JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 88/82

BEFORE: The Hon. Mr. Justice Zacca, P.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. WINSTON HAYE

Mr. B. Macaulay, Q.C., and Mr. Delroy Chuck
for the Applicant.

Mrs. C. Beswick for the Crown.

December 12 - 14, 1984
& March 1, 1985

PRESIDENT:

On December 14, 1984, we refused this application for leave to appeal and stated that we would deliver our reasons in writing therefor at a later date. We now do so.

The applicant Winston Haye was convicted in the Westmoreland Circuit Court on May 18, 1982, on an indictment charging him with the murder on May 24, 1981, in the parish of Westmoreland of Bueline Jathan and was sentenced to death.

The Crown's case was that on May 24, 1981, the deceased was at his home. There was a shout for "Help" and two persons ran into the deceased's house. There was a demand that they should be sent out of the house. This was refused and the deceased went outside and spoke to the applicant who had a machete in his hand. The deceased went towards a piece of stick. The applicant then rushed

down towards the deceased and chopped him in his back with the machete, and he fell on the ground beside the stick. Eugenie Gooden, a witness for the Crown stated that she threw a bottle at the applicant which hit him in his head and he staggered. The applicant was going to chop the deceased again and Gooden called to one Danzel McKenzie who threw a stone which hit the applicant in his head and the applicant went away.

The deceased died as a result of injuries inflicted by the applicant. The deceased received injuries to his back and shoulder.

Sergeant Clinton Gayle who gave evidence for the Crown stated that he visited the applicant's house and there he saw bloodstains about 1 yard from the applicant's doorway. He also observed that a window was broken. There was broken glass inside and outside the house. He also saw two stones inside the house.

In his defence the applicant stated that he was at his house. He saw Eugenie Gooden and the deceased coming towards his house. Gooden had a machete in her hand and the deceased had a stick and two stones. The deceased threw a stone which missed him. He was now standing in his doorway. Two other persons, Polly Witter and Desmond Clarke were coming towards his house with machetes and stones and they threw stones at his house. The deceased then began to hit him in his head with a piece of stick and the others were stoning his house and coming closer to him. He then took up a machete from a corner in his house and flashed the machete. The deceased was at that time hitting him with the stick and the others were coming down towards him. His defence was that he was being attacked by the deceased and others and that he was defending himself.

The learned trial judge in his summing-up left the issues of self-defence and provocation for the consideration of the jury.

On the hearing of the application for leave to appeal several grounds of appeal were argued. We found no merit in all the grounds of appeal except one. We, therefore, consider it necessary to deal only with that ground of appeal which is as follows:

> "The learned trial judge unwittingly misled the jury that provocation, for the purpose of reducing a charge of murder to manslaughter must have emanated from the victim only. He failed to direct the jury that provocation may have emanated from some person other than the victim."

It is submitted that this was a misdirection on the part of the learned trial judge, as he omitted to tell the jury that provocation could have arisen from persons other than the deceased himself.

In his summing-up to the jury the learned trial judge at page 153 stated:

> "Now for provocation to arise there must be a loss of self-control by the accused. That loss of self-control must be the result of something said or something done by the deceased ....
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> Secondly, loss of self-control must be as a result of something said or done or said and done by the deceased. You have to say whether if the accused lost his self-control it was as a result of the action by the deceased if he did lose his self-control it's because of the act of the deceased; and finally, you have to consider whether those acts would have caused a reasonable man that is to say an ordinary, responsible man capable of reasoning to lose his self-control and to act as the accused man did. Even, as I said, if he did lose his self-control and it was a result of the act of the deceased and those acts would in your opinion have caused a reasonable man to lose his self-control and to act as the accused man did, then

> "he would certainly be acting under provocation and he would be guilty not of murder but manslaughter."

Again at page 134 the learned trial judge stated:

> "The question of self-defence will arise at that point. If the accused being attacked by the deceased and others, but on the defence all of them were down on him, they were at him, the three of them came to the doorway, Polly, Denzel and Jathan, on the evidence of Princess Anderson they were at the doorway, the accused is saying they were some distance off stoning that side of the accused's house and only Jathan was by the doorway hitting him with a stick, the accused's evidence; but if that act caused him to lose his self-control because he was hit with a little bit of stick and he acted in the way he did, the question of provocation can arise, but you must bear in mind too, Mr. Foreman and Members of the Jury, the location of the injury. "

It was the applicant's case that the deceased and others were attacking him. Clearly, if this was so, then they were all acting together. No where does the learned trial judge direct the jury that the act of the persons other than the deceased could be considered as acts of provocation.

R. v. Thompson [1971] 18 W.I.R. 51 was a case in which the applicant had a fight with one 'Derrick'. The deceased intervened as peacemaker and was later killed by the applicant. It was held that the jury could take into consideration on the issue of provocation not only the provocative acts of the deceased but also those of Derrick even though there was no evidence that the deceased was acting with Derrick during the fight.

At page 57 (R. v. Thompson) Smith, J.A. states:

> "The question we had to decide was whether the jury could legitimately add to these acts of the deceased any provocative acts that the applicant may have received from Derrick in the fight with him.
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> "We are of the view that the incidents starting with the fight and ending with the stabbing of the deceased were so closely connected that they could properly be regarded as one entire incident. On the issue of provocation the jury had to consider the state of mind of the applicant when he inflicted the fatal injuries on the deceased. Indeed, the whole doctrine of provocation is referable to the state of mind of the accused judged against the standard of the mind of a reasonable man. Derrick had, apparently, been the aggressor in the fight with the applicant, who appears to have had the worst of the encounter. A prosecution witness, Barrington Dawkins, gave evidence that while the applicant and Derrick were fighting, the applicant was trying to get up and Derrick was pushing him down and the applicant's head "knock the ground". The mental state of the applicant after this fight may have been such that the blows from the deceased were all that was required to tip his mind into a state of loss of self-control; though by themselves these blows might not reasonably have been sufficient to place it in that state. In these circumstances, where all the provocative acts were done to the applicant in the course of one incident, his state of mind when he committed the act of stabbing could not, in our view, fairly be judged without taking all those acts into account. His conduct would, of course, still have to be considered from the standpoint of a reasonable man. "

In the instant case, if the jury accepted the account given by the applicant that other persons were attacking him along with the deceased, then it would be open to the jury to say that they were acting together. The provocative acts of those other persons ought to have been left to the jury for their consideration on the issue of provocation.

The medical evidence was to the effect that the deceased was chopped in his back. The account given by the accused of the attack by the deceased and the other persons was left for the consideration of the jury on the issue of self-defence. The jury rejected self-defence. Even had the jury been invited to take into account such provocative acts, other than those of

the deceased, as arose during the alleged attack on the applicant, we are of the view that the jury would have arrived at the same verdict.

Although the point raised on the hearing of the appeal has been decided in favour of the applicant, we are of the view that no substantial miscarriage of justice occurred. We, therefore, applied the proviso to s. 13 of the Judicature (Appellate Jurisdiction) Law, 1962, and refused the application.