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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 107/82

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.(Ag.)

R. v. WILFRED GREEN

Mr. B. Frankson for the applicant.

Mrs. M. McIntosh for the Crown.

September 26 & October 18, 1984

PRESIDENT:

On September 26, 1984, this application was refused. We promised to put our reasons into writing and this we now do.

The applicant and his brother Norman Green were charged with the murder of Heptha Irving. The applicant was convicted in the Home Circuit Court for murder and Norman Green for manslaughter.

The facts very briefly as stated by the Crown witnesses are that Norman Green had an altercation with the deceased during which stones were thrown by the deceased at Norman Green. One of these stones caught Norman Green on his elbow and injured him. On seeing the injury Norman Green stated that he was going for his bad brother to come for the deceased. Norman Green then left and went home. The applicant and Norman Green then returned to where Heptha Irving was. This was some 10-20 minutes after the incident with Norman Green. The applicant was heard to say "You see wha' him do with mi brother." It may be presumed that Norman Green

made a report to his brother, the applicant, who was shown the injury. The applicant proceeded to stab the deceased several times with an ice-pick and he died as a result of injury received from the stab wounds. Norman Green also participated in the attack on the deceased. The applicant's case was that he was attacked by the deceased with a knife and in defending himself, he stabbed the deceased. The applicant stated that he received an injury from the deceased.

The learned trial judge in her summing-up directed the jury that on the Crown's case the issue of provocation did not arise in so far as the applicant was concerned. She, however, left the issue of provocation with respect to Norman Green who was convicted for manslaughter. It seems that the jury's verdict must have been based on provocation.

At p. 292 the learned trial judge stated:

> "If you think there was no pre-arranged plan or agreement but Wilfred attacked the deceased with the intention to kill him or to inflict serious bodily injury on him and Norman came down there and participated in the attack knowing that Wilfred was armed with this icepick, realized that the attack on Irving would be likely to result in the infliction of serious bodily injuries and with all that knowledge, still participated by holding him down, it would be a joint attack and it would not matter who inflicted the fatal injury, both would be equally guilty. <u>But in respect of Norman, because he had got this wound, you will have to consider provocation; in respect of Wilfred, provocation does not enter the picture at all.</u> "

The learned trial judge did in relation to the applicant correctly leave to the jury the issue of self-defence and provocation as it arose on the case for the defence.

Several grounds of appeal were filed but only two were argued. These are:

(1) The learned trial judge misdirected the jury on the issue of provocation when she told the jury that in respect of the applicant 'provocation does not enter the picture at all.'

(2) The learned trial judge in her summing-up failed to adequately analyse the case for the defence in a form that the jury could appreciate, particularly as it related to the issue of self-defence and provocation.

In respect of the first ground of appeal it was submitted by counsel for the applicant, that a report having been made by his brother Norman Green to the applicant that the deceased had injured him with a stone and the applicant having seen the injury, if he thereafter killed the deceased, then the issue of provocation should have been left to the jury based on these facts.

There is no doubt that if the applicant had been present and seen the attack on his brother by the deceased and was acting in aid of his brother, then it could be said that the issue of provocation should be left to the jury. R. v. Porritt [1961] 3 A.E.R 463.

In R. v. Fisher [1837] 8 C. & P. 182, a case in which a father got a report of the deceased committing an unnatural offence with his son, and thereafter killed him, it was held that this would be murder. If he had seen the act being committed, then the issue of provocation would be a consideration for the jury.

At p. 186, Park. J. stated:

> "In all cases the party must see the act done. What a state should we be in if a man, on hearing that something had been done to his child, should be at liberty to take the law into his own hands, and inflict vengeance on the offender. In this case the father only heard of what had been done from others. I say, therefore, and I do it with the assent of those who are with me, that there is not enough to reduce the offence from murder to manslaughter. We think there is not sufficient provocation to reduce this offence even to manslaughter."

If a person on the receipt of a report of an attack on his brother or other close relative was allowed to kill and then afterwards allowed to rely on provocation, this would in effect be sanctioning a person to take the law into his own hands. It would be a licence to kill. Clearly this could not be the law.

In our opinion the applicant not having been present and seen the attack on his brother, he cannot in the circumstances rely on provocation. Such a proposition would be an extension of the law and in our view would be totally unwarranted.

The learned trial judge quite correctly stated that the issue of provocation did not arise on the facts of the instant case in so far as it related to the report of the attack on his brother.

In so far as the other ground of appeal is concerned, we need only say that the learned trial judge fairly and adequately directed the jury on the case for the defence. The issues of provocation and self-defence were properly left to the jury for their consideration. We find no merit in this ground of appeal.

For these reasons we refused the application.