JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 165/80

BEFORE: The Hon. Mr. Justice Kerr, - President (Ag.)
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

R. v. TRENTON BROWN

Horace Edwards Q.C., Noel Edwards Q.C., & Winston Young for Applicant

Mr. Howard Cooke for the Crown

February 15, 16 & March 31, 1981

ROWE J.A.

We quashed the conviction for murder, substituted a verdict of manslaughter, and imposed a sentence of fifteen years imprisonment at hard labour on Trenton Brown who having been convicted of the murder of Gilbert Roberts in the Clarendon Circuit Court on October 3, 1980 and sentenced to death, applied to the Court to have his conviction set aside on some ten grounds of appeal. The application was treated as the hearing of the appeal and the reasons for our decision which we promised, we now proceed to give.

The ten grounds of appeal were argued as if they were but two, viz, that in relation to the defence of self-defence the learned trial judge failed to relate the law to the particular facts of the case and in relation to provocation as the case turned upon the proper assessment of the evidence it was imperative for the learned trial judge to have put that evidence in its proper perspective and his failing to do so amounted to a grave miscarriage of justice.

About 150 people crowded into Terrier's Betting Shop at Bryan's Crescent, May Pen on Saturday February 23, 1980. Some were betting on race horses and some on Mr. Clark's crown-and-anchor game. In that

crowd were Special Constable Jackson and Det. Cpl. Jamieson. A rasta-man threw sky-juice on the trousers of Special Constable Jackson and this trifling incident led to the man drawing a knife according to Special Constable Jackson and Det. Cpl. Jamieson and to both Jackson and the rasta-man drawing knives according to Mr. Clark. Det. Cpl. Jamieson produced his service revolver and this resolved that scene as the rasta-man dropped his knife. Another rasta-man armed with a knife approached Jackson menacingly and he too was ordered to drop his knife by Det. Cpl. Jamieson. He complied and left the shop. It is not then surprising that with all this activity and with the crowd bunched around Det. Cpl. Jamieson another incident was in progress before it caught the attention of Novelette Williams who appears to have been an impressive and dramatic witness at trial. Her evidence was that she saw the appellant "reversing Jimmy like this - (and she demonstrated) with a ratchet knife" and she saw the appellant "give Jimmy three jams fast fast" saying, "I will kill you boy, I will kill you." Jimmy, by which name the deceased Gilbert Roberts was known, ended up by an old table beside a wall. Novelette Williams said she did not see the deceased with any knife as he retreated from the appellant. She cried out and it was her cry which alerted all the others. Mr. Clark did not see any stabbing but he saw the deceased against the wall as if sliding to the ground and he was being held in the collar by the appellant who had a ratchet knife in the other hand. Mr. Clark said from the position of the deceased he could not see if he had a knife in his hand and he did not see any knife taken from the deceased. Special Constable Jackson was put up by the crown for cross-examination and he said that after hearing Novelette Williams' alarm he looked and saw the appellant holding the deceased in his throat with his left hand, the deceased was stooping down with his back against the wall and the appellant held a ratchet knife in his right hand in a stabbing position. He said that the two men were facing each other and that the deceased had a kitchen knife which he dropped at the command of Det. Cpl. Jamieson. That knife h

took up and noticed that it had blood on it and later he gave that kitchen knife together with the ratchet knife retrieved from the appellant to Det. Lawrence.

The post mortem examination was performed by Dr. Morgan. On external examination he found three puncture wounds at the uppermost section of the chest and situated two inches from the base of the neck and a fourth puncture wound at the base of the neck near to the collar bone. The wounds ranged in depth from four to five inches and on internal examination it was found that the first rib on the left side was punctured, the upper atrium of the heart was punctured and the mid-lobe of the right lung was punctured. Death was due to shock and haemorrhage and in the doctor's opinion fairly strong force was necessary to cause the wounds even if a sharp knife was used.

