JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.162/90

BEFORE: THE HON MR JUSTICE FORTE, J.A.
THE HON MISS JUSTICE MORGAN, J.A.
THE HON MR JUSTICE GORDON, J.A.

R v RALDY GAYLE

Delroy Chuck and Michael Clarke for Applicant

Cheryl Richards for Crown

November 4 & 26, 1991

MORGAN, J.A.

The applicant was tried in the St Elizabeth Circuit Court at Black River before Pitter J. for the murder of Trevor Gayle. He was convicted and sentenced to death on the 15th November, 1990. This is an application for leave to appeal that conviction and sentence.

The deceased was described as a jovial fellow who clowned around performing karate kicks creating laughter and earning for himself the name "Shaolin". On the night of Saturday 14th July 1990 at Tryall in St Elizabeth he went to a "set-up" which is really a get-together of villagers and friends of a deceased person on the ninth night after death. He left and went to a shop nearby and was in an area where drinks were being sold - a small area - music was being played and he was dancing as also the applicant who had a bottle of beer in his hand. This area has a back door, and a front door with a piazza some two feet from it. The deceased had come there with Mr Dythe a farmer 65 years old who at 5.30 a.m. was ready to go home. Mr Dythe went into the shop, spoke to the deceased and both left the shop with the deceased a little ahead. The deceased stepped across the piazza and then on to the ground where he stood looking inside for some three minutes. The applicant then came

from the shop with a bottle of beer, hit it on the piazza breaking it and said to the deceased, "I gwine stab you because a long time me after you." Mr Dythe stretched out his hand between them and said, "cho Raldy man forget that man," in an attempt to stop him from acting but he moved towards the deceased and stabbed him in the throat. A Mr Hylton also saw the applicant as he broke the bottle and moved towards the deceased who then stepped back. He held the applicant by both his hands to lead him away but he sustained a cut on his hand and so let him go. After he stabbed the deceased Mr Hylton again held him, led him away to a driveway leading to his home and said to him, "Raldy you put yourself in trouble for you cut the man." The applicant replied, "I don't care a r... cloth."

The deceased by then had run off but he only managed 3-4 yards then fell bleeding. Mr Dythe took him up and leaned him against the bonnet of a motor vehicle but he rolled off, dead. At the time of the attack the deceased had nothing in his hand, he had done the applicant nothing, there was no fuss between them, and prior to that he was not drunk or staggering nor was he troubling anyone.

Dr Maille performed a post-mortem examination on the body which was identified at the Mandeville Hospital morgue by Albert Dennis and found a stab wound on the supor stenanotch (an area which he indicated to the court). The wound was half-inch deep had rugged edges causing laceration to the skin, superficial vessels of the neck, and exposing the trachea. The body was soaked in blood and in his opinion death was caused from hypovolenic shock - loss of blood. The injury could have been caused by a broken bottle he said and slight or even moderate penetration could have caused it as the area of the injury was one of very soft tissues.

Det. Sgt. Campbell received the report at 6.30 a.m. and saw the applicant at the Bull Savannah Police Station. When he was cautioned and told by the detective that he was investigating the death of Trevor Gayle the applicant said "mi nun know nothing bout Trevor death." In the presence of a Justice of the Peace he

subsequently gave a short caution statement.

> "I don't know anything about Chang death, mi neva see im ah the shop, mi neva see im on de road, mi an im no have any fuss and mi no do im anything."

The applicant in his defence gave an unsworn statement from the dock. He said he was at the bar-counter drinking a bottle of beer when the deceased "jooked" him at his side and asked him to buy him a drink of rum. When he told him he had no money he again "jooked" him in his eye and with an expletive demanded that he buy him the drink. He held his eye pushed him away and enquired if he wanted "to blind" him. Deceased punched him in his chest and as he fell backwards on the counter punched him again whereupon he broke the bottle on the shop wall and "jook after him". The deceased ran and Hylton tried to take the bottle from him and got cut, and it was one Lorna Gayle - not Hylton who took him from the shop. He had to defend himself he said as the deceased practiced karate, shaolin, and was in the habit of kicking people and had kicked him and stuck him in the eye. He admitted telling the officer he knew nothing about Chang's (the deceased) death, and of giving the caution statement. He denied using the words as alleged by Mr Dixon.

He called a witness Dionne Spence the mother of his 15 year old son who said she was at the back door and who corroborated his account of the incident.

