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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 194/72

Before: The Hon. Mr. Justice Fox
The Hon. Mr. Justice Hercules
The Hon. Mr. Justice Swaby (Ag.)

R. v. Stafford Madden - Murder

Mr. Roy Taylor for the applicant

Mr. Henderson Downer for the Crown

1st October, 1973.

Fox: J.A.

In this application for leave to appeal against conviction for murder in the Home Circuit Court, on the 18th December, 1972, a single ground of complaint was advanced. Learned counsel for the applicant submitted that the directions on intention and provocation were misleading and confusing and may well have resulted in a miscarriage of justice.

The evidence described what may be termed an unfortunate backyard brawl. The applicant and the deceased were tenants in certain premises in Kingston. The deceased complained that money was taken from his room during his absence. The landlord of the premises paid the deceased the sum which he had missed. The applicant urged the deceased to return the money to the landlord. The deceased refused to do so. The applicant became inscensed. It was the crown's case that under the impulse of this anger he employed force to secure his wish, and that in the course of doing so, he struck the deceased in his head with a stick causing an injury which resulted in death. In the crown's case there was evidence that in the course of the altercation and before the fatal blow was struck the applicant had thrown a bottle at the deceased and that the deceased had thereupon thrown back a bottle at the applicant.

The applicant gave evidence on oath. The gist and substance of his defence was that whilst the applicant was

standing under an ackee tree in the yard, the deceased who was going out with his bicycle, lifted it up and struck the applicant on his right leg with one of the wheels. The applicant pushed the bicycle back on to the deceased who then threw the bicycle to the ground and "grabbed up" the applicant. The applicant succeeded in releasing himself whereupon the deceased picked up a bottle and broke off a part. Fearing that the deceased was about to stab him with the broken bottle, the applicant hit the deceased on his side with a stick which the applicant had picked up from the ground. This version of the incident was of course denied by the witnesses for the prosecution.

In this evidential situation the jury were correctly told that if they accepted the evidence of the applicant or were in doubt concerning his statement that the fatal blow was struck by a third person, they should acquit him. The jury were also given correct directions concerning acquittal as a result of self defence, and the alternative verdict of manslaughter open to them on the basis of provocation and the absence of a felonious intent. No complaint is possible in relation to these directions. The burden of the complaint on appeal is that entirely correct earlier directions were subsequently erroded by what was said on the last page of the summing-up (p. 128).

At that page the learned trial judge commenced by telling the jury that if provocation did not avail the applicant, if the jury found that the applicant had hit the deceased in his head with an intention to kill or to cause him serious injury if he was not acting in self defence and if he was not provoked then their verdict should be guilty of murder. The directions then continued:

> "If you think that there was provocation, that he did not intend to kill or to cause serious injury then you find him guilty of manslaughter and not murder."

It was contended that this direction, together with other

directions to be noticed, would have had the effect of erroding the directions given earlier on in the summing-up that provocation could arise even when accompanied by intention to kill or to cause serious injury.

We do not agree that this is a fair reading of what is quoted in the passage. It seems clear to us that in that passage the learned trial judge was adverting to the two limbs upon which a verdict of manslaughter could be returned, namely provocation, or an absence of a felonious intent. In taking this view of the passage we do not overlook the passage which immediately follows and is to this effect -

> "Again if you take the generous view that he took this man's death, not intended to cause this man's death but doing some unlawful and dangerous act to the deceased man that resulted in his death, then again members of the jury that may be manslaughter. The same acts that mightn't avail him for self defence are still available in as far as provocation is concerned."

It is clear to us that the learned trial judge was here doing no more than impressing upon the jury the alternative verdict of manslaughter available either by way of an absence of a felonious intention or the existence of provocation.

The summing-up concluded with this paragraph.

> "That, members of the jury, I will just recap. He said it is 'Look-up' who did it; that he did not cause this man's death. Accept that he was acting in self defence - that the man stabbed him with the bottle and he hit him with the stick, any reasonable doubt that you have - not guilty. Accept the crown's case that he hit this man in his head and caused serious injury and that he was not provoked, not because of self-defence, murder. If you find that he did not intend to kill

> this man but was acting under provocation then manslaughter. These are the verdicts open to you."

The contention of Counsel was that the earlier direction that provocation could co-exist with a felonious intention had been so effectively submerged by that passage; in particular by the penultimate sentence in the passage, that when the jury came to consider their verdict they could have well lost sight of the earlier correct direction.

We have carefully considered this contention and have given the closest examination of which we are capable to this last paragraph of the summing-up, and are unable to agree that the jury could have been confused or mislead in the manner described. The learned judge was seeking to put in a short form the possible verdicts open to the jury and the basis upon which these verdicts were available. In doing so the language which he employed is admittedly lacking in the precision and the expansiveness discernible throughout the rest of the summing-up, but this is neither surprising nor fatal.

In the light of these considerations, although we give unquestioned acceptance to the view expressed in R.v. Burns and Holgate (1967) 11WIR., 110. that an earlier correct direction may be erroded by a later misdirection, we are of the view that on a fair reading of what is recorded of having been said in this case on the last page of the summing-up no such SUBSQUENT errosion occurred. The decision in R.v. Ronald Harvey, Supreme Court Criminal Appeal, 97/72, December 15, 1972, (un-reported) to which counsel referred, is based upon facts peculiar to that case which are clearly distinguishable from the facts of this case.

Before parting with this application we would like to observe that although on the facts of the case as related by the defence, it was open to the jury to return a verdict of manslaughter on the basis of an absence of felonious intent, or

doubt in this respect there is no defect in the summing-up, and no point of law based upon the insufficiency or the incapacity of the evidence whereby this court could properly hold that the verdict of the jury should be interferred with. The application is refused.