A. CRIMINAL LAW – Murder – whether trial judge misdirected jury on issue of self-defence – whether trial judge failed to direct jury on issue of provocation. Crown conceded sufficient evidence to raise issue of provocation. Conviction for murder quashed. Verdict of manslaughter substituted – 3 years imprisonment

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 46/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

REGINA

VS.

ESMELDA WHITE

Miss Janet Nosworthy for Appellant

John Moodie for the Crown

July 27 and December 17, 1987

KERR J.A.:

This application for leave to appeal from a conviction for murder in the Home Circuit Court on February 13, 1987 was treated as the hearing of the appeal. The appeal against conviction was allowed, the conviction for murder was quashed, a verdict of manslaughter was substituted and a sentence of three years imprisonment with hard labour imposed.

The case for the prosecution rested on the evidence of Cherita McLeod, a cousin of the deceased, Robert Whittick. According to her at about 3:30 p.m. on 19th April, 1986 she was at the corner of West Street and Spanish Town Road, Kingston, and was speaking to the deceased, when the deceased called to the appellant who was walking along Spanish Town Road. She replied with obscene language. The deceased stepped towards her and said: "Ah whey you a gwaan so", and held out his hand as demonstrated by the witness. The appellant then drew a knife from her

bosom and stabbed at the deceased. The deceased said: "Maggie you stab me". The appellant said: "Come mek me give you a next one". The deceased became pale and looked as if he was about to fall; the appellant ran off. The witness then went to the deceased. She opened his shirt and saw a deep hole in his chest from which came a "tip of blood". She put him to lie on the side-walk where he died shortly after. The body was placed in a hand-cart and taken to the Kingston Public Hospital where Dr. Royston Clifford, on 25th April, 1986, performed a post-mortem examination. He found that the stab wound which was on the left anterior chest penetrated the chest and perforated the left ventricle of the heart. In his opinion, from this type of injury death would occur within three minutes after infliction. The wound was consistent with infliction by a sharp instrument such as a knife used with a severe degree of force. He observed five scars of old wounds to the chest, abdomen and legs. It is probable that a knife could have caused those wounds.

Cherita McLeod said that she did not know the appellant before that day, or of the deceased ever having any relationship with her, or of her having a son for him. She grew up with the deceased but never saw any such scars on him as described by the doctor. The deceased as far as she knew was a quiet man. She denied the suggestions in cross-examination that the deceased held the appellant's hand; that she flashed him off; that he flung several bottles at the appellant, and that he attacked the appellant with a knife, and that the appellant had an empty dragon stout box which she dropped, and that it was while he was attacking the appellant that she stabbed the deceased with a knife which she had in her hand.

The appellant gave evidence on oath. She is a "seller" of certain fruits, biscuit and cigarettes. She and the deceased lived together from 1971-74. Of that relationship there is a son, Maxwell Whittick, born 30th April, 1973. He was at the time of the incident living with her mother in Portland. The deceased she said was a 'warrior', and justified that opinion with evidence of his brutal treatment of her. She gave details of three incidents in which he had wounded her with a knife. Two in 1974, and

one in 1976, when he cut her in her face; and she showed the scar. In addition, in 1985 when she was pregnant, he kicked her in her abdomen with such force that she had a miscarriage. This happened in front of the Central Police Station. She had to be taken to the Hospital in a police vehicle. Despite the reports she made to the police the deceased was never charged or prosecuted for them.

On the afternoon in question she was on her way to the Coronation Market to buy fruits. She had an empty dragon box in her right hand, and a knife which she usually used to test the oranges she bought, and in her left hand a plastic bag with money in it. The deceased called to her but she made no answer. He came before her and held her hand with the money and said: "Give me something out of this". She "flashed him off" and walked on; he flung empty bottles at her, one of which hit her on the shoulder. He then came before her, and drew from the back of his waist a knife. He cut at her; she let go the box and stabbed at him. The stab caught him, and he ran back for two more bottles, and she ran away. In cross-examination she said the deceased got his scars from fighting. She did not know where he was living in 1985, or that he had a business on Marcus Garvey Drive. She said that when she heard the deceased had died she went to the Gold Street Police Station to give up herself. She was seeing Cherita McLeod for the first time at the preliminary enquiry. She did not know her before.

Two Grounds of Appeal were argued. The first reads:

> "(1) The Learned Trial Judge erred in law when he misdirected the jury on the issue of self Defence in that his Lordship's directions on the question of whether or not the Appellant believed her life was endangered failed to adhere to the guidelines laid down as to the proper directions in the circumstances of the case in REGINA V. GLADSTONE WILLIAMS [1984] 78 CAR 276 and SOLOMON BECKFORD V REGINA - Privy Council 1987 thereby misleading the jury and creating confusion in the minds of the jury as to the proper test to be applied in the circumstances of the case in determining the issue of Self Defence."