The appellant gave a statement from the dock. He spoke of observing the incident of the sky-juice being thrown on Special Constable Jackson, of the pulling of the knives and of the intervention of Det. Cpl. Jamieson. He said the second armed rasta-man was coming at Det. Cpl. Jamieson and that man too droped his knife and left the shop. Then he said, he looked to his left and saw a third rasta-man moving towards Det. Jamieson's back with a long kitchen knife in his right hand. The appellant said that he stepped in the path of this man, asked him what was the matter and as reply the man stabbed at him with the knife and said, "move out of my way boy, I want to kill that rass man there because he sent me to prison already." With that the rasta-man continued to slash after him with the knife while he backed away looking for something with which to defend himself as it appeared to him that the rasta-man wanted to kill him too. The appellant said he saw a ratchet knife on the floor and he bent to pick it up at the same time holding his left hand as a shield. As he grabbed the ratchet knife the rasta-man slashed him a cut on his left hand. The appellant continued:

> "we then started to wrestle. As we moved across the floor and in the process he got cut by me and he cut me again on my left hand a second time."

he ended up by saying:

> "I didn't have any intention of killing anyone. I was only defending Detective Corporal Jamieson and myself from us being killed."

Special Constable Jackson was quite emphatic in his answers that he saw no cut on the appellant. When however, Det. Cpl. Jamieson was called as a witness for the defence, he said that his preoccupation with the original knife wielders was cut short by a noise coming from the corner of the building and on looking he saw the appellant and another man and "both of them hands were slashing at one another as if they were fighting". He wormed his way through the thick crowd to where the men were and saw the deceased with his bottom on the floor and his upper body leaning against the wall. The deceased, he said, had to shine blade knife in his hand, held up towards the appellant, who was stooping over him with a ratchet knife in his hand. His version was that both men were reluctant to drop their knives but that of the deceased eventually fell from his hands even as he was saying to the appellant that, "Buoy it nah go so." He took up the knife dropped by the accused which appeared to have on traces of blood stains and importantly, he said he observed that the appellant had two small cuts on his hand. Det. Cpl. Jamieson said that seven years before then he had arrested the deceased for smoking ganja and assault at common-law and for these offences he was convicted.

A statement which Det. Cpl. Jamieson had written on the very day of the killing was in the possession of the crown and two passages from that statement were put to the Detective Corporal which he admitted to be the truth. The first passage read:-

> "Whi e carrying out that investigation I was interrupted by a noise, sounds of hit and voices in a corner so I quickly moved towards the vicinity where the crown-and-anchor was in progress. I then looked and saw two men wrestling in a corner so I quickly moved towards them to settle their dispute. One of the men, the deceased who I knew personally as Jimmy was at the bottom and the other man who I knew by face but not by name was atop."

The second passage was:

> "When I went where the deceased and accused were fighting, I saw both men with knives in their hands at the time but they were not stabbing at each other, and they did not stab after each other, after I went there. The stabbing took place before that incident was brought to my attention as when it began I did not see it as my back was then turned towards them."

Det. Sergeant Lawrence the investigating officer was called by the defence and he said he was given two knives by Spl. Cons. Jackson and that after arrest and caution, the appellant said, "He pulled a knife on me and I defend myself." He said he saw a cut on one of the fingers of the appellant but could not recall if on the left or right hand.

On that state of the evidence the learned trial judge left to the jury the defences of self-defence and of provocation. In the very opening paragraph of his summing up the learned trial judge told the jury that the crown witnesses said that the deceased had no knife. This was a misdirection of fact as the witness Jackson did say the deceased had a knife and although not examined in chief by crown counsel he was put up by him for cross examination during the presentation of the crown's case. The reality of the situation, however, is that Jackson did not see how or when the fatal injuries were inflicted. Novelette Williams, on the other hand is the only witness who gave evidence of having seen the appellant stab the deceased and if her evidence is to be believed, at the crucial time when the stabbing was taking place, the deceased was not stabbing at the appellant. The fact then that the

deceased was not using his hands in an offensive manner might explain why Novelette Williams' attention was not focussed on his hands as she observed him being "reversed" and stabbed by the appellant.

