JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL,NO. 126/84

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

R. v. Wilfred Pennant

H. G. Edwards, Q.C., for applicant

Miss Jennifer Straw for Crown

28th April, 15th May, 1986

CAREY, J.A.:

Between the 1st and 4th October, 1984, the applicant stood his trial in the St. Catherine Circuit Court for murder before Vanderpump, J., and a jury and upon his conviction, was sentenced to death. He applied for leave to appeal against this conviction which, in the event, we refused. We now give our reasons for that decision, as we had intimated at the hearing.

The facts may be shortly stated. On 22nd February, 1983, the slain man Ernest Stephens, a District Constable, had in his possession a warrant of commitment for the recovery of a civil debt in respect of the applicant. Accompanied by one Vincent Stephens, himself a District Constable and Assistant Bailiff attached to the Resident Magistrate's Court in the parish, Stephens went to 45 Old Harbour Road where they met the judgment debtor, the applicant, outside in the roadway. There Stephens read the warrant to the applicant who stated that he had already paid the lawyer. There was evidence that the judgment creditor was present at the time, because he, it was, who pointed out the applicant. Stephens then invited the applicant to accompany them to the lawyer so that his statement could be confirmed. But the applicant was not minded to comply, whereupon the District Constable held him in his waist. The response was swift as it was unexpected. From his waist, the applicant whipped out a knife, using it to stab the District Constable twice in his chest, piercing the heart and the left lung. Although the

stricken man managed to pull his service revolver, he only succeeded in firing 6 rounds aimlessly into the ground, at a range of one yard from his assailant. Johnson who tried to intervene, was also stabbed in his chest by the applicant, who thereafter left the scene, but by this time, the District Constable had fallen to the ground, dead. The cause of death was stated to be shock and haemorrhage from the stab wounds to the chest.

The applicant who gave evidence on oath, painted a different picture. According to him, at about 5:30am while he was still lying in bed, the door to his room was kicked in and suddenly, a man appeared. In his hand he held a gun: He then in examination-in-chief, gave the following narrative:-

> "I jump up out my bed and I grab him in his collar here and a fight began. And after the fight began, I hear a shot burst out of the gun and I hear a second one and my blood run cold. Then I move across the table, took an ice pick off the table and the table went down and I stab him two times, and after I stab him I let go and he ran outside. I run out there too and when I went out there he turn on the gun and fire four more shots out of the gun after me. I sight the shot them and when the gun was finished I see him do the gun like this and put something there like a shot and I run away. I run away and didn't go back home".

The ground which learned counsel was granted leave to argue was formulated thus:-

> "2. It is manifestly clear that Provocation arose on the Crown's Case but this issue was not treated by the Learned Trial Judge albeit with the concurrence of Defence Counsel who was equally culpable in this regard.
>
> The deceased Stephens had no power or authority to take the Appellant to any lawyer and the Appellant was within his rights to refuse to accompany him".

During the summing up, there occurred the following colloquy between the trial judge and defence counsel:

> "MR. EDWARDS: May it please, you, M'Lord, before you continue may I just indicate to you that on reflection, M'Lord, I do not think, it does not seem that the issue of provocation arises.

"HIS LORDSHIP: On either crown or defence.

MR. EDWARDS: That is so, M'Lord.

HIS LORDSHIP: Thank you very much, Mr. Edwards. You don't want me to deal with provocation then?

MR. EDWARDS: No, M'Lord.

HIS LORDSHIP: Thank you very much, Mr. Edwards.

MR. EDWARDS: As it pleases you, M'Lord".

That was a plain invitation on the part of defence counsel to withdraw the issue of provocation from the jury, a request which was acceded to by the learned trial judge in this way:

> "HIS LORDSHIP: Yes. So. Mr. Foreman and members of the jury, learned counsel, on reflection, says he does not want me to deal with provocation, so you will just think of the sole limb, that of self defence;....".

It is fair to the learned trial judge to point out that he did appear minded, at one stage of the summing up, to leave to the jury the issue of provocation as arising on the defence version of the facts, though not on the prosecution case. First, at page 94 he commented:

> "But on the crown's case it is clearly murder, if you accept the crown's case no provocation in that, no self-defence, man hold him in his waist and he retaliated with an icepick and stabs him to death; that is plain murder on the crown's case. But on the defence's case, that is different to what happened in the room, if you accept any thing happened in the room, that is different".

Later at pages 99-100 he expressed himself thus:

> "So, with all I have told you and all the accused has said in the witness box happened to him, if you still don't think that he acted in self defence, if you feel that he did not, then you would go on to consider the question of provocation, that is an alternative which Mr. Edwards has submitted arises on the facts. Not on the crown's case, I don't agree with him, on the defence, could be, but that is only if you reject the defence of self-defence you go on to consider provocation, which would lead to a verdict of manslaughter and not murder".

But in the end, he yielded to the considered opinion of an experienced leader at the criminal Bar. This occurrence prompts us to make some observations with respect to one of the responsibilities of a trial judge when he comes to sum up a case to the jury. We adopt this course in the hope

that this will obviate what has been highlighted in the ground of appeal argued, and manifested in the approach of counsel for the applicant.

It is well settled that a trial judge has a duty to leave to the jury in a case of murder, the issue of provocation where it properly arises. Lord Tucker in Bullard v. R. (1957) 42 Cr. App. R. at p.5 made this point, in these words:

> "....if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to the jury, and, whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked".

