CA-CRIMINAL LAW - Murder - Trial ——— MANSLAUGHTER: whether manslaughter to be an issue of each of intent should have been left to jury. EVIDENCE - proof by prosecution: whether attempt of prosecution to disprove prosecution had failed to negate self-defence - whether judge should have withdrawn case from jury on own motion. HELD ① Manslaughter did not properly arise on evidence ② Judge did not err in failing to withdraw case from jury - R v Galbraith (1981) 73 Cr App R 124 applied. JAMAICA APPLICATION FOR LEAVE TO APPEAL REFUSED. Case referred to / ① R v Vincent McFarquhar (1974) 12 J L R 1363 ② R v Howard Martin S C C A 24/81 ③ R v Lawrence (1981) 2 W L R 524 ④ R v Galbraith (1981) 73 Cr App R 124. ✓ Comp

EVIDENCE
CRIMINAL PRACTICE

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 58/91

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

R. v. PAUL DEANS

Paul Ashley for Applicant

Miss Diana Harrison, Deputy Director of Public Prosecutions for Crown

May 5 & 18, 1992

WOLFE, J.A. (AG.)

In the Hanover Circuit Court on the 24th May, 1991 before Mr. Justice Courtenay Orr, and a jury, the applicant was convicted of the murder of Devon Peart and sentenced to be kept at the Governor General's Pleasure. We heard his application for leave to appeal the conviction on 5th May when we reserved our decision until today.

The facts upon which the conviction is based are uncomplicated. On the 19th October, 1990 at approximately 6.15 p.m. Delores Grant, the only eye-witness called by the Crown, said she was at the gateway leading to her home, sweeping her yard. She observed the deceased, whom she did not know before, walking up the road with a hammer in his hand. The applicant was also seen walking along the said roadway, travelling in the opposite direction. He had in his hand a "pointed rusty instrument." When the deceased reached the gate of a Mr. Clunis' yard the applicant accosted him and said, "You think mi nuh catch yuh now." The deceased responded "Just low mi mek mi gwan whey mi a go nuh."

As the deceased spoke, he retreated, whereupon the applicant rushed and armed himself with two stones. The deceased did likewise. They hurled stones at each other. The deceased ran up to the applicant and hit at him with the hammer. The hammer caught the applicant on his shoulder. The applicant moved towards the deceased and used the "pointed rusty instrument" to stab the deceased under his left breast. The deceased staggered and fell to the ground, mortally wounded. The applicant ran away. The body was removed to the Noel Holmes Hospital Morgue in Lucea. A post-mortem examination done on the 30th October, 1990 revealed that the deceased sustained an incised wound on the left aspect of the chest just below the nipple, at the 4th intercostal space. The wound measured half inch in length and had a depth of six inches. The injury pierced the heart. Death was due to haemorrhagic shock as a result of the incised wound.

The applicant was seen by the police on the 30th October, 1990 and having been duly cautioned and interrogated, he told the police that he had thrown away the knife. Asked why he had stabbed the deceased, he said "Mi never mean fi kill him sah." Upon arrest, when cautioned, he said "Me sorry sey him dead sah."

The applicant in an unsworn statement said inter alia:

> "Mi walking down the road and see this young man coming up the road, sir, and him turn to me and sey, you see how mi could a catch you. And me sey, Star low mi mek mi gwan wey mi a go nuh, and mi see him a come down pon me with the hammer sir, and mi rush go over Mr. Clunis gate for two stones, sir and him go fi two to, sir. After the two a we start fling stone, sir but none of them never catch we one another and then him rush me with the hammer sir, and lick after me head, sir, and mi shift it and it catch me on my shoulder and mi rush and grab him sir. Mi hold him up and mi feel a knife in a him side sir, and mi draw it out, sir, and mi shub the knife after him, sir, just to ease him off a mi sir. After when him ease off a mi sir, mi run."

Leave was sought and granted to argue three supplementary grounds of appeal. Ground I was formulated thus:

> "The learned trial judge erred in law by failing to leave for the jury's consideration the question of manslaughter based on lack of intent."

