JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 94/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

REGINA

VS.

DERRICK WOLFE

Bert Samuels for the Appellant

Miss Diana Harrison for the Crown

July 13 and 31, 1992

ROWE P.:

This is an appeal from a conviction for the murder of Larkland Matthews in the Saint Catherine Circuit Court, Spanish Town, on the 24th July 1991 before Reckord J. and a jury.

On July 13, 1992 we allowed the appeal, quashed the conviction for murder, entered a verdict of guilty of manslaugher, and sentenced the appellant to fifteen years imprisonment at hard labour. We now give our reasons for so doing.

The accused and the deceased were both employed to the Coney Park Entertainment Centre. The Crown elicited the main facts from two witnesses, Phillip Grant and Maurice Heslop, who also worked at the entertainment centre. Phillip Grant testified that on the 4th July, 1990, himself along with the deceased and Morris Heslop were sitting in a maintenance shed. The deceased was in the process of having his lunch when the accused entered the shed, approached him and said: "What that you go do man?"

On the deceased's enquiry as to what he had done the accused replied: "Bout you gone tell them boy say you hear me a tell gal say me is the boss son". A heated argument followed this exchange of words. The accused then drew a "buck knife" from his trousers pocket, "draped up" the deceased, hit down the deceased and stabbed him on the back of his hand. The accused then began to make stabbing motions towards the deceased until he finally stabbed the deceased in the chest. This stab wound proved to be fatal.

Dr. Royston Clifford a pathologist testified that he peformed a post-mortem on the body of the deceased. He found one stab wound on the body. This wound had penetrated the heart thus causing death from massive bleeding. It was his view that the stab wound was one consistent with a wound made by a sharp instrument such as a knife with a moderate degree of force. He stated further that the wound would not be consistent with a fall on a knife or on a scrap heap.

Detective Corporal Everard O'Neil testified that on arresting and cautioning the accused, the latter said: "Officer, a wrestle me and him was a wrestle for the knife, sir and him fall down pon it ".

The accused gave an unsworn statement. He said that on the day in question he locked away his tools in the maintenance shed and then proceeded to the canteen. There he heard a group of men, including Phillip Grant and Maurice Heslop (but not including the deceased), teasing him saying: "We didn't know that the boss have a big son here now". The accused said he laughed it off, completed his lunch and then proceeded to the shed to pick up his tools. On arrival at the shed he saw Phillip Grant and the deceased He noticed that the lock was torn off his locker and some of his tools were missing. On his enquiry as to how this could have occurred, Grant said: "A me pop it off ..." An argument then

developed between the accused, the deceased and Grant. The accused said he then informed Grant and the deceased that he was going to make a complaint to management whereupon the deceased said: "Hey you boy, you a go make complain to management, you a informer". The deceased then pulled a ratchet knife from his pants pocket and with this he began to threaten the accused who said the quickest thing he could find to protect himself was a crankshaft. The accused testified that a struggle ensued in the course of which the deceased stabbed him on his shoulder and after further struggle the deceased fell into a scrap heap. Having managed to extricate himself from the grasp of the deceased, the accused stated he then ran to the first aid clinic to get attention for the wound on his shoulder. He had no knowledge that the deceased had suffered any injury due to their fight but on learning of it afterwards he could only assume, that any injury might have been due to the deceased falling on his own knife.

The jury returned a verdict that the accused was guilty of murder. The appellant filed the following grounds of appeal, viz.:

> "1. The Learned Trial Judge's direction on the Law relating to Self-Defence was confusing and inadequate and amounted to a misdirection.
>
> 2. The Learned Trial Judge erred when he failed to leave the issue of provocation to the Jury as there was ample evidence to justify directions to them on it thereby depriving the accused of the chances of verdict of guilty of Manslaughter.
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> 3. The Learned Trial Judge made several comments in the Course of his summing up which were either confusing, misleading or highly prejudicial to the Applicant's case and deprived him of a fair trial. (To wit inter alia pages 172, 175, 173, 133, 138 and 156)."

Ground 3 was abandoned.

