J A M A I C A

IN THE COURT OF APPEAL
CRIMINAL APPEAL NO. 114/72

BEFORE: The Hon. Mr. Justice Fox, J.A., Presiding.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Grannum, J.A. (Ag.).

R. v. TREVOR GREEN - MURDER

Martin Wright Q.C., for the Crown.

Roy Taylor for the applicant.

June 13 and 18, 1973

FOX, J.A.:

On the night of 1st January, 1972, a dance for which a fee was demanded at the gate was being held at James Hill in Clarendon. At about 8 p.m. a man called 'Fine' tried to force his way into the dance. He was barred at the gate by the gateman and other persons at the dance including the deceased. The accused was in the road. He came up to the gate, and stretching over the heads of other persons, he cut at the deceased and another person with a long knife. When this happened, a witness said that he called to the accused and asked him why he had cut at the deceased when the deceased had not troubled him. The accused did not answer this question. He looked at the witness, walked back into the road, and at some stage commenced to dance in the road. After the altercation at the gate had subsided, the deceased left the dance and went some little distance down the road where he spoke with his brother. Having done this, he was returning towards the dance. He came up to where the accused was, stopped, and spoke with the accused. One witness heard the deceased ask the accused "why you cut after me with the knife." All the witnesses for the prosecution agreed that at this stage

the deceased's hands were at his side, and that they heard him say nothing and saw him do nothing amounting to aggressive conduct towards the accused, or from which the accused could have apprehended an attack or any threatened violence to him. The accused reached into his back pocket, drew out a knife, plunged it into the breast of the deceased and ran away. The deceased received a fatal stab wound. He died on the spot.

The applicant's reply to the Crown's case was by a statement from the dock in which no specific reference to the incident at the gate was made. It was left to be implied that the testimony of the witnesses for the prosecution of this incident was false. The applicant said that he was dancing in the road "paying attention to no one because I know that I trouble no one." The deceased passed him and went down the road. On his return, the deceased suddenly spun around, grabbed him and said 'Bass you, why you cut after me with the knife'. Putting his hand in his back pocket and 'coming up' the deceased said further that he "going to shoot out my blood cloth." The applicant continued: "I go for my knife into my pocket and I jook him and I run..... why I gots to run is because I thought he was going to shoot me."

On the evidence for the prosecution, the jury could have had very little difficulty in coming to the conclusion that the deceased died as the result of an act which was unprovoked and must have been intended to kill. Somewhat faintly it was argued that the verdict of guilty of murder was unreasonable having regard to the evidence. It is sufficient to dispose of this argument by according it mention. The main contention on appeal before us was that as a result of confused and misleading directions in general, and on the issues of self-defence and provocation in particular, a proper consideration of the case by the jury had been so gravely prejudiced as to require the conviction to be quashed.

The complaint on the issue of provocation

In telling the jury early in the summing-up that to amount to murder the killing must be by an act which was intended

to kill or to inflict really serious bodily injury, the learned judge said:

> "You must bear in mind that it is not every deliberate and intentional killing which amounts to murder. A deliberate and intentional killing done as a result of legal provocation is not murder but manslaughter"

It was contended that these entirely correct directions were nullified by further statements which sought to describe the burden upon the crown to prove the intention necessary to constitute murder, and to explain the consequence in terms of manslaughter of a failure to discharge that burden. Particular complaint was made of this passage towards the end of the summing-up.

> "You are entitled to find the accused guilty of murder if you are sure the accused killed the deceased by a voluntary and deliberate act intended to kill or intended to inflict really serious bodily injury, that he was not acting in self defence or in circumstances amounting to justifiable homicide and that the killing was not an accident. If that is what you find from the totality of the evidence, you are entitled to return a verdict of murder.
> CROWN COUNSEL. Your Lordship forgot just now to tell them that the Crown also has to satisfy them that there is no provocation before they can find a verdict of guilty of murder.
> HIS LORDSHIP. Yes, and the Crown has to satisfy you that there was no provocation before you can find a verdict of murder."

