JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 201/88

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA Vs. ASTLEY RICKETTS

Ernest Smith for appellant

Lorna Errar-Gayle for the Crown

November 27, 1989 and February 23, 1990

WRIGHT, J.A.:

On November 27 last, we treated the hearing of the application for leave to appeal as the hearing of the appeal. The appeal against conviction for murder was allowed, the conviction quashed and sentence set aside; a conviction for manslaughter was substituted and a sentence of five (5) years of imprisonment at hard labour imposed. We now put into writing our reason for judgment as we promised.

The appellant had been convicted for murder of Paul Bryan and sentence of death was passed upon him at a trial in the Circuit Court for the parish of St. Ann before Malcolm J. and a jury on the 13th day of October, 1988.

The single ground of appeal, which was argued with leave of the Court, was that:

> "The learned trial judge did not accurately direct the jury on the issue of provocation, consequently the defence was not adequately left to the jury with the result that the jury may have been confused."

On the case for the prosecution the killing was a mysterious event the result of a chance encounter between strangers. The evidence of Alwyn Williams, which was borne out by Conroy Bryan, was that at about 3:30 p.m. on November 26, 1987, these two witnesses and the deceased, Paul Bryan, the cousin of the deceased, who all worked at the Ruins Restaurant, Ocho Rios, were on their way from work walking along the sidewalk, when the appellant approached them from behind, touched Paul Bryan on his shoulder and as the latter turned to see who it was the appellant said "swing slow" and with a knife, which he then pulled from his waist, stabbed Paul in his chest. The appellant then retraced his steps while Paul staggered across the road bleeding profusely and then fell to the ground. Paul had only managed to say "what do you mean?" before being stabbed and none of the three of them had done anything to the appellant or threatened any violence to him.

But there was another witness called by the prosecution, who came to Court from prison, and it cannot be certain whether the difference in his evidence is to be accounted for on that basis. His name is Evan Sawyers and his evidence, insofar as he gave any, favoured the defence version. He testified that he was standing on the side of the road opposite to the point of encounter between the deceased and the three young men. He had seen the deceased standing there in conversation with a young lady when the three young men, i.e. the two witnesses and the deceased, came up to him. He said he did not keep watching them but the next thing he saw was that one of the three young men, who came up, "pitch on the other side of the street" then he fell but got up holding his belly then ran off and fell again. He did not see the appellant do that man anything. Nor did he see any of the three

men do the appellant anything. He, however, admitted in cross-examination that the appellant had a bag with him. Defence counsel put to this witness, as he had put to the other two, that there was a fight between the appellant and the three who, it was contended, attacked him when they came up but he stuck to his version that he was not looking at them.

Constable Fidel Wong was on beat duty in Ocho Rios when he saw the appellant with a blood-stained knife in his hand running in his direction being chased by a crowd. He stopped the appellant and asked him what had happened to which he received no response. However, someone from the crowd, which gathered, said that he had just stabbed a man up the road. To this the appellant responded, "A the buoy dem lick me down". This witness observed that the appellant had "an old scar across his forehead". Indeed, that injury was the subject-matter of a charge against the deceased, Paul Bryan, which was due for a hearing in Court on the 10th December, 1987. Constable Wong handed over the appellant and the knife to Constable Noel Morgan, who preferred the charge of murder.

The appellant, at the moment when Constable Morgan was brought into the case, informed the Constable "a three a dem rush me". Constable Morgan, when cross-examined by defence counsel, denied the presence of any fresh injury on the appellant.

Bernice Tate, sister of the deceased who identified his body at the post-mortem examination, barely survived a vigorous cross-examination which sought to obtain an admission from her that the appellant had been hospitalized for six days because of an injury inflicted on him by the deceased on October 2, 1987, and that after his discharge

from hospital, both herself and her mother had been to his home in an endeavour to get him to compromise the matter. She maintained throughout that he was a stranger in the area and that she had never seen him before coming to Court. Further, she confessed ignorance of the incident out of which arose the charge against Paul Bryan which was slated for hearing on December 10, 1987.

The opinion of Dr. Noel Black, who performed the post-mortem examination, was that death was due to haemorrhage and shock the result of a three inch wound below the left breast which penetrated the left ventricle of the heart going straight through the heart. This wound, said the doctor, required fairly severe force.

