be opened to criticism, counsel commendably declined to make them, no doubt appreciating that on the whole not only were they fair but contained passages unduly favourable to the appellant.

Accordingly we are of the view that the directions on self-defence not only did no harm but were necessary in the circumstances and were to the advantage of the defence.

RE: (b) Provocation:-

It was submitted that neither on the Crown's case nor in the case for the defence did the issue of provocation arise and that the trial judge by directing the jury on that issue denied the appellant a full consideration by them of his defence, as it tended to distract the jury with the result that the appellant could not be said to have had a fair trial. In that event, Mr. Macaulay submitted that there had been a miscarriage of justice. In course of argument he referred to a number of cases including Mancini v. D.P.P. (1941) 3 A.E.R. p. 272 and D.P.P. v. Walker 21 W.I. Rep. at p. 410 and cited in support passages from R. v. Moxan (1973) 21 W.I.R. p. 389 and in particular that which quoted with approval a statement from the Mancini case at page 393 thus:-

> "We think that his gratuitous directions on these fanciful situations, coupled with his invitation to the jury to concentrate on a verdict of manslaughter, must, in a very real sense, have deprived the appellant of a chance of complete acquittal. We would re-echo the warning given by Viscount Simon L.C. in Mancini v. D.P.P. (Supra).
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> ..... 'it is not the duty of the judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is upon the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it'.
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> In our view the trial judge attempted "to tilt the balance" in favour of the appellant on an issue in respect of which there was not a shred of evidence. Applying the relevant test with the exactitude demanded by the circumstances of this case we were satisfied without the least difficulty that the trial judge was in grave error in inviting the jury to return a verdict of manslaughter. It is for the foregoing reasons that we allowed the appeal".

It is not every time that a judge is unduly generous to an accused by leaving to the jury an issue not arising that there is a miscarriage of justice. (See R. v. Thomas & Others Sup. Ct. App. No. 123/77 Mar. 1978 unreported at p. 5). In both Mancini's case and Walker's case the complaint on appeal was that the judge omitted to leave to the jury a

particular issue and accordingly the passage quoted from Mancini's case was in response to a complaint that the issue of Manslaughter ought to have been left to the jury. Here in the instant case the situation is the reverse, the complaint being that the trial judge had done what he ought not to have done, namely, leaving to the jury an issue that was non-existent. Complaints of this nature are obviously rare. It could be said that quite often such a direction halved the risk of conviction for the capital offence of murder. However, the correctness of a judicial decision is not properly tested by an arithmetic mean but upon careful consideration of the principles of law applicable to the facts and circumstances of the case.

It is the duty of a trial judge to leave to the jury all issues that arise on the evidence whether specifically raised or not. (See R. v. Williams (1961) 3 W.I.R. p. 162). The principle has been reiterated and restated in so many reported cases as to be considered trite. The duty is often a very fine one as it arises even when such evidence is slight or tenuous. Illustrative of this is the case of Thompson v. R. (1960) 2 W.I.R. at p. 265 in which it was held that on the trial of a person for murder it was the duty of the judge to deal adequately with any view of the evidence which might show that the crime committed was manslaughter and not murder. In a case where the reality or existence of the issue is doubtful, it is to be expected that a cautious judge would err on the side of the accused. In R. v. McPherson (1957) 41 Cr. App. Rep. p. 213 dealing with a somewhat similar situation Lord Goddard, C.J. in delivering the judgment at p. 215 said:-

> "In all the circumstances, this court finds it exceedingly difficult to say that there was evidence of provocation at all sufficient to satisfy the law on that subject; but, in the exercise of his direction, the learned judge did leave the question of manslaughter to the jury, and therefore, the issue having been once left to the jury, one has to see that the jury were properly directed".

This statement has been criticised as being illogical, (See R. v. Moxam (Supra) p. 391. No one however, has challenged the justice of the decision in substituting a verdict of manslaughter for murder. In our view the position in this case would be more on all fours with McPherson's case than with either Mancini's or Walker's.

Here the judge showed anxious concern as to whether or not manslaughter should be left to the jury. Thus he told them at page 66:-

> "So, members of the jury, normally there would be three possible verdicts open to you, depending on the evidence you accept, and what verdicts I leave to you to consider that is, guilty of murder; guilty of manslaughter or not guilty of any offence at all. I do not think I will leave manslaughter to you but as I go along with my summing-up to you I might find it necessary at that stage to do so".

However, in the course of his summing-up influenced perhaps by the appellant's account of an attack on him by the deceased the trial judge gave [illegible] directions on provocation. The appellant and his witness in their account left no room for provocation and there was no evidence that the deceased was in fact on intimate terms with Angela Singh.

As in the McPherson case we found "it exceedingly difficult to say that there was evidence of provocation at all sufficient to satisfy the law on that subject". However, the position here is distinguishable in two important aspects:-

(1) There was no complaint about the adequacy or accuracy of the directions to the jury.

(2) In the end the issue was effectively withdrawn from the jury. This was done in the following manner:-

At the end of his uninterrupted summing-up defence Counsel quite properly addressed the learned trial judge and the following occurred:-

MR. MACAULAY: "May it please your lordship, before the jury retire, may I request your lordship to make certain directions. I am inviting your lordship - the direction which you just gave on manslaughter and provocation, m'lord, I am inviting your lordship to reconsider it, because the evidence which your lordship has recited to the jury was to the effect, so far as the defence was concerned, that he was attacked with a knife and they fought for the knife, There was no suggestion whatsoever that he lost his self-control - no suggestion that he lost his self-control. He deliberately fought with the man to get the knife from him.

HIS LORDSHIP: I thought I did that.

MR. MACAULAY: If I am right on that point, then manslaughter does not arise. I am inviting your lordship to re-consider. There is no question of his losing his self control. He is attacked and he defends himself, he tries to, that is his defence. Provocation does not arise at all. Of course, your lordship is the final arbiter of the law.

M'lord two other points on the evidence that I am inviting your lordship to direct the jury that it is for the prosecution to disprove accident and disprove self-defence. Your lordship has done that but if they are in doubt as to whether it was or was not accident or was not self-defence it is their duty to acquit.

HIS LORDSHIP: I told them that any doubt must be resolved in the favour of the accused.

Members of the jury, if you are in doubt that there was accident - you are not sure or in doubt as to accident - as I told you, an accidental killing is no offence as far as murder is concerned and I told you earlier that jealously is not provocation. The accused's defence was that he was wrestling for a knife, defending himself by wrestling for a knife, and as I said earlier, if in wrestling for the knife, there was accident, he is not to be found guilty, but in defending himself it might amount to provocation if he deliberately killed him, but his defence is and from the totality of the evidence in the circumstances presented by the crown, having due regard to the defence, that he never killed him at all, he did not deliberately injure the accused, then provocation would not arise in those circumstances,

.....

The verdicts open to you would be guilty of murder or not guilty of any offence".

Despite argument from the appellant's Attorney to the contrary, we were of the view that those directions responding to and in effect embracing this final address by Counsel, clearly and effectively withdrew the issue of provocation from the consideration of the jury and therefore there could be no real cause for complaint.

Accordingly, we treated the application which involved questions of law, as an appeal, dismissed the appeal and affirmed the conviction.