We have examined this and other passages to which our attention was drawn and consider that there was not the slightest chance of the jury being misled into thinking that if they found the intent

necessary to constitute murder, they could find the applicant guilty of that offence even if they found also that he had struck the fatal blow under the impulse of provocation. In R v. Harvey Cr. A. 97/72 - December 15, 1972, the jury were so misled and as a consequence the conviction was quashed. We are satisfied that this particular pitfall was successfully avoided in this case. Nothing which the learned trial judge said could have obscured his directions that provocation reduced murder to manslaughter, or in any way have hampered consideration of the evidence which was relevant to this issue.

The complaint on the issue of self-defence

There were two prongs to this complaint. In the first prong Mr. Taylor submitted that it had not been sufficiently explained to the jury that if the applicant reasonably apprehended an attack upon himself as distinct from an actual attack, he would have been entitled to take the action which he did take to repel the threatened attack. This complaint is without merit. At several places in the summing-up the learned judge made it abundantly clear to the jury that if they believed or were left in doubt concerning the applicant's account of the incident, they must acquit him. In telling them that if the applicant believed upon reasonable grounds that the deceased was pulling out a gun he must be regarded as having acted in self-defence, the learned judge did not confine the jury's attention to the material in the applicant's statement from the dock which was capable of supporting that situation, but went on to invite examination of the evidence for the prosecution, and to direct an acquittal if upon such an examination the jury thought that the applicant had acted in self-defence. In so inviting the jury, the learned judge was being more than generous to the applicant because there was nothing in the Crown's case from which self-defence could have been extracted. Equally over favourable to the applicant was the direction which suppressed the jury's right to reject evidence which was disbelieved and advised that "the only way" in which the

applicant's statement from the dock could be rejected was by acceptance of the crown's evidence.

The second prong of the complaint on self-defence canvassed the consequences of the direction that if the jury believed that the killing was the result of justifiable homicide they should return a verdict of acquittal. It was submitted that these directions must have confused the jury's consideration of the issue of self-defence. We cannot agree. In the summing-up, self-defence and justifiable homicide were treated as two separate issues, and even though the jury were told that the two could be combined, they were also told that if they felt sure that the applicant was not acting in self-defence, they would still have to consider the question of justifiable homicide. The judge then went on to say that if the applicant had killed in defending himself from the commission of a forcible and atrocious crime he was under no duty to retreat, and the degree of force used in repelling the attack was irrelevant. Justifiable homicide occurs under three heads. The head which was relevant in this case was homicide committed in prevention of an attempt to murder. The situation was identical with that which made necessary the directions on self-defence, and there was no real occasion for separate and detailed directions under the rubric of justifiable homicide. These directions could have been conveniently incorporated in the discussion of the law and the evidence relating to self-defence, and we agree that the task of the jury might have been facilitated if this course had been followed. But to say that labour would have been made easier under certain circumstances is not to admit that it was rendered so difficult under other circumstances as to be incapable of performance. Under the combined effect of the directions on self-defence and justifiable homicide the avenues for a complete acquittal were broadened and emphasised, and we are satisfied that those directions could not have confused the jury's consideration of the issue of self-defence.

The complaint of general confusion

Finally we have considered the complaint that in their totality the directions to the jury were so confused a.. to inhibit a proper consideration of the case as a whole. We have followed with care and patience the exhaustive submissions in support of this complaint. In our view these submissions exaggerate the faults in the summing-up. All human endeavour is susceptible to fault. A summing-up is no exception to this general rule.The summing up here is full, in parts too full. It is fair, in parts overly fair to the applicant. The same cannot be said in relation to the Crown's case. It is repetitious sometimes, but never at the expense of, and often in furtherance of the defences which were available on the evidence to the applicant. And in some places the record of the summing-up is lacking in clarity. But neither did this deficiency nor others which Mr. Taylor identified obscure the vital issues in the case, the burden of proof upon the Crown, the defences open to the applicant, or perception by the jury of their primary function to resolve the simple questions of fact which arose for decision on the evidence.

For these reasons we refused this application, on Wednesday 13th instant and affirmed the conviction for murder which was recorded and the sentence of death which was passed.