Ground 1: Self-Defence

Mr. Samuels argued that the learned trial judge should have directed the jury that "in so far as the attack on the accused was concerned this required a subjective test". This we took to mean that the jury should have been given directions that in order to decide whether the accused honestly believed he was under attack, the subjective test, and not the objective test should be used. That is, the test is not whether a reasonable man would have believed he was under attack, but whether in the circumstances the appellant honestly believed that he was under an attack. Mr. Samuels thus urged the Court to say that the alleged defect in the summing-up in this case was similar to that in the case of R. v. George Burke S.C.C.A. 112/87, delivered 18th April, 1988 (unreported).

In his summing up, Reckord J. stated at pages 142-143 of the Record:

> "Now, what I will tell you about the law of self-defence is that when a man is attacked in circumstances where he honestly believes that his life is in danger, ... he may use such force as he believes is necessary, to prevent and resist the attack. And if in using such force he kills his assailant, he is not guilty of any crime, even if the killing is intentional. So, in this issue of self-defence, you must be satisfied Mr. Foreman and your members, that there was an attack upon the accused."
>
> [Emphasis supplied]

The facts asserted by the accused indicate that he was attacked and actually sustained an injury to his shoulder. We therefore do not find the case of R. v. George Burke (supra) apposite to these facts. In that case it is stated at page 9 of the judgment of this Court:

> "The issue for the jury in the instant case was not one of attack or no attack. It was plain that the real issue was whether the appellant honestly believed that he was under attack and that is the issue which ought to have been left for the jury's consideration."

The precise directions contained in R. v. Solomon Beckford [1988] A.C. 130 are not required in every case in which self-defence is raised. In the instant case there was no need for directions on the issue of whether the appellant honestly believed that he was under an attack. The appellant has not asserted any mistaken belief that he was under attack but instead has stated positively that he was attacked. The Beckford direction must be given where there is a question as to the nature or existence of the attack. When it is clear, however, on the defence that the appellant was being attacked the jury would not be assisted with a direction on honest belief. We therefore believe the directions given by Reckord J. in this case were adequate. [See also R. v. Denton Williams (unreported) S.C.C.A. 119/91, delivered 21st July, 1992 and R. v. Roy Thomas (unreported) S.C.C.A. 105/86, delivered January 29, 1988].

Ground 1 therefore fails.

Ground 2: Provocation

Section 6 of the Offences Against the Person Act provides that if there is evidence on which a jury could find that a person charged was provoked to lose his self-control the jury should be left to determine whether the provocation justified the reaction displayed by the accused in the circumstances.

Mr. Samuels argued that the learned trial judge took from the jury's consideration the question of provocation although on the case of the defence there were words and acts of provocation. It is clear that Reckord J. did not leave the question of provocation to the jury as at page 176 of the Record he said:

> "The question of provocation I am not leaving it to you because there is no evidence from either side to say that this accused man was provoked by anything said or done by the deceased. ... So the question of provovation doesn't arise."

We have stressed on many occasions that a trial judge has a duty to leave to the jury all issues that arise on the evidence even if the evidence in support of these issues is "slight or tenuous."

Miss Harrison stated that if on the facts there were words or acts of provocation then the issue should have been left to the jury. In her view, however, there were no provocative acts and/or words and on the totality of the evidence provocation did not arise.

On the other hand Mr. Samuels submitted that the lock torn from the locker of the accused's tool-box, the missing tools, and the assertion that the accused was an "informer" all amounted to acts which could have provoked the accused so as to cause him to lose his self-control and kill the deceased. Directions on the issue of provocation should therefore have been given by the learned trial judge. We believe that the acts and words indicated by Mr. Samuels could have indeed amounted to acts of provocation. We do not have to be sure that the jury would have found that the appellant was indeed provoked, it is sufficient for us to find evidence of provocative acts in order to determine whether the issue should properly have been left to the jury. [See R. v. Neville Collins (unreported) S.C.C.A. 212/88, delivered 13th July, 1992].

We were unable to say that no reasonable jury properly directed would have returned a verdict of manslaughter in the instant case, and as in our view the issue of manslaughter arose on the unsworn statement of the appellant we made the previously stated orders.