JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 59/88

BEFORE: THE HON. MR. JUSTICE CAREY, P.(Ag.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. TREVOR JOHNSON

Bert Samuels for applicant

Miss Yvette Sibble for Crown

8th & 29th November, 1988

CAREY, P. (Ag.):

This was a wholly unmeritorious application for leave to appeal a conviction for murder, but in accord with present practise, we are putting into writing our reasons for its refusal.

The applicant was convicted in the St. Elizabeth Circuit Court held in Black River on 10th March before Patterson, J., and a jury and sentenced to death. The indictment charged him with the murder of Robert Stephenson on 3rd July, 1987.

The incident in which Stephenson met his death began innocently enough. It took place at a shop in Rosehall District in St. Elizabeth, where a bingo game was in progress. Stephenson it is alleged, removed a dollar ($1.00) from the table on which the game was being played. That seemed to have given the game its quietus for there followed some sort of passage at arms between Stephenson and a Venrice Wint (who gave evidence for the prosecution) and both men touched each other in the head. No fighting actually took place between them.

At this point, Stephenson removed himself to the front of the shop but he did not stay for long, and soon returned to the rear of the shop eating a bun and cursing. The applicant also appeared from the front of the shop, observing - "You can't trouble mi cousin so". Venrice Wint and the applicant are cousins.

In the next stage, the applicant then grabbed Stephenson, punched him all over his body, choked him and pitched him onto the floor. He administered the coup de grace with a stool - a blow to the foot and one to the head. Stephenson lay still: he was dead. The medical evidence revealed that he had died by strangulation and serious brain damage.

In the cross-examination of the eye-witnesses, which was significant rather for its length and purposelessness, it was suggested to them, but not accepted, that Venrice Wint had fought with Stephenson and choked him to death.

The applicant, consistent with our forensic practice, gave an unsworn statement. He related that Stephenson kicked Wint three times, wrestled with him, grabbed him in his throat and hit his head against a wall. He added -

> "Squeeze him on the wall in a him throat and have him head a lick on the wall a squeeze him. Venrice say if him no get him dollar him a kill him tonight because nobody can pick up fi him dollar. Venrice say him want him dollar else him a squeeze him and kill him tonight on the wall. Mi go up and say you can't kill the man over dollar.
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> .....
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> Mi go up and say 'low the man, you a go kill the man over dollar."

The applicant thus attributed responsibility for the killing of Stephenson to Wint, his cousin.

Provocation does not arise on his case. Learned counsel for the applicant thought that issue arose on the Crown's case. One of the two grounds on which he sought and obtained leave to argue was - that the learned trial judge ought to have left the issue of provocation based

on the evidence of Venrice Wint. The evidence which he identified was the words of the applicant himself when he came to the back of the shop - "You can't trouble mi cousin so."

Mr. Samuels conceded that provocation must emanate from the deceased but in the present case, the words showed that the applicant must have been provoked by something said or done to his cousin. He was not, however, able to draw our attention, to any provocative incident on the evidence. He did not suggest that the evidence of the mild fracas between Wint and the slain man, with respect to the dollar abstracted from the bingo table, could be so categorized.

Where counsel seeks to argue that a trial judge is in error in withdrawing the issue of provocation from the jury, he must be able to point to the three conditions for that issue to arise. They are -

(a) the act of provocation;

(b) the loss of self control both actual and reasonable; and

(c) the retaliation, proportionate to the provocation.

This Court in R. v. Pennant (unreported) SCCA 126/84 dated 5th May, 1986 stated the approach of an appellate court. We said this at pages 5-6:

> "The approach of an appellate court when it is considering whether provocation was properly withdrawn by a trial judge is not to put itself so to speak in the place of the trial judge, because
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> > 'a cautious judge might tend to err on the side of an accused'.
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> See Kerr, J.A., in R. v. Johnson 25 W.I.R. 499 at p. 503. Lord Devlin in Lee Chun Chuen (1963) 1 All E.R. 73 at p. 78 identified the true test, in this quotation from his advice:
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> > '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'.

> "If we are to apply the rest with as much exactitude as the circumstances permit, then there must exist the three elements which together constitute provocation in law, viz., the act of provocation, the loss of self-control, both actual and reasonable and the retaliation proportionate to the provocation. We can do no more than emphasize the pithy observation of the learned Law Lord in the case just cited (at page 79):
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> '.....provocation in law means something more than a provocative incident'."

In the present case, we agree that there was no evidence of any act of provocation. Thus there was no material on which it could fairly be said that the issue arose and accordingly, the learned trial judge was right to withdraw it from the jury. That ground must, accordingly, fail.

The other ground in which Mr. Samuels challenged the learned trial judge's directions was expressed in this way:

> "1. The learned trial judge misdirected the jury on how to consider the evidence in the case in the event that the defence had been rejected (see p 128)."

Counsel took exception to the following words at page 128:

> "You must consider all the evidence including what each accused has said and see whether you are satisfied so that you can feel sure that the prosecution has proved its case."

He was quite unable to appreciate how "rejected evidence" could play any part in the analytical process of determining guilt.

In order to understand the directions, the full text of the directions, must be set out. The learned trial judge expressed himself in terms that have become time honoured and so far as we are aware, have, until now, never been challenged. We quote from pages 126-127:

> "Now before you can convict any of these accused men the prosecution must satisfy you by the evidence so that you feel sure of the accused men's guilt. As I said, there is no duty on the accused to prove his innocence but he may attempt to do so and in this case both accused men have attempted. Now, I shall tell you in due course how to deal with or how to view the unsworn statement that they have made in this case."

The challenged words, we think, derive from Woolmington v. D.P.P. (1935) A.C. 462, the 'locus classicus' on the burden of proof, where Lord Sankey in his speech said this at page 482:

> "If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

See Mancini v. D.P.P. (1942) A.C. 1 at page 13.

The jury, even if they reject the evidence or statement of an accused, are required to review all the evidence to see if the Crown has discharged the onus of proof. "All the evidence," must include whatever answer or explanation the accused has offered. What is being conveyed is that the jury are not entitled to convict merely because they have found the accused to be telling a pack of lies: they are required to bear in mind the evidence of the accused when they are engaged in considering the evidence in its totality. We do not quite appreciate how the impugned words can, in any way, be capable of prejudicing an accused person. We would think it, not only absolutely fair to him but it is correct in point of law. We see no merit in this ground either.

We have, ourselves, considered the facts of the case and the summation and we are of opinion that the summing-up was fair and balanced and left the issues clearly for the jury. The trial judge was careful to leave manslaughter on the basis of their finding the absence of an intention to kill or cause serious bodily harm. His denial of the charge was explained. The jury plainly were not impressed with the applicant's story. They thought he intended to kill his victim, not only did he choke him into unconsciousness but hit him in his head with a stool. There was abundant credible evidence upon which the jury could arrive at the verdict eventually returned. We were quite unable to detect any basis for our interference.