However, the learned trial judge in leaving the issue of self-defence to the jury focussed upon what he described as "a counter-attack" by the appellant. This could only mean that the learned trial judge was inviting the jury to accept as true what the appellant said as to the genesis of the dispute between himself and the deceased which apparently Novelette did not see and then to go on to consider whether they would in such circumstances accept the evidence of Novelette Williams as true and in the process reject the appellant's version of what happened after he possessed himself of the ratchet knife. Having regard to all the facts and circumstances of the case we approve of the following direction of the learned trial judge:

> "If you find that the deceased launched a serious attack on this accused, you will have to ask yourself whether it was so serious that the accused would reasonably believe that he was in imminent danger of death or serious bodily harm. It was so serious that he had a reasonable apprehension because of the words and conduct of his attacker. Remember the words..... "Move out of me way boy, I want to kill that rass man." If you find that it was so serious, then the accused is entitled to defend himself. But please listen carefully. He was only entitled to do what was reasonably necessary in the circumstances to protect himself. It is for you to determine Mr. Foreman and members of the jury, did this accused person by proceeding to pick up a knife and in effect launch a counter-attack against the deceased, because he himself said that the deceased retreated before him some yards. Mr. Edwards adopted the crown's case in that regard. The accused launched a counter-attack and proceed to stab him three times in quick succession. It is for you to determine, Mr. Foreman and members of the jury, if you find that the accused is entitled to defend himself, did he do what was reasonably necessary in all the circumstances to protect himself by doing what he did. Was it reasonably necessary to prevent and resist the attack launched

> "on him by the deceased to do what he did, because if that was not reasonably necessary, then it would be excessive and the defence of self-defence would not avail the accused person, then you would go on to consider the question of provocation."

Mr. Edwards severly criticized the learned trial judge's directions to the jury on the issue of provocation, in that he said the judge failed to relate the fact that the deceased had a knife to the other evidence in the case and that the tests of provocation were put to the jury in the wrong order.

We think, in accord with the views of the Court of Appeal in R. v. Brown (1972) 2 All E.R. 1328, that when directing on the issue of provocation, it is desirable that the trial judge should deal firstly with the acts of provocation, then secondly with the loss of self-control both actual and reasonable, and lastly with the retaliation proportionate to the provocation. If too heavy weather is made in the first place of whether a reasonable man would be provoked by the provocative acts, this may distort the fact that the person on trial is a real person and not an abstraction and may mislead the jury into thinking that / the person on trial was not provoked. In his directions on page 83 of the Record the learned trial judge three times referred to the question of whether the acts of provocation could cause an ordinary person to lose his self-control without at the same time posing the first question of whether the accused did in fact lose his self-control.

However, on the very next page of the Record he is reported as saying,

> "Put it another way, the accused must have been so provoked that he lost his self-control as a reasonable person would lose his self-control in similar circumstances,"

and he went on to give the directions in terms of section 6 of the Offences Against the Person Act. We do not think that the jury were

likely to be confused by these directions.

The jury were correctly directed that the burden was on the crown to negative provocation and that there was no duty on the defence to prove that the appellant was provoked. However counsel for the appellant complains that what was put before the jury as constituting the acts of provocation was the statement of the appellant from the dock which the learned trial judge had told the jury they could give such weight to as they thought fit bearing in mind that it was an unsworn statement and not subject to cross-examination. In the view of the defence attorney this was inadequate because there were two other all important facts common to both defence and prosecution namely that at the final moments of the episode the deceased had a knife in his hands, and secondly that the appellant had cuts on one of his hands. He said that by his not reminding the jury that the appellant did not stand alone on those matters when he was dealing specifically with the issue of the provocative acts, the learned trial judge did not fairly leave that issue to the jury.

In our view the prosecution not having proferred any explanation as to how the appellant received the cuts to his hand, not having been able to offer an alternative theory as to how the fracas started, and not being able to give positive evidence as to how the kitchen knife got into the hands of the deceased, it rested as a duty on the learned trial judge to place those issues before the jury in their consideration of the issue of provocation. The learned trial judge's reference to counter-attack when he was dealing with self-defence should have alerted him to the necessity to give maximum assistance to the jury when he came to deal with factors which although they may not justify the appellant's conduct may provide some excuse. We are not satisfied that had he given the careful directions which were required, the jury would nonetheless have returned a verdict of guilty of murder. We accordingly, allowed the appeal, quashed the conviction for murder and substituted a verdict of manslaughter.

The nature of the injuries showed that extreme force was used, and any of those four stab wounds could have been fatal. The sentence of fifteen years imprisonment at hard labour reflects our view of the gravity of the offence.