Testifying in his own behalf the appellant gave his age as twenty-five years and stated that he is a professional chef, having worked on a ship and at hotels. At the time of the incident, he was employed as a chef at the River Seas Inn, Ocho Rios. From his evidence, the genesis of the conflict, out of which the charge arose, was that there was resentment towards him who was regarded as an outsider who had come into the area and had a more prestigious job than the three men with whom he had the encounter, each of whom worked as a dining-room attendant. Further aggravation was supplied by the fact that he found favour with a local girl, Marcia Brown, with whom he was then living. Where he lived with this girl at Boscobel, was only a few chains from where the deceased Paul Bryan lived. In the night of October 2, 1987, the deceased Paul Bryan visited his home along with three other men and accosted him concerning advice which he had given Marcia Brown about her assisting the deceased's cousin with his homework. Bryan struck him a blow with a stone over his forehead which resulted in his being hospitalized

at St. Ann's Bay for six days. On October 4, his girl-friend, Marcia Brown, visited him in hospital. She was accompanied by the mother of the deceased. The latter brought him some groceries as well as a proposal for compromising the case with her son. He agreed to the proposal, which appeared to be in his interest. After he left hospital he was visited at home by the same mother and Bernice Tate. Their mission was the matter of the compromise but he told them the matter was in the hands of the police so he could not compromise it. The next thing he knew was that on November 25, the day before the fatal encounter, he was accosted on the road by one Mikey, a cousin of the deceased, and two other men about the withdrawal of the agreement to compromise the case. Mikey cut him below his left rib cage leaving a scar which was observed by the Court at his trial. He reported the incident at the Ocho Rios Police Station.

On the following day he left work at about 3:10 p.m. carrying his bag by a strap across his shoulder. In a pocket of this bag was his chef knife. As he walked along the side-walk a girl stopped him and he was speaking to her when up came the deceased and the two witnesses, Alwyn Williams and Conroy Bryan, both of whom he knew before. He heard the deceased say "See the bwoy deh whey mek police a terrorize me". Thereafter, the three of them attacked him. Conroy held him around his neck while the deceased punched him. In the meantime, Alwyn tried to trip him. It was in that situation that he reached for his knife and "jucked at the deceased". He disagreed with the police that he had no visible signs of injury.

No complaint was made about the directions on self-defence, which defence the jury rejected. Counsel for the Crown, quite properly we think, conceded that the

directions on provocation are faulty. At page 205 of the summing-up, the learned trial judge introduced provocation thus:

> "A deliberate and intentional killing is not necessarily murder. A deliberate and intentional killing done as a result of legal provocation is not murder but manslaughter. The accent in this case has been self-defence but I will give you a little more about provocation later on when I come to the defence."

The actual direction on provocation appears at pages 213-214:

> "I told you that a killing sometimes, although intentional, can be done under legal provocation and and that would reduce the offence from murder to manslaughter. The crown is saying it was an unprovoked act. But provocation, to my mind, arises on the defence.
>
> What is provocation? Provocation is some act or series of acts done by the deceased to the accused, which would cause any reasonable person and actually caused him, the accused, a sudden and temporary loss of self-control. It consists of two elements. The act or acts of provocation: the fighting, the thumping and all that. Those were the acts I am talking about. If you accept that that was done. The act or acts of provocation may consist of things done. But what was done or said must be such as would cause a reasonable person to lose his self control and must have actually caused in the accused this sudden and temporary loss of self control. And when I am talking about provocation, you know, I am not talking about taking away girlfriend; I am not talking about blow in the forehead with stone, because the law says that there must not be time for cooling down. Provocation must not amount to retaliation or revenge. If somebody attacks you or tell you harsh words, tripped you, picked on you or do something and you go home and you think about it 'You know, this is provocation, man, I am going to get even with him' and next morning you meet him and you shoot him, then the law wouldn't avail you. You have had time to cool off. It would be revenge,

> "retaliation. So that is what I have to tell you about provocation.
>
> And, it is not for the defence to make a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. So, all the defence needs to do is to point to material which would induce a reasonable man to do the act. That is all that needs to be done. If you are in doubt whether the facts show sufficient provocation, then you should determine the issue in favour of the accused."

Section 6 of the Offences Against the Person Act, dealing with provocation, states:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

The elements provided for are -

1. The provocative act
2. Loss of self-control
3. Retaliation proportionate to the provocation.

This is now too well established to admit of any doubt: See Lee Chun Chuen v. R. (1963) A.C. 220; (1963) 1 All E.R. 73, Glasford Phillips v. R. (1968) 13 W.I.R. 356.

It was, therefore, obviously an error for the issue to be left to the jury on the basis that "it consists of two elements". It seemed to us that a fair presentation of the defence would require the learned trial judge to direct the jury, when considering the question of

retaliation, to consider what effect, if any, the previous events would have had on the mind of the appellant on this occasion when, according to him, he was confronted with hostility by the deceased and his cohorts.

In the circumstances, therefore, we could not say, with any degree of certainty, that had the jury been properly directed they would inevitably have returned the same verdict. The appellant was obviously denied the opportunity of a conviction on the lesser count. Hence, the course we adopted as earlier stated.