JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CRIMINAL APPEAL NO. 161/72

BEFORE: The Hon. Mr. Justice Henriques, President
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Hercules

R. v. SAMUEL MOXAM

H. Hamilton for the Appellant
Miss J. Bennett for the Crown.

November 26, 27, 1973

GRAHAM-PERKINS, J.A.

On November 27, last we allowed the appeal herein and entered a verdict of acquittal. We promised to put our reasons therefor in writing and this we now do.

The appellant was convicted before Parnell, J. and a jury of manslaughter on an indictment which had charged him with the murder of Rupert Clarke (otherwise called "Putt") on October 22, 1971. In support of that indictment the Crown led evidence through a single eyewitness, a Mr. Emsley Tomlinson. The circumstances described by this witness were as follows: On October 22, 1971 at about 4.30 p.m. he was at the corner of Maple View Road and Olympic Way when he saw the appellant "hold up" Putt "in his shirt with a knife". The appellant asked Putt about his (the appellant's) bicycle and Putt tried to get away. The appellant then stabbed Putt "in his belly-side" and ran off. Putt ran after the appellant "and the two of them grab up back". Putt now had a knife. A third man came up and held Putt's hand. Putt fell and died shortly thereafter.

In a statement from the dock the appellant said that he was walking on Olympic Way when he saw three men ride past him. One of these was Putt who turned back and came up to him. He said to Putt:"I want my bicycle or else you will have to pay me for it or else I am going to the Police Station to give a report about it". Putt thereupon "grabbed me in my shirt front and pushed his hand in his pocket and pulled out a knife; he opend opened it with his teeth and stabbed me". He held Putt's hand and they started to wrestle. Putt "struck my head on a wall. I slipped and my hand lose balance of his hand and I grabbed him around his waist. He stabbed me twice in the back. We wrestled.

I lose balance and fell. We both fell and he dropped on top of me. I slipped away and ran off and I fell on the ground". Putt had fallen on his own knife.

An examination of the appellant by Dr. Morrison at the Kingston Public Hospital on October 22, 1971 revealed the presence of an incised stab wound on the left side of his back. This wound was consistent with infliction by a knife. The evidence disclosed another wound on the accused's shoulder. This, however, was not mentioned by the doctor. Dr. Dawson performed a post mortem examination on Putt's body and found an incised wound at the outer angle of the left eye and an incised wound two inches below the left nipple and near the mid-line. This latter wound, the fatal wound, extended through the heart into the left lower lobe of the lung. In the opinion of Dr. Dawson this wound could have been caused by the deceased falling on a knife in the course of a struggle.

Here then were two simple and straightforward, albeit diametrically opposed, versions of the circumstances culminating in Putt's death. On the version advanced by the Crown this was a case of murder pure and simple. Of that offence the appellant was found not guilty. Clearly, therefore, the jury must have rejected the evidence of Tomlinson in so far as that evidence was calculated to sustain a charge of murder. The appellant's case on the other hand described a violently aggressive attack upon his person by Putt, his effort to escape therefrom, and the circumstances of an accidental death. There was no common ground between the Crown and the defence.

The learned trial judge dealt with the issue of self defence. He also dealt with the question of manslaughter in extenso. He invited the jury to consider no less than three bases on which they would be entitled to return a verdict of manslaughter. Indeed it appears that he became so irrevocably obsessed with his own views and impressions, unsupported as they were by the evidence, as to what the verdict ought to be that he felt constrained, towards the end of his summing up, to direct the jury to concentrate on a verdict of manslaughter. The crucial question that arose on this appeal was whether there was any evidence on which the jury should have been asked to consider a verdict of manslaughter.

It is clearly desirable, even now, to restate certain well-established principles. Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict can be returned. To deprive him of that right must necessarily constitute a grave miscarriage of justice. See Bullard v. R. (1957) A.C. 635.

In Lee Chun-Chuen v. Reginam (1963) 1 All E.R. 73, Lord Devlin said (at p. 78):

> "But their Lordships must observe that there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit."

Lord Devlin had earlier dealt with the test to be applied when a trial judge was required to decide whether or not to leave provocation to a jury. At p. 79 he said:

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements ... The point that their Lordship wish to emphasise is that provocation in law means something more than a provocative incident. The ... submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct."

Seventeen years earlier, in Holmes v. Director of Public Prosecutions (1946) 2 All E.R. at p. 126, Viscount Simon said:

> "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven ... to violence which produces death, it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter."

We are aware that in R. v. McPherson (1957) 41 C.A.R. 213, the Court of Criminal Appeal held that if in the circumstances of that case the learned trial judge had not left the issue of manslaughter to the jury the Court would not have interfered. It is by no means easy to understand why the conviction of murder was quashed and a verdict of manslaughter substituted when the Court was prepared to hold that there was no evidence on which a jury might feel a reasonable doubt whether the appellant was

provoked. This decision has been described as quite illogical (See, e.g., 1957 Crim. L. R. 618) and we entirely agree.

