C.A. CRIMINAL LAW — Murder — Summing up — whether trial Judge wrong in law to have withdrawn issue of provocation. S 6 offence against the Person Act. CA holds Judges withdrawal of issue of provocation a mis-direction. Conviction JAMAICA for Murder quashed, verdict of Manslaughter substituted — 4 years h/e.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 61/86

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

FLORENCE MARSHALL

Noel Edwards, Q.C. and Arthur Williams for the Applicant

Courtney Daye for the Crown

October 11 and December 18, 1987

WRIGHT J.A.:

On October 11, 1987 we treated the hearing of the application for leave to appeal as the hearing of the appeal, quashed the conviction for murder, set aside the sentence of death, substituted a verdict of manslaughter and imposed a sentence of four years imprisonment at hard labour to run from the date of conviction. We now fulfil our promise to put our reasons in writing.

Clement Francis was a praedial thief caught virtually flagrante delicto about 9 o'clock in the night of February 1985 in the hill-side district of Plowden in South Manchester. His loot, which was found with him, was a bag of escallion. A witness, Dessie Francis, testified that he was first alerted by sounds of chopping in the bushes and cries of "thief, thief, thief" and it appears that there was some searching in the bushes because in his estimation it was not until about forty-five minutes later some twenty-three persons emerged from the dark with Clement Francis.

They bound his hands and tied them across his waist and put him to sit on a box under the street light at the square to await the arrival of the District Constable. Some persons registered their displeasure by inflicting blows on the thief. Before long the crowd had grown to some two hundred persons. Up until then no one knew whose field had suffered at the hands of this unwelcome visitor.

The applicant Florence Marshall who apparently lived some distance from the square was not among the early arrivals but as the news spread she heard and came. Francis was still seated under the street light and she approached him and said: "Make sure is not my scallion you draw up. A better go look", and off she went in a direction opposite to that from which she had come. She had a bottle torch with her but the evidence is divided as to whether it was lighted at that time. Judging by the length of time which elapsed before she returned - the witness Dessie Francis estimated it at another forty-five minutes - her field must have been some distance away. When she did return she was visibly affected. She was in boiling rage. The bottle torch was then lighted and held in her upraised right hand. With her left arm she parted the crowd and plowed her way right up to Clement Francis, whose posture had not changed and without hesitating she smashed the lighted torch against the captive's chest and as she did so she said: "You thiefing blood cloth; a long time you fi dead". Any doubt as to whose field had suffered was now put to rest.

The bottle broke and set Francis ablaze. He jumped up shouting: "Out me, out me, you a go mek me dead. Out me, out me". One Kenton Martin responded to his pleas and with a piece of bag put out the blaze and Francis otherwise called 'Slabba' walked off into the night. But he had been badly burnt so much so that ten days later he succumbed to 50% first and second degree burns which according to Dr. Gail Codrington, Consultant Pathologist, produced electrolyte imbalance which was the cause of death. She observed small abrasions on the body, apparently resulting from the beating, but these were not contributory to the cause of death.

As if to set the killing in perspective Cirhensa Hibbert testified that on the morning following the capture of 'Slabba' he saw and greeted the applicant and as a manner of speaking he said to her: "What happen?" She responded: "How you asking me what happen, where were you last night?" "I was at Thatch Walk at Church", he replied. "So you didn't hear what happen?," she asked: "No ma'am, was his reply. Then she said: "We ketch the tief": "Which thief?," he enquired. "The skellion tief," she informed. His response was: "Den oonoo noh kill him?". She obliged: "No man, when I go down there I see him tie up under the street light and I just take the bottle light and fock him blood claut and burn him up in him pussy claut." She concluded: "Anybody call me name sorry fi dem". The witness' final words were: "Praise God me did deh a Church last night". But the police seemed not to have been convinced about Mr. Hibbert's presence at Church at the material time. They detained both himself and Dessie Francis, as well as, Leroy Morgan, another witness for assaulting 'Slabba' and they were released only after they had given statements some days later implicating the applicant. She was arrested and charged with murder on March 2, 1985 and when cautioned she said: "A no me do it".

Consistent with this denial she made an unsworn statement in which she said that she had gone to bed on the night of February 19, 1985 when she was aroused and told that one Victor had sent to call her. She took a flash-light and followed the messenger to the square at Plowden where she saw Victor, as well as, a large crowd in which she was shown 'Slabba'. Victor told her they had caught 'Slabba' "a tief and we carry him out here and a beat him". She saw the bag of 'skellion' and was advised to go and check her field, which she did. But before doing so she advised that they send for the police because they were still beating 'Slabba'. Roy said no police would be sent for "because a rass claut long time him a tief". On her way to the field she heard a loud noise. She reached her field and returned but did not disclose any discovery. When

she returned she saw the District Constable, who told her that they had sent for him but had let the man go before he got there. It was not until the next morning when she visited her field that she discovered that she had lost 'skellion'. She accordingly took the bag of 'skellion' to the Police Station at Cross Keys and made a report but the police never kept their promise to visit the locus. Next thing she knew she was arrested and charged but that she had only been implicated by the witnesses who had themselves been detained and said further that she had heard the police express a desire to entrap her. So on her account she was the victim of a diabolical plot between the police and witnesses whom her attorney, Mr. Mundell, labelled as tainted.