The duty of the judge only arises if there is any evidence on the issue, fit to be left to a jury. It follows as night the day that if there is no such evidence, the trial judge must withdraw that issue. It is a positive duty. The responsibility is the judge's: it is not defence counsel's, however well-meaning or well-intentioned. It is, in our view, an abdication of function and a surrender of responsibilities, for a judge against his better judgment to yield to the divergent view of defence counsel. Tactically defence counsel often desires an acquittal, not a verdict to the lesser count. Moreover, counsel appearing on appeal might well endeavour to argue, as indeed has occurred in the instant case, that the trial judge was in error as was counsel below.

The view which we have just expressed is by no means novel. But perhaps, attention should be called to it once again. In R. v. Wylie 25 W.I.R. 430 at p.434, a much cited authority in respect of visual identification, this Court issued some helpful guidelines in these words:

> "We think that if in a charge of murder the trial judge has given due ear to the submissions of counsel for the prosecution and for the defence, and has himself combed the evidence, if he finds no evidence to support a defence of justifiable homicide he should tell the jury so in a single short sentence. If he finds no evidence to ground the defence of self-defence or the defence of provocation he should tell the

> "jury so in a single short sentence. A judge should be courageous enough and practical enough to deal with and only with the live issues in the case being tried before him".

In this case, had the learned trial judge stuck to his guns, the ground of appeal as formulated, could not have been open to counsel. The gratuitous provision of a hunting ground for points of appeal, is not to be encouraged by a judge.

Learned counsel who argued in this application before us, did not appear at the trial and from the submissions he pressed upon us, did not share the view of counsel in the Court below. Undeterred by what had taken place there and by the ground of appeal in respect of which he had sought and obtained leave to argue, he told us that provocation arose not only on the Crown's case but also on the defence case. As to the Crown's case, he pointed to the fact that the slain man had assaulted the applicant by holding him in his waist. As to the defence case, he said that provocation arose from the fact that the applicant's door had been kicked in by an armed man. He observed that there was evidence from the investigating police officer that the lock on the applicant's door appeared to have been forced and the room ransacked. Therefore, it was said, a clear duty was then cast upon the trial judge to leave that issue to the jury, and the applicant had accordingly been denied a chance of a verdict of manslaughter.

With all respect to the pertinacity of learned counsel, we do not think that having regard to the circumstances of the case, his submissions are well-founded. 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

> "a cautious judge might tend to err on the side of an accused".

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:

> "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 test 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):

> "....provocation in law means something more than a provocative incident".

In the present case, learned counsel isolated as provocation arising on the Crown's case, the evidence that when the applicant refused to go to the lawyer to whom he said he had paid the debt, the arresting officer had held him in his waist, which had prompted the reaction resulting in the officer's death. But the slain man on that occasion was clothed with lawful authority to arrest the applicant and acted reasonably and justifiably in holding him to enforce his authority in the face of the applicant's refusal to submit to arrest. From that lawful conduct, no act of provocation or even a provocative incident, call it what you will, could therefore arise. Since none of the three elements, which, as we have indicated, should co-exist, are present in the Crown's case, we are clearly of opinion that the learned trial judge was eminently right when he withdrew the issue of provocation from the jury's consideration, and directed the jury that on the Crown's case:

> "that is plain murder".

As to the defence, it was clear that it was self-defence. If the jury accepted or were in doubt with respect to the applicant's version of the events which took place in the early morning of February 22, 1983 viz. that his door was peremptorily kicked in by a man who burst into his room and fired a gun with which he was armed and in defence he stabbed that intruder, the applicant would have made out self-defence. That defence would have entitled the applicant to a complete acquittal. The learned trial judge correctly advised the jury in these terms:

> "If you believe this, Mr. Foreman and members of the jury, it does appear that

> "he was acting in self defence. Mr. Edwards has submitted so. You remember both learned counsel addressed you. So, that is the evidence. Will you please consider it. If you feel sure that this accused man stabbed the deceased with intent either to kill or to cause serious bodily harm you must ask yourselves the question: did he act in self defence. It he did, then he is not guilty, and if you are not sure whether or not he did, then he is also not guilty".

Accordingly, had the trial judge in these circumstances left provocation to the jury, the effect of such a direction would have been to deprive the applicant of a chance of acquittal. It would in our view, totally erode the force of the direction affording an acquittal. To do so would be wholly unfair and lead to manifest injustice.

The precise point was argued by counsel in R. v. Johnson (1978) 25 W.I.R. 499 who urged that the trial judge by directing the jury on that issue (i.e. provocation) denied the appellant a full consideration by (the jury) of his defence (of self-defence) as it tended to distract the jury with the result that the appellant could not be said to have had a fair trial, and in the circumstances there had been a miscarriage of justice.

We find that case particularly apposite for there learned counsel at the trial had successfully invited the trial judge to withdraw the issue of provocation from the jury but nevertheless relied on that withdrawal as a ground of appeal. This court speaking in the words of Kerr, J.A., at p.504 observed:

> "....we found it exceedingly difficult to say that there was evidence of provocation at all sufficient to satisfy the law on that subject".

The learned Judge of Appeal then concluded in these words:

> "Despite argument from the appellant's attorney to the contrary, we were of the view that those directions responding to and in effect embracing this final address by counsel, clearly and effectively withdrew the issue of provocation from the consideration of the jury and therefore there could be no real cause for complaint".

The situations are indistinguishable, and we are content to echo the observations quoted, and reiterate, that there can be no cause for complaint.

No other ground was argued before us. But having considered the facts and the directions of the learned

trial judge which we note, were, on occasions, unduly favourable to the applicant, we are quite unable to discover any reason to disturb the verdict of the jury which was warranted on the facts.

For these reasons, we refused the application for leave to appeal.