Counsel for the applicant contended that based upon the statement made by the applicant, when asked by the police why he had stabbed the deceased, viz "Mi never mean to kill him sah" as well as the words which form part of the unsworn statement "Mi shub the knife after him, sir just to ease him off a mi sir", made it obligatory for the trial judge to have left to the consideration of the jury the question of manslaughter based on a lack of intent.

In this case, the cardinal line of defence was self-defence. Arising out of the evidence the judge unmistakably left for the consideration of the jury the pleas of self-defence and provocation. It was conceded by counsel for the applicant that the directions of the judge in respect of self-defence and provocation accurately stated the law. The extra-judicial statement by the applicant that he never meant to kill the deceased made almost two weeks after the incident which was not repeated in the course of the unsworn statement, does not entitle the applicant to have left for the consideration of the jury manslaughter on the basis of the lack of intention.

The refusal of the trial judge to leave the statement made to the police by the applicant, as being capable of meaning that the accused did not intend to kill or cause grievous bodily harm when he cut the deceased, was in no way an error in law. That statement was not consistent with the version given by the applicant in his unsworn statement, neither was it consistent with the manner in which the Crown witness Delores Grant testified the injury was inflicted. See **R.v. Vincent McFarquhar** [1974] 12 J.L.R. 1363.

This Court in S.C.C.A. 21/81 **R. v. Howard Martin** (unreported) per Carey, J.A. emphasising and approving the dicta of Lord Hailsham, L.C. in **R. v. Lawrence** [1981] 2 W.L.R. 524 at 529 said:

> "It is no part of the trial judge's functions to leave to a jury remote defences or one not canvassed by the defence or arising on the facts on the off chance that his failure to do so may result in an accused being deprived of a possible chance of acquittal."

We are of the view that manslaughter on the basis of lack of intention did not properly arise on the evidence. This ground therefore fails:

GROUND 2

> "The learned trial judge erred in law by failing to direct the jury to enter a formal verdict of not guilty as the Crown had failed to negative self-defence."

After much uncertainty, counsel explained the meaning of this ground to be "that at the end of the prosecution's case the prosecution had failed to negative self-defence and the learned trial judge, notwithstanding the failure of counsel to make a submission of no case, ought to have withdrawn the case from the jury on his own motion."

On the prosecution's case, there was evidence of aggressive conduct on the part of the deceased, but the evidence also disclosed that the applicant from the very outset of their meeting was the aggressor. According to the chief witness Delores Grant, it was the applicant who confronted the deceased. It is fallacious to think that once there is evidence on the Crown's case of aggressive conduct on the part of the victim, the trial judge must withdraw the case from the jury. In considering whether or not to withdraw a case from the jury, the judge must take into consideration all the circumstances including the aggressive conduct. In this particular case, the evidence disclosed that the applicant was armed with a weapon from the outset. His language when he confronted the deceased,

"You think mi nuh catch you now", suggested that he was awaiting the opportunity to confront the deceased. It was the applicant who ran and armed himself with stones, while the deceased retreated from him. In such a situation we regard the victim striking at the applicant with the hammer as no more than a pre-emptive response. At the close of the case for the prosecution, the judge had before him a credible narrative which cannot be said to have failed to negative self-defence. There was evidence before him upon which a jury properly directed could properly convict. It would therefore ultimately be for the jury to decide whether or not the applicant honestly believed that it was necessary for him to act in the manner he did.

There is support for the approach of the learned trial judge in dicta of the Court of Appeal in R. v. Galbraith [1981] 73 Cr. App. R. 124 where the court said that a judge should only withdraw a case from a jury if there is no evidence upon which a jury properly directed could properly convict.

We are therefore of the view that the learned trial judge did not fall into error by leaving the issue for the consideration of the jury.

GROUND 3

> "The learned trial judge erred in law by failing to give a special direction to the jury in order to assist them in evaluating the evidence of the sole eye-witness which raised the issue of self-defence."

This ground, we found to be wholly unmeritorious. There is no obligation on a trial judge to offer the jury any special direction in the terms of this ground of appeal. The duty of the trial judge in the instant case was to leave fairly to the jury the evidence which raised the issue of self-defence, along with proper directions in law as to how the law on self-defence is to be applied. This duty the learned trial judge discharged beyond impeachment.

For these reasons, the application for leave to appeal is refused.