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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 40/87

BEFORE THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE BINGHAM J.A. (AG.)

REGINA

VS.

PETER McHARDY

Mr. Bert Samuels for applicant

Mr. Winston Douglas for the Crown

22nd July, 1987 & 24th September, 1987

WHITE, J.A.:

This applicant was convicted on a charge of murder in the Trelawny Circuit Court after a trial before Harrison J., and a Jury on the 25th February, 1987.

The facts shortly put are taken from the summing up, where the Judge repeated the evidence. That evidence was given by Mervalyn Foster and Larry Palmer, the grandchildren of the deceased, Emilyn Palmer. They said that about 6 a.m. on the 13th May 1985, they were going from their home to the stand-pipe. They had to pass the home of the accused. As they passed he called to Mervalyn. She said she could not stop, but the accused came up to her, held her by the hand. She told him loudly to let her go and the accused said, "Don't I tell you I am going to kill you?" Although she kept asking him to let her go, the accused continued to hold on to her, and he attempted to draw her into the gully.

Their grandmother, the deceased, came up and said to the applicant

"Why don't you leave Carlene alone?" Carlene is the other name for Mervalyn, the witness who said the accused let her go. She was told by her grandmother to go home. The grandmother walked off. The witnesses heard the applicant say to the grandmother "All you a fight against me too?" The witnesses said they saw the applicant push the grandmother down to the ground, and while she was on the ground the applicant kneeled down over her, and gave her several stabs. The doctor said he found six stab wounds on the body of the deceased.

The witnesses ran off, Mervalyn herself was chased by the accused, after he got up from over her grandmother. She ran away another grandmother's house and apparently hid there. The applicant himself took to the bushes. For sometime he could not be found and was in fact not found again until July. The two eye witnesses said that the grandmother had nothing in her hand, but what they do say, is that the applicant had an icepick which he used to inflict the six wounds on the body of the deceased.

When the trial was about to begin, the learned trial judge enquired of the applicant whether he wished to have counsel, reminding him that on the previous occasion when the case came before the court he had said he did not wish to have the services of counsel in his defence. The applicant said that he did not wish to have a lawyer to defend him. To the specific question, "You want to defend yourself?", he answered "Yes sir;" and to another specific question "You realise what sort of offence you are charged with?", answer "Yes sir." Having been offered legal aid which he refused, it followed that, according to the statute which establishes the Legal Aid System, the applicant would have to defend himself. It may be that to the onlooker this is a rather bizzare situation, but the judge did bring home to the mind of the applicant what was required, but he insisted that he preferred to defend himself. As it turned out after the witnesses for the prosecution had given their evidence, the applicant, although urged by the judge, several times refused to ask the witnesses any questions. He certainly didn't ask Carlene and Larry any questions, He didn't ask the doctor any, but the Special Corporal, Rudolph Spencer,who arrested him, gave evidence that on that occasion the accused said to him after caution, "Mr. Spencer, me never really mean to kill the lady is just push me push the icepick and she drop. Thats why me run."

The applicant by cross-examination suggested to the special corporal that contrary to what that witness had said, the applicant said nothing after he was cautioned. The witness insisted that he did say something to him.

At the end of the prosecution's case, which apparently didn't last too long, the learned trial judge asked the applicant whether he wished to say anything in his defence. He was told of his rights by the Registrar; which is here quoted:

choose to giv

> REGISTRAR: "Mr. McHardy please stand Having heard the evidence of the Crown's witnesses in this case now is the time for you to make your defence. You can do one of three things, you can remain silent and say nothing at all. You may choose to give evidence on your behalf. What do you wish to do.
>
> ACCUSED: I have nothing to say
> HIS LORDSHIP: You understand what the Registrar has told you about your rights.
>
> ACCUSED: Yes, sir.
>
> HIS LORDSHIP: You don't have anything to say?
> ACCUSED: No, Sir.
>
> HIS LORDSHIP: You wish to address the jury?
> ACCUSED: I don't understand what you mean by address the jury.

To continue the quotation:

> HIS LORDSHIP: "What I want to know is, if you wish to speak to the jury now to tell them how they must review the evidence for the prosecution, how they must decide on a verdict, whether they must decide in your favour or in the favour of the persons who gave evidence. I am asking you if you want to speak to them to tell them what verdict they must bring in.
>
> ACCUSED: No, Sir.

It is clear from the records that the trial judge did everything which was expected of him in trying to get the applicant to understand the seriousness of the situation, but the applicant was adamant.

Firstly, that he wished to defend himself, secondly, that he did not wish to ask the witnesses any question except in one case, and thirdly, he had nothing to say to the jury either by evidence or by unsworn statement, or to address the jury.