In his directions to the jury the learned trial judge said at p. 80:

> "..... a person who is attacked in circumstances where she reasonably believes her life to be in danger or that she is in danger of serious bodily injury, may use such force as on reasonable grounds she believes is necessary to prevent and resist the attack and if in using such force she kills her assailant, she is not guilty of any crime even if the killing is intentional, ..."

Now, in the Solomon Beckford case, the primary question of general import as certified for consideration of the Privy Council reads at p. 1:

> "1. (a) Must the test to be applied for self-defence be based on what a person reasonably believed on reasonable grounds to be necessary to resist an attack or should it be what the accused honestly believed?"

In answering this question, pertinent statements from a number of decided cases, both Jamaican and English, were considered. In the end the Board, in a judgment delivered by Lord Griffiths, approved of the statement of the law by the English Court of Appeal in R. v. Gladstone Williams (1984) 78 Cr. App. R. at p. 281 and quoted with apparent approval the following guidance contained in the model direction on self-defence produced by the Judicial Studies Board and approved by the Lord Chief Justice at p. 10:

> "Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not."

The judgment continued at pp. 10-11:

> "Their Lordships have heard no suggestion that this form of summing-up has resulted in a disquieting number of acquittals. This is hardly surprising for no jury is going to accept a man's assertion that he believed that he was about to be attached without testing it against all the surrounding circumstances. In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury

> "will conclude that such a belief was or might have been held.
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> Their Lordships therefore conclude that the summing-up in this case contained a material misdirection and answer question 1(a) by saying that the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another."

The directions in the instant case are similar to those in the Solomon Beckford case and which were considered improper by the Privy Council. Accordingly, in the light of the re-statement of the concept of self-defence in the Solomon Beckford case, the directions of the learned trial judge in the instant case which followed up to then, the accepted formula, amounted to a misdirection. However, regard must be had for the realities. Their Lordships took time out to consider whether or not in the particular circumstances of the case a substantial miscarriage of justice was occasioned thereby and concluded thus at p. 11:

> "It was submitted that the jury must have accepted the evidence of Peart that the deceased had been shot down in the act of surrender and rejected the accused's account that he was killed in a gun battle, which the judge had clearly directed them would amount to self-defence. Their Lordships have given anxious consideration to this submission for there is much force in it. If on the facts as they appear from the summing-up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest."

In the instant case, the learned trial judge after his general directions on self-defence went on to say at p. 80:

> When she says the man had a knife and was coming down poised, ready to strike, I had to hit out, there must be a reasonable necessity for killing and a necessary belief based on reasonable grounds. In those circumstances, there is no duty on the accused to retreat. So you must be satisfied in determining this matter of self defence, that there was an attack upon the accused, next that as a result the accused must have believed on reasonable grounds that she was in imminent danger of death or serious bodily injury. Needless to say a knife can cause death and if what she is saying is true and she used

> "her knife in the manner in which she said she did, then that would be reasonable grounds for her to believe that she was in imminent danger of either death or serious bodily injury."

and at p. 81:

> "What she is saying is that in the past, this man has done me injury by using weapons upon me and now, here again, he has a knife ready to do it again. So she does not have to wait until the knife comes down upon her. If she from reasonable apprehension, induce either by the words or by the conduct of the deceased, and the conduct of the deceased she is saying, is what happened in the past, and presently, a knife held up in the air, then she would have every right in law to do what she said she did."

In our view the learned trial judge in the instant case left the matter to the jury as a choice between two diametrically opposed accounts - the case for the prosecution in which there was no room for self-defence - and on the other hand, the case for the defence in which 'she would have every right to do what she did'.

Accordingly, notwithstanding the misdirection we are of the view that no substantial miscarriage of justice was occasioned thereby.

The other Ground of Appeal reads:

> "The issue of provocation having been raised on:
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> (a) the case for the prosecution
>
> (b) the case for the Defence
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> the Learned Trial Judge erred in law in his failure to direct the jury on the vital issue of Provocation thereby depriving the Appellant of an opportunity that was reasonable open to her to have a verdict of not guilty of Murder returned in her favour and of having Manslaughter Verdict entered against her by reason of provocation."

Counsel for the crown conceded that there was sufficient evidence to raise the issue of manslaughter for the consideration of the jury.

We are of the same opinion. The memory of the many brutal attacks made by the deceased on her must have been with her that afternoon and his accosting her in the manner he did was the final straw that broke her self-control.

For these reasons we quashed the conviction for murder and substituted a verdict of manslaughter. In her plea in mitigation Miss Nosworthy referred to the pugnacious disposition of the deceased and the history of his attacks on the appellant and that the appellant was the mother of children of tender years. We gave due consideration to all the circumstances of the case including those urged by her and were of the view that a custodial sentence of three years imprisonment was adequate and appropriate.