We now quote certain extracts from the summing up of Parnell, J. At p.36 of the record the learned judge says:

> "Now one other matter, apart from the fact that a man has the right to defend himself, he has the right to defend his property too. So if a man finds that he has lost his property, the law gives him a little self help; help yourself, but here again you have to act reasonably. You cannot just go and rough up the man and shoot him to see how much force he is going to offer you in your endeavour to try and get back your property from him. So you match your force with the amount he offers you, because that will show that you acted reasonably. If then, in trying to protect your property from this trespasser you acted reasonably and you killed him, you commit no offence; because we have from the prosecution's evidence, from the prosecution's case that there was this contention about a bicycle. We have the accused telling us that he was asking this man about his bicycle. How the deceased got the bicycle we don't know; whether it is being said that the deceased had stolen the bicycle, we don't know; we don't know how long he had lost the bicycle, or the deceased was supposed to have had the bicycle, we don't know. Here again it is a matter that you will have to consider the over-all picture. Suppose then I were to put the question of defending property, protecting his property in the highest way, in favour of the accused - I have already dealt with self defence, because we heard these suggestions made, Putt was the man who attacked with the knife and was supposed to have stabbed him twice. Let us deal a little more with this question of this bicycle. Listen, if a man has his property like a bicycle, and finds another with it, he has the right to recapture the lost property; a measure of self help is afforded the owner of the property; in re-taking the property, the owner should act reasonably; he should use only such force as the situation demands. If in re-capturing the

property the owner acted reasonably, having regard to the attitude of the trespasser, and the trespasser is killed, there is no offence; no offence is committed. You would have to find the man not guilty. If, however, he uses the finding of the property with the trespasser as the motive for the killing, when with a favourable and objective view of the situation, it was not necessary for him to kill, then he is guilty of murder or manslaughter.

Now, he could be guilty of manslaughter on this basis, that where a man is defending himself, the jury may say well you were not only defending yourself as such but you were provoked, smarting under provocation, it would be manslaughter if he struck the blow while smarting under provocation, and by reasonable provocation and for the purposes of this case, and here again as a Jamaican as a Judge and as we are operating in our society as it is today, I am prepared to leave this for your consideration having regard to this case.

A man could be provoked if he finds another in the public street with his property and the person who is found with it offers resistance to him in returning it when there is no just cause or excuse for refusing to return the property. Whether that is enough is for you. Whether that would be evidence that could be left to you, I think it is and that is how I leave it; and you could get this proposition that I put forward to you from the prosecution witness Tomlinson himself about this question of his trying to get his bicycle, although as I said you and I are in the dark as to how long he had the bicycle or how he got it. Did he go and take it away from the man's house? Was it leaning along the street? Did he give another man and he took it away? We don't know."

Later in his summing up the learned judge said:

"But, Mr. Foreman and members of the jury, I am going to put a view for your consideration having regard to how the whole case is put and in all the circumstances. This is not a direction

> that you must obey, it is a view I am putting forward. As I see it, Tomlinson said he heard this contention between the accused and Putt about the bicycle, so it seems then that Putt did have a bicycle belonging to the accused. As I said how Putt got it we don't know; whether Putt could have at that time refused to give up the bicycle we don't know but we have this contention ... If, in fact, Putt had this man's bicycle and he is trying to get back his bicycle would Putt just remain silent and calm? Consider that. And even if Putt realised now that the man has found him with the bicycle in those circumstances would it be a way in which he could just take it like that, for this man to cut him? In other words what I am driving at is this, this accused is found with some wounds from the medical evidence that we have, at least two clear wounds, ... Putt had two also ... in those circumstances if you think an offence has been committed, if I were in you place I would concentrate on the manslaughter part, having regard to how the whole thing went."

If ever a summing up was calculated to confound a jury this one certainly was. Let it be observed that the above quoted passages are manifestly predicated on the hypothesis that the bicycle ridden by Putt was the property of the appellant and claimed as such by him. There was not a scintilla of evidence in this case that this was the situation in fact. On Tomlinson's evidence the appellant merely enquired of Putt about his bicycle. The terms of this enquiry do not ex facie make it clear whether Putt ever had the appellant's bicycle in his possession. We do not understand the evidence to suggest, even remotely, that the appellant was either defending his property or attempting to recapture it. Indeed, the appellant does not appear to have made any attempt to take possession of the bicycle ridden by Putt after the latter fell to the ground. He certainly did not, at the trial, claim that that bicycle was his. Why then did the trial judge find it necessary to discuss questions of self-help, defence of property or the recapturing of property with the jury? 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. Director of Public Prosecutions (1941) 3 All E.R.

at p.279:

> " ... 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. They 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."

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 fair to add that the attorney for the Crown appeared to experience the most serious difficulty when called on to answer Mr. Hamilton's submissions.