Mr. Bert Samuels, who has appeared for the applicant before us,

has raised several grounds of appeal supplementary to the first ground. He complains that in the circumstances of the conduct of the trial, the learned trial judge should have left the defence of diminished responsibility to the jury. He bases that submission on the following part of the transcript:

> HIS LORDSHIP: "You wish to ask him (Larry Palmer) any questions
>
> ACCUSED: No sir
>
> HIS LORDSHIP: You wish to suggest to him what you say happened
>
> ACCUSED: I don't know what took place that morning sir. I don't have any suggestions.
>
> HIS LORDSHIP: Are you saying what he said is the truth.
>
> ACCUSED: He is not speaking the truth
>
> HIS LORDSHIP: You want to suggest to him that he is not speaking the truth
>
> ACCUSED: I couldn't suggest that he is telling a lie sir.
>
> HIS LORDSHIP: You dont want to suggest to him that he is telling a lie.
>
> ACCUSED: No, sir."

Well, having listened to Mr. Samuels, we are not quite clear as to what he really hoped to get from that passage. He went on to argue that certainly the judge had a responsibility, by the exercise of his discretion, to order that the applicant be medically examined as to the issue of his fitness to plead. Maybe one could go on to say that on the question of diminished responsibility the judge also had that responsibility.

Shortly put, our answer is that we did not and do not agree with the submissions in that regard bearing in mind who has to raise the defence of diminished responsibility. The judge saw the accused. The judge heard the accused challenge several jurors more than the Crown Counsel did, and certainly there is nothing on the transcript which would indicate that this question was ever raised at all. Therefore, we do not see wherein the judge should have taken it upon himself without more to ask for this accused man to be examined medically in respect of his fitness to plead, or to ascertain whether he was suffering from diminished responsibility. I am to add that the onus is on the accused to adduce evidence to establish the defence of diminished responsibility.

There are complaints that the trial judge abdicated the jury's function in respect of self defence. But when the judge said 'Now if she had no weapon it means there is no question of the accused acting in self defence,' the judge was perfectly right. Because there is no evidence that this woman had any weapon in her hand up to the time when she spoke to the accused. On the evidence, she didn't even raise her hand to the accused. So that we do not agree with the submission regarding this passage, and in fact, if one reads the transcript, one will see that the judge went on to say 'that there is no evidence that he was attacked, and that caused him to use the icepick, so it means that the prosecution, if you accept it, would have satisfied you that the accused was not acting in self defence at the time he is alleged to have used the icepick."

It was also submitted that in the circumstances of the conduct of the defence and having regard to the evidence the jury should have been directed on the defence of provocation. We were quite patient in listening to Mr. Samuels on this because his argument was that provocation could be gleaned from the remark by the applicant to the deceased, when he said "All you a fight me to." Provocation must arise out of a provocative act and/or provocative words spoken by the deceased to the accused which caused him to lose his self control, and would have caused any reasonable person to have lost his self control. Under the particular circumstances of the case it seems to us that if a woman,presumably the guardian of a young girl, goes to the accused, and says, "leave her alone," it is incredible that he should without more say that this lady has provoked him. Maybe what did happen is that her words caused him to transfer his anger and his resentment, and his intention to kill, to the grandmother. In fact as we pointed out to Mr. Samuels, when he spoke about transferred malice during his argument to us on the question of the judge's directions on intention, he might very well be misusing the term, because his submissions on the question of the intention of the accused was that there was a misdirection on the evidence. That piece of evidence about which he spoke is repeated by the learned trial judge in the summing-up where he said, "Now the evidence that you are asked to consider is to find the intention based on the evidence from Mervalyn Foster and Larry Palmer." And he goes on to repeat that "he came up and held her hand. She told him loudly to let her go and the accused said

"don't a tell you a gwine kill you." These are the ocomments of the learned trial judge. "Those are words if you accept he said it, he demonstrated an intention to kill. Its a metter for you." Mr. Samuels said that was wrong because in the events which happened the judge was indicating transferred malice.

We do not agree with him, because further down the judge did go on to explain that the intention which was of importance was whether he had an intention to kill the grandmother. The complaint made is really in respect of the judge putting to the jury the state of mind of the applicant on that morning. It is undeniable that if one took his words into account when he saw Carlene, he had an intention to kill her. When in fact Carlene got away from him on the intervention of her grandmother, the applicant turned around on the grandmother, pushed her to the ground and stabbed her six times. It is observed that in the summing-up the learned trial judge put to the jury that if in fact they accepted what the special constable said the applicant told him, that he didn't mean to kill her he just push the icepick and it caught her and he ran, they should find him not guilty of murder but guilty of manslaughter.

The trial judge was very generous in putting the lesser offence to the jury. The jury did not accept this avenue in favour of the accused, but found him guilty of the charge of murder. Having listened to Mr. Samuels with much patience, and I hope he thought with great understanding, we have no course open to us but to refuse the application for leave to appeal against this . conviction for murder. The conviction and sentence are therefore affirmed.