JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 278/01

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE WALKER, J.A
THE HON. MR. JUSTICE HARRISON, J.A (Ag.)

R v PAUL MILLER

Bryan Sykes Senior Deputy Director of Public Prosecutions and **Miss Meridian Kohler** Crown Counsel for the Crown.

Appellant un-represented.

February 2 and April 2, 2004.

HARRISON J.A (Ag.)

The appellant was tried and convicted in the St. Mary Circuit Court on the 14th November 2001, on an indictment for non-capital murder committed on the 12th April 2001. He was sentenced to life imprisonment and it was ordered that he should serve a period of fifteen years before he becomes eligible for parole. His application for leave to appeal to the single judge having been considered and refused was renewed before this Court. We treated the application for leave as the hearing of the appeal, allowed the appeal, quashed the conviction for murder and set aside the sentence of imprisonment for life. The Court substituted a verdict of manslaughter

and imposed a sentence of fifteen years imprisonment at hard labour to commence as from the 13th day of February 2002.

We promised at the time of handing down our decision to reduce our reasons into writing. This we now do.

The facts on the Crown's case are that on the 12th April 2001, at about 8 o'clock in the morning, Alton Bentley, Winston Thomas and Anthony Barnes (the deceased) were at certain premises at Comma Union Estate, St. Mary. Both Bentley and Barnes were sitting on a verandah talking. The appellant who is called "Soljie" came along and the deceased man said to him, "mi hear that you saying mi tief five bunch a plantain". Soljie then said, "tell mi a who and si if mi nuh murder that somebody". The deceased did not tell him who it was, but said to him "when the boss come him will know who tief the plantain".

After asking the deceased about three times who had told him about the stealing of the plantains the deceased in turn said to him, "I hear that is you Soljie tief the plantain". Immediately that the deceased spoke those words, the appellant grabbed up a knife belonging to the deceased man from off a table and rushed down upon him whilst he was sitting on a stool. The deceased stood up, "dressed backwards" grabbed up the stool and moved to a corner. The appellant then ran down to him, stabbed him in the region of his chest and ran away. The deceased then grabbed a machete that was on the verandah and chased the appellant. He chased him for a distance of about two chains but was unable to catch up with him. He turned back, and shortly thereafter he collapsed.

It was suggested to the Prosecution witness, Alton Bentley:

i) That there was a fight between the deceased and the appellant;

ii) That the deceased had a knife whilst they were wrestling;

iii) That the deceased was disarmed;

iv) That the deceased then took up a machete and the appellant used the knife to cut the deceased.

These suggestions were strongly denied by the witness.

The medical evidence revealed that the deceased had sustained an incised stab wound penetrating the left ventricle thereby producing introthoracic haemorrhage resulting in death.

Detective Sgt. Ian Mc Corkel of the Oracabessa Police Station visited the scene of the stabbing. Investigations were carried out by him and sometime later during the day the appellant was handed over to the police by his Attorney at Law.

The appellant gave evidence and testified that on the morning in question he went on to the verandah and the deceased man said to him, "hey bwoy Soljie, a you me hear say a call up mi name sey mi tief the boss five bunch a plantain". He told him that it was he who had stolen the plantains and that he would tell the boss when he came to the property. An argument developed between the deceased and himself and the deceased man "chuck" him in his face. He made an attempt to chuck back the deceased man and immediately he saw him coming at him with a knife. He grabbed on to the hand with the knife and managed to disarm him. The deceased man thereafter grabbed a machete that was in a corner and came towards him. He pushed out the hand with the knife and he felt as if it had touched the deceased who

then jumped backwards with the machete in his hand. He in turn ran off from the verandah and the deceased man chased him with the machete still in his hand. He was unable to catch up with him and subsequently he went to the Oracabessa Police Station where he gave up himself to the police.

The appellant also testified that when he saw the deceased with the machete he believed that he would have chopped off his head and that was the time that he pushed the knife towards him. He further testified that it was "like a split second" between the time the deceased man took up the machete and when he pushed the hand with the knife.