At the trial before Vanderpump J. and a jury in the Manchester Circuit Court on May 8-10, 1985 the case was left to the jury in the following manner:

> "Before you can convict of murder, you must be satisfied that the killing was deliberate, that it was not any accident. Further, you must be satisfied that the person doing the killing intended either to kill or to inflict grievous bodily harm, that is, some really serious injury which resulted in death to that person; and next, you must be satisfied that the killing was unprovoked, that is to say, that the accused was not under any provocation so as to lose his self control at the time of the killing. And further, you must be satisfied that the killing was done without lawful excuse or justification. But here there is no question of provocation, no question of lawful excuse or justification. The only question now, was the killing done deliberately and intentionally; and if you accept that she was there, would it appear that it was done deliberately and intentionally and not by any accident?"

The issues for the jury therefore were:

1. Identification.

2. Was the act deliberately and unintentionally done,

and if these were concluded in a manner adverse to the applicant the verdict would be murder. As to (1) the facts were totally against her and as to (2) nothing could be more deliberate. She had hurled the lighted torch from a distance of two yards in the full glare of the street light. He was a sitting duck.

On the question of intention the jury was told:

> "If you accept that she threw a lighted torch at the deceased person some two yards away with such force that it set him on fire, you would ask yourselves whether as an ordinary responsible person, she must have known that death or really serious bodily harm would result from her action in so doing, and if you find that she must have so known, then you may infer that she intended the result and that would be satisfactory proof of the intention required to establish a charge of murder. It is, of course, the actual intention of the accused person that you are trying to discover. So you must take into account any evidence given by her in expressing her intention or perhaps absence of intention. And then on the totality of the evidence in the case you come to your decision whether the required intention has been proved or not".

The words accompanying the act of throwing the torch were then referred to as the expression of intention on which the Crown relied. The alternative verdict of Manslaughter based on the lack of intention to kill was also left to the jury. On the evidence Manslaughter based on lack of intention to kill was a non-starter.

The real options before the jury therefore were:

(a) a verdict of Not Guilty which on the evidence would be perverse or

(b) guilty of murder.

The jury chose the latter.

Against the conviction and sentence of death for murder two Grounds of Appeal were filed and argued by Mr. Williams:

> "GROUND 1
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> That the prosecution witnesses DESSIE FRANCIS, LEROY MORGAN and CIRHESINA HIBBERT were as a matter of law accomplices, and the learned Trial Judge ought therefore to have directed the Jury that their evidence required corroboration, which was in fact absent. VIDE DAVIES vs. D.P.P. 1954 AER 507.
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> GROUND 2
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> Even if the prosecution witnesses DESSIE FRANCIS, LEROY MORGAN and CIRHESINA HIBBERT were not as a matter of law accomplices, the evidence disclosed that they had a substantial interest of their own

> "to serve, and the learned Trial Judge in these circumstances ought to have so directed the Jury and warned them of the danger of accepting such evidence.
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> VIDE R vs. BECK 1982 AER 807
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> The learned Trial Judge's reference to the defence's contention that the prosecution witnesses were tainted did not amount to a warning, and was in any event, inadequate, and accordingly, operated to the prejudice of the appellant."

Obviously, what must at first have seemed attractive submissions to Mr. Williams did not measure up in presentation and after seeking in vain for evidence in support of Ground 1 he had, suo motu to abandon that Ground as lacking in merit. Ground 2 was not faring much better when with the encouragement and leave of the Court he formulated and added Ground 3:

> "The learned trial judge was wrong in law to have withdrawn the issue of manslaughter on the ground of provocation as the act of Praedial Larceny of the appellant's property by the deceased was a sufficient ground for the issue to be left to the jury's consideration".

He referred to the evidence showing the appellant's involvement as related by the three eye-witnesses and compressed it into the submission that:

> "The evidence suggests that the farmers in the area had long been suffering from praedial larceny indicated by one person saying 'we catch the thief now'."

Accordingly, the issue ought to have been left to the jury.

Mr. Daye seems to have had ideas of opposing Mr. Williams' contention but just as the latter succumbed to the weight of the evidence in his earlier efforts, so too did Mr. Daye, who had to admit that provocation ought to have been left, in which circumstances it cannot be said that the jury would inevitably have come to the same verdict.

The remarkable thing about this case is that the evidence echoed the anguished cry of a suffering community - a community that had suffered long at the hands of praedial thieves who have for long become a national scourge. The cry was heard but not understood. In such

circumstances, it is unlikely that the applicant, or for that matter any farmer on trial any where in Jamaica, for killing a praedial thief, would have had a fair trial if denied the opportunity of being convicted on the lesser charge of manslaughter by withdrawing the issue of provocation from the jury. We have well left far behind the era of Woolmington v. D.P.P. (1935) A.C. 462 when an intention to kill negated provocation. It is now well settled law that such an intention is not inconsistent with provocation if the intention was brought on by the provocative act(s). We think, too, that our legislature addressed the question by the amendment to the Offences Against the Person Act introduced in 1958 as Section 6 to the Act. It reads:

> "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."

It is obvious therefore, that the learned trial judge's decision to withdraw the issue of provocation from the jury's consideration deprived the appellant of the opportunity of a conviction of the lesser offence of manslaughter and was in the circumstances a misdirection in law.

It was for these reasons that we adopted the course mentioned earlier.