J A M A I C A

IN THE COURT OF APPEAL
SUPREME COURT CRINIMAL APPEAL NO. C.A. 162/72

Before: The Hon. Mr. Justice Fox - presiding
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Robinson

R. v. Sydney Campbell

Mr. K. E. St. Bernard, for the appellant

Mr. Chester Orr, Q.C., for the Crown.

8th June, 1973.

FOX: J.A.,

In the course of a trial of a charge of murder in the St. Ann Circuit Court on the 12th of October, 1972, a witness is recorded as having observed that he heard someone say, " you don't see the man bleeding like a hog?" When the witness heard this, the fatal blow had already been struck. The deceased was then lying on the floor of the shop or bar in which the fatal wound was inflicted. At that time the applicant was not in the shop. He had left immediately after the blow was struck and shortly before the observation was made. The witness could not say whether the applicant had heard this statement. Mr. St. Bernard contended that the statement was neither part of the res gestae nor something said in the presence of the applicant, and was, therefore, inadmissible. He complained that having regard to the prominence which was given to this statement in the summing up, the minds of the jury would have been unfairly prejudiced against the applicant. This complaint is not without substance. The learned trial judge should have told the jury that the statement should not be considered. Instead, he gave it significance when discussing the question of intention.

Nevertheless, we are satisfied that this observation was a relatively harmless one, and that nothing which the judge said about it could have affected the verdict of guilty of murder which was returned.

In the course of his directions to the jury, the learned judge reviewed the medical evidence describing the wound in the left chest of the deceased which caused his death. This wound had been inflicted with a sharp cutting instrument, was two and a half inches deep and had penetrated the heart. Death was due to shock and loss of blood and was instantaneous. The learned judge then continued, "so members of the jury, whoever did it there must have been the intention according to the doctor's evidence if you accept it, either to kill or to cause serious bodily injury." Mr. St. Bernard whose submissions on behalf of the applicant were made with a refreshing clarity and candour, complained that this direction was wrong in that the jury were told that if they accepted the medical evidence they were obliged to find in the person inflicting the wound the intent necessary to constitute murder. In view of the use of the categorical must, we agree that this is a fair interpretation of the passage. Although it was not expressly stated and has been left to be implied, it is obvious that the learned judge was seeking to alert the jury to the common law presumption that as a general rule every man is taken to intend the natural and probable consequences of his acts. But in so alerting a jury care must be taken to emphasize the generality of the rule and to explain that a jury is not bound in law to infer that a person intended the result of his act by reason only of its being a natural and probable consequence of that act. In deciding whether a person had an intention to kill or to cause serious bodily injury, a jury is entitled to refer not only to the common law presumption, but, as well, to all the evidence, and they should be told that such

inferences from that evidence, as in their judgment appear proper in the circumstances are permissible. This view was not made clear to the jury and we agree that the passage constitutes a misdirection in law. Mr. Orr, who appeared for the Crown, conceded the misdirection but submitted that on a right direction a reasonable jury would inevitably have come to the same conclusion. We accept this submission. The emphasis is on a reasonable jury. In all the circumstances, a reasonable jury, if satisfied that the wound was inflicted in the manner described by the totality of the prosecution's evidence, could not have failed to conclude that the wound was inflicted with an intention to kill or to cause serious bodily injury.

The third complaint which was discussed before us concerned the learned judge's directions on provocation. It is unnecessary to embark upon extensive pronouncements on the law. The law is well settled. Three elements must co-exist: one, the act of provocation; two, the loss of self-control both actual and reasonable; and three, the retaliation proportionate to the provocation. In Holmes v D.P.P. [1946] A.C. 588 at 598, Lord Simon said:

> "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case) or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

In Lee Chun-Chuen v The Queen, [1962], 3W.L.R. 1461 at 1465, it was pointed out that this part of Lord Simon's speech cannot

safely be taken as a basis for a direction to a jury since even with the most careful explanation it is likely to be misunderstood. The danger lies in a failure to appreciate what Lord Simon intended by the use of the word "actual." This word is the distinguishing feature. In R. v. Duffy, [1949] All. E.R. 932, Lord Goddard approved a direction to a jury by Lord Devlin in which the following passage occurs:

> "Indeed circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation."

In R. v. Clifford Humphrey 6J.L.R. 271 at 280 O'Connor C.J. approximated:

> "an actual intention to kill or to cause grievous bodily harm" with "the conscious formulation of a desire for revenge."

By the use of the word "actual" in the well-known dictum it must therefore be understood that Lord Simon intended to recognize the principle that a person may have an intention to kill or to cause serious bodily injury and yet not be guilty of murder. This principle was applied in Clifford Humphrey, where it was held that the defence of provocation may arise where a person does intend to kill or to inflict grievous bodily harm, but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. In R. v. Bunting, 8W.I.R. p276 at 278, this branch of the law was further illuminated by Lewis J.A. when he said that:

> "In a case where provocation arises as a defence to a charge of murder, it is proper and indeed necessary for the trial judge to tell the jury

> that murder is not established unless an intent to kill or to cause grievous bodily harm is proved. But the converse proposition, namely, that the accused is guilty of murder if such an intention is proved is not necessarily correct, for where the intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation, the accused is guilty not of murder but of manslaughter."

Nowhere in his summing up did the learned trial judge explain these important subtleties in the law of provocation. On the evidence, accidental killing, self-defence and provocation arose for consideration. These issues were properly left with the jury. We cannot say that if the law of provocation had been fully explained the jury would inevitably have brought in a verdict of guilty of murder. On this ground alone, therefore, the conviction for murder must be quashed.

The summing up is deficient in a further respect. Although the learned judge did explain the basic elements in the law of provocation, he did not relate this law to the evidence. A jury is entitled to have the assistance of the judge in identifying all those matters which fall within the category of act or acts and words which constitute provocation so as intelligently to perform their function of applying the law told to them by the judge to the facts which they find. In this respect also, the trial was unsatisfactory.

We have carefully considered the consequences of quashing the conviction. The alternatives are a re-trial for murder or a substitution by this court of a conviction for manslaughter. Our decision involves an exercise of the discretion. The interests of justice is the predominant consideration. There was distinct evidence upon which the jury could have brought in

a verdict of guilty of manslaughter on the ground of provocation. We take the view that in all the circumstances the proper course is to substitute a conviction of manslaughter with an appropriate sentence of imprisonment. The application is therefore granted and is treated as an appeal. The appeal is allowed. The conviction for murder is quashed, and the sentence of death is set aside. A conviction for manslaughter is substituted with a sentence of imprisonment with hard labour for a period of ten years commencing on 12th October, 1972.