On these facts the learned trial judge left to the jury for their consideration the issues of self-defence and provocation.

Mr Chuck filed one ground of appeal that the learned trial judge failed to direct the jury on the live issue of involuntary manslaughter thereby depriving the applicant of a verdict on the lesser count.

He submitted that on the basis of the medical evidence i.e. the depth of the injury being half an inch in soft tissue that the inference could be drawn that the degree of force was such that could indicate from his action that there was no intention to kill and this would reduce the verdict to manslaughter. He submitted

that in leaving it as he did the jury was left to believe that the verdict was murder or nothing, whereas the action of the applicant was more consistent with causing bodily harm, than with intent to kill.

He argued that the jury were thus not properly directed and although it was open to them to reject the directions they were never given that opportunity to consider evidence from which they could have found a verdict of manslaughter.

Miss Richards while agreeing that the learned trial judge did not leave to the jury's consideration specifically the lack of a required intention and the option as to whether or not a verdict of manslaughter could arise, submitted that in his general directions he directed them to the issue of intention and the verdicts available. She also submitted that the jury not having been told of half-measure, i.e., manslaughter on the basis as to whether he intended to kill or to cause serious bodily injury, it was open to them to acquit. Any non-direction on the totality of the evidence then would enure to the benefit of the applicant in that if they did not find murder they would have acquitted. The non-direction she concluded was not fatal as the evidence was overwhelming.

Mr Chuck in his reply argued that the admitted non-direction was fatal because on the facts it was an appropriate case for the jury to have at least been directed.

Our anxious concern is whether there was sufficient evidence to leave the issue for the consideration of the jury.

The totality of the applicant's defence was that the deceased "jocked" him in his side and in his eyes so he "jooked" at him with the broken bottle when he came over him and the bottle caught him. The deceased had no weapon but in the applicant's mind he was a karate man - a skill equal to a deadly weapon. Mr Chuck finds support for his submission that he did not intend to kill on the medical evidence which revealed a half-inch wound on soft tissue. He cited the fact that the jury were at liberty to draw an inference from these facts, that the degree of force was not

severe but slight and that this evidence supported the lack of the required intention sufficient to find manslaughter.

In other words the accused had done an unlawful act resulting in a death which was not intended. Mens rea in these type of cases has been discussed in a number of authorities over the years. What has now been established is that, the killing is manslaughter if it is the result of his unlawful act, where the unlawful act is one (e.g. an assault) which all sober and reasonable people would inevitably realize must subject the other person to the risk of some harm resulting therefrom, albeit not serious harm whether the defendant realised the possible consequences or not. See Andrews v D.P.P. (1937) 26 CR App R 34.

In Hyam v D.P.P. (1974) 2 ALL ER HL p.42 the appellant being jealous set fire to her ex-lover's house knowing that a lady - her son and two daughters were living there and thus caused their death. She was charged with murder. She admitted that she realised it could cause danger to persons in the house-hold but said she did not intend to cause death or grievous bodily harm but to frighten only.

Lord Diplock in his speech at p.63 said:

> "On the first question I do not desire to say more than that I agree with those of your Lorships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement, whether imposed by statute or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with 'intent' to produce a particular evil consequence or, in the ancient phrase which still survives in crimes of homicide, with 'malice aforethought'."

In this case the Crown says that the act was a deliberate

one. The defence admits it was deliberate though in circumstances of self-defence a defence which the jury rejected. It is common ground that he broke the bottle on a wall. The purpose of that act was to have in his possession a sharp cutting weapon. He knew he intended to use it on the deceased to cause serious bodily harm. If that were not his intention he would not have broken it -there was no necessity to use a sharp cutting weapon if serious bodily harm was not contemplated. After he broke the bottle he said, "I gwine stab you because a long time me after you", so when he "jooked" at him he must have had it in his mind that such use was likely to cause serious injury, or kill. In these circumstances following the dicta of Lord Diplock (supra) it is clear on the evidence that he had the required intent.

We are of the view that the learned trial judge was correct in his direction. The evidence was indeed overwhelming as counsel urged and the jury by their verdict, having rejected self-defence indicated that they accepted the case for the Crown that he intended to kill, a position which effectively extinguished any consideration of manslaughter.

Mr Chuck has failed in his single ground of appeal, the application for leave to appeal is treated as the hearing of the appeal and we order that the appeal be dismissed and the sentence affirmed.