Supplemental grounds of appeal were filed and they are stated as follows:

> "1 Inconsistencies in the evidence as given by the three witnesses.
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> 2. Judge erred by not directing the jury to weigh the possibility of bias with regard to the witnesses giving evidence against the defendant.
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> 3. Judge erred by not directing the jury to consider the defendant acting in self defence".

The appellant was both un-represented and absent at the hearing of his appeal. We nevertheless, invited learned Counsel for the Crown to address the Court on the issue of provocation even though it was not specifically stated in the supplemental grounds of appeal. The Court was concerned about the manner in which this issue was handled by the learned trial judge. Mr. Sykes submitted however, that the learned trial judge had dealt with this issue adequately, and had properly focused her directions on self-defence, the primary defence raised at trial.

In directing the jury on the issue of provocation this is what the learned trial judge had to say:

> " I had also told you in order to establish a case of murder, the prosecution had to prove that the killing was unprovoked. Because if the killing was done when the accused was provoked, then you could not convict him of murder but of manslaughter.
>
> Now provocation is some act or series of acts done and/or words spoken which cause the accused a sudden and temporary loss of self control and which would cause a reasonable person to loose his or her self control and behave as the accused did. So, you will have to first say whether these words that the witnesses have told you, whether they were spoken and if they would have caused a sudden and temporary loss of self control in the accused. You have to consider the witnesses. First of all, what caused, this accused to loose his self control and secondly would that conduct have caused a reasonable person to lose his self control as the accused did.
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> Again you have the situation where, if you accept what the witnesses for the prosecution has said, Mr. Barnes told the accused, 'When the boss come him will know a you tief the plantain and sell them to a lady up Hamilton Mountain'. You will have to say what effect such words, if you find that they were spoken, could have had on the accused. As to the second question you have to take into account everything said and done according to the effect, whether in your opinion it would have on a reasonable man.
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> Now, a reasonable man is a person having the powers of control to be expected of an ordinary person of the sex and age of the accused. Because the prosecution must prove the accused guilt. It is not for the accused to prove that he was provoked. The prosecution must

> make you sure that the accused was not so provoked or if you think he may have been provoked, then you can only convict him of manslaughter".

It will be observed from the above excerpt, that the learned trial judge left the issue of provocation solely on evidence outlined by the prosecution witnesses. The account given by the appellant revealed that in addition to using the words attributed to the deceased man, the deceased man had chucked him in his face and had armed himself with a knife. His evidence further revealed that the deceased moved towards him and that he had disarmed him of the knife. The deceased man further armed himself with a machete and was coming again towards the appellant with the raised machete and that was when he used the knife he had taken from the deceased to stab him. These acts on the part of the deceased would certainly have warranted the appellant taking defensive action but they could also constitute sufficient provocative acts that would have caused the appellant to retaliate in the manner described by him.

It was quite evident therefore, on the facts of the case, that both self-defence and provocation were live issues for the consideration of the jury. In the circumstances it was incumbent upon the learned trial judge in directing the jury to deal adequately with all the issues that arose on the evidence. The trial judge in her charge to the jury recognized that she was required to direct them on provocation hence it was vital for her to assist the jury by dealing with the salient features of the evidence. See **R. v. Tillman** [1962] Crim. L.R. 261.

Now, once the jury rejected self defence, they would have been obliged to consider the evidence which was capable of constituting provocative conduct on the part of the deceased man and resulting in a loss of self control on the part of the appellant. We were of the view therefore, that the learned trial judge had erred when she left provocation based solely on what the prosecution witnesses said without directing them to the appellant's account. Her failure to give a full and comprehensive direction on provocation therefore amounted to a misdirection based on a non-direction. In these circumstances, the appellant would have been deprived of his chances of being convicted on the lesser offence of manslaughter. We were therefore unable to agree with the submissions of Mr. Sykes and concluded that the conviction for murder could not stand hence we made the order referred to at the commencement of these reasons.