JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 42/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS

BARRINGTON CAMPBELL

Enoch Blake & Mrs. Marian Rose-Green for Applicant

Brian Clarke for Crown

30th March & 27th April 1992

CAREY, J.A.

In the Circuit Court Division of the Gun Court held in Kingston on 8th March 1990 before Wolfe J and a jury, the applicant was convicted of shooting Paul Vassell to death in the course of a robbery on the premises of the Seventh Day Adventist Church at East and Charles Street, Kingston.

The Crown's case depended substantially on the visual identification evidence of one witness, Karl Bowen and an admission allegedly made by the applicant to a police officer. The circumstances which give rise to the charge are these:-

On the evening of 22nd March 1989, there was a meeting of the Circuit of Churches Committee at the Church. Among the persons attending, were the slain man and the sole eye-witness. After the meeting, those attending prepared to leave and went out onto the side-walk adjacent to the church premises. Mr. Vassell went to his car from which he removed a machette and then re-entered the premises accompanied by Mr. Bowen, who is a police officer, and two other colleagues. As they traversed a passage way, Mr. Bowen heard the

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peremptory order - "hands up". He observed a man whom he identified as this applicant armed with a shotgun. He complied with the order while the two other men beat a hasty retreat. Mr. Vassell who was in possession of the machette, then attacked the gun-man who retreated. Mr. Vassell pressed his attack by chopping at the applicant. Mr. Bowen in the meantime, was held at gun point by the applicant's companion who relieved him of some cash. Both the applicant and Mr. Vassell went out of his view. Then he heard screaming and the sound of running feet. Next, there was the sound of a gunshot. The applicant re-appeared with an injury to his left hand and the shotgun and then conversed with his companion. Mr. Bowen was ordered to run. He did not hesitate. As he ran back along the passage way, he came upon his courageous church-brother who was lying at the entrance to the church mortally injured, if not already dead.

The pathological evidence disclosed that the victim's face had been blown away by a blast from a shotgun. According to the Pathologist Dr. Clifford:-

> "There was a large gaping shotgun wound on the face which completely shattered the mouth, the entire mandible and chin extending to the upper anterior neck".

On the 12th April, 1989 Mr. Bowen pointed out the applicant at an identification parade as one of the participants in the robbery.

The applicant in an interview with the police, Detective Sergeant Fullerton, on 10th April, 1989, said this:-

> "If de man neh chop me, me woundn't shoot him. All me a beg yuh, mek me go fe de gun. If it stay out dere it can kill ten people. It can kill your family and my family. Me gi it to de odder man to pudung. Yuh ever hear seh a lawyer carry in a man? Mek me lawyer carry me goh for it".

The defence was an alibi and the applicant swore that the injury to his hand occurred accidentally when he was chopping a coconut at Seaforth in the parish of St. Thomas where he alleged he was at the time of the shooting incident.

The ground of appeal did not attack the basis of the Crown's case i.e. identification evidence or the trial judge's directions thereon but raised the issue of provocation. It was in these terms:-

> "That the Learned Trial Judge erred in law in that he refused/failed/neglected to direct the jury on the law as it relates to provocation which defence properly arose on the Crown's case and ought properly to have been left to the jury for their consideration. (See Transcript pages 14, 15, 96 and 97) Edwards v The Queen (1973) AC 648".

Mr. Blake contended that the act of provocation was that the victim had attacked the applicant with a machette while he was in retreat albeit armed with a shotgun. Counsel was not so bold as to argue that the learned trial judge was wrong to withdraw self defence because it was clear that the member of the Church Committee or any of them was entitled to defend himself against the commission of a forcible crime upon him. He said this was a form of self-induced provocation which was recognized at law. He relied on Edwards v R [1973] AC 648 at page 658 E-F where Lord Pearson delivering the opinion of the Board, said:-

> "No authority has been cited with regard to what may be called "Self-induced provocation". On principle it seems reasonable to say that:-
>
> (1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing of the victim from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with a fist;
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> (2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer;
>
> (3) there would in many cases be a question of degree to be decided by the jury".

Mr. Blake said that hostile reaction of the victim went to extreme lengths in that he injured the applicant on his hand and that

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constituted sufficient provocation which the trial judge was obliged to leave to the jury for their consideration.

This concept of "self-induced provocation" appears to have legitimacy. Certainly it has been accorded a label and was discussed by their Lordships In Edwards v R.(supra). We would think that the reaction of a great many people to this principle is one of instant and total rejection. Why, it may be asked, should a criminal benefit from a situation brought about by his own criminal conduct? The essence of this type of provocation is that the conduct of the deceased which provokes the killer, is caused by the unlawful or wrongful acts of the killer himself. Perhaps, if it were appreciated that the benefit it confers is not entirely exculpatory but only to this extent, that if it reduces murder to manslaughter, (really, a sentence of death to one of imprisonment), then it becomes possible to deal with the matter.

In cases of self-induced provocation, the jury will be required to focus on the reaction of the victim and the question to be answered, is the extent of the reaction by the victim - did it go beyond all reason? This means that a jury would have to exercise some mental acrobatics and contemplate the reasonable blackmailer, burglar or robber for example.

Having said that, we are of the opinion that on the facts of this case, this principle is altogether inapplicable. The victim was entitled to defend himself using no more force than he honestly believed was necessary to counter a forcible crime about to be perpetrated. Indeed he was entitled to apprehend these felons who were both armed with firearms. He was in possession of a machette. The disparity in weaponery made it an entirely uneven contest. The "hostile" reaction of Mr. Vassell was legitimate. He was justified in his action. That action on his part, cannot, by any stretch of the imagination, be considered going "to extreme lengths" which is the test if the judge is to hold that there is sufficient provocation

fit to be left to a jury. But for the nature of the case, this point could be dismissed as laughable. We think it is appropriate to say that we are not impressed by the arguments in this regard.

That is enough, in our view to dispose of this application but the nature of the case constrains us, despite the absence of any other submission on behalf of this applicant, to consider the visual identification evidence and the trial judge's directions thereon.

The lighting which Mr. Bowen said illumined the scene, and allowed him to observe the applicant came from indirect electric lighting. One source was the light which came through a bathroom door and the other source was the glass through the church windows from lights in the church itself. The passage-way about which the witness spoke was formed by the wall of a lunch-room to the west and one side of the church building itself, to the east. At the head of the passage, is the bathroom into which a door is let. That door faces the passage which the witness and Mr. Vassell traversed. The applicant emerged from Mr. Bowen's left and into the light. No attempt was made to ascertain the actual distance between the witness and the applicant at this time. The trial judge in his summation at page 114 speaks of "the close proximity". It was however open to the jury to take the view that when Mr. Vassell attacked the applicant and forced him down along the passage, that the applicant came in close proximity to the witness. On the first occasion the witness viewed the applicant, the duration, a matter of 15 - 20 seconds. When the applicant returned to his companion having shot Mr. Vassell, the witness was able to observe him for about a minute and a half at the longest. During this period, both gunmen were in conversation.

The learned trial judge gave proper and adequate directions on the approach of the jury to visual identification evidence. As we have already stated, Mr. Blake did not seek to challenge the

directions and we, having examined them, think they are impeccable.

Apart from the identification evidence and the fact that the witness gave a description of the applicant to the police which tallies, there is the coincidence of the injury admittedly suffered by the applicant around the material time and the evidence of the admission by the applicant to the police.

In our judgment there was ample evidence upon which the jury could come to the verdict which they returned. We can find no reason to interfere with their decision and accordingly the application for leave to appeal is refused.