JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 96/89

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

ICILDA BROWN

R. Fairclough for appellant

L. Clarke for Crown

23rd, 24th July, 1990

DOWNER, J.A.

In this case Mr. Fairclough who appears for the appellant abandoned five of the original grounds filed by the appellant and two of the supplementary grounds of appeal which is undated.

It is necessary to rehearse the facts of the case to understand the nature of the ground which was argued before us. The accused Icilda Brown lived with Lawford Carey, the deceased as man and wife. The two Crown witnesses were the Watsons who were neighbours in a housing scheme in Montego Bay. Both these witnesses have related that there were frequent quarrels between the deceased and the accused. They also recounted that on the 11th of July, 1988 Icilda Brown chased the deceased into the Watson's home and all this while she was in the position of the assailant and as the dominating partner in what had turned out to be a struggle. While he was being held over a component set, blood gushed from Lawford Carey's neck. This account is related by both parties.

What was significant in the evidence as it emerged was that Carey in fact said words to the effect that it was Icilda Brown who stabbed him and that he was going to die. He called for help to give him water and to take him to the stand pipe but despite these efforts he died. The doctor who gave evidence said that he died from shock and haemorrhage as a result of receiving a stab wound which went three inches deep into his neck. This was in essence the Crown's case and the actual stabbing was proved by way of inference as neither of the Watsons saw the stabbing. It was the deceased who returned the knife to Mrs. Watson and again he repeated that Mrs. Watson should not return the knife to Icilda because it was that knife which in fact was used to stab him. Both the Watsons said that they had not seen the knife in Lawford Carey's hand.

The defence was given by way of an unsworn statement and in it Icilda Brown said that she had not held the knife - there was a wrestling between herself and Lawford Carey and that in those circumstances the knife cut Lawford Carey. It was against that background that the judge in fact left accident. I was the judge who gave leave to appeal and I gave leave to appeal on the basis that it should be questioned whether the judge was correct in withdrawing self defence from the jury. At that time it had not in fact dawned on me with sufficient force that the judge was not using accident as a term of art that is to say that Icilda Brown was saying that she inflicted the wound but that as she did it accidently, she had no mens rea. That defence could not have been put to the jury because what she was saying was that she neither held the knife nor did she stab. The only inference that could be drawn from her defence, she added was that the wound was self-inflicted.

In his very careful summing up, the judge did leave the facts as she had put it to the jury. At p. 28 of the record, the learned judge said the deceased didn't die as a result of any deliberate or voluntary act on her part. Since that was what she was saying, it was a faithful summary of her unsworn statement. At p. 33 of the record the learned judge again said she was saying that the deceased had the knife at all times and it was he who chased her with it and at one stage while they were wrestling he got stabbed accidently. So it is quite clear that the learned judge was using accident in its ordinary sense to mean that he stabbed himself accidently rather than adverting to the classic defence of death by misadventure which would have meant that he was accidently stabbed by Icilda.

It was in those circumstances that Mr. Fairclough chose to rely on his third ground of appeal which reads -

> "The learned trial judge erred when he permitted to be given in evidence (of a) dying declaration, (a) statement by the deceased that the appellant had stabbed him in the absence of the required evidential pre-requisite for the admission of such evidence."

The fact is that the learned judge at no stage relied on the principles of dying declaration to receive the evidence. He relied on the statement that it was Icilda who stabbed him as part of the res jestae and although the judge did not mention it, as it was not necessary to mention a case in a summing up, it is clear that he relied on the case of R. v. Andrews [1971] 1 All E.R. reported at p. 513. Further, it is clear that all the pre-requisites were there for the admission of this statement.

In those circumstances this court rejected Mr. Fairclough's submissions that the statement was wrongly admitted and this being the only ground argued, we dismissed the appeal and proceeded to hear Mr. Fairclough on his original ground which was

that the sentence of ten years hard labour was manifestly excessive. By a majority, this court is inclined to view Mr. Fairclough's submission in this regard with favour. This was a domestic incident and in our experience, that is, to say majority view is that the range of sentences in these instances vary from five to seven. Mr. Fairclough could show us no reason why the lower range should be applied in this case and therefore we have varied the sentence from ten years to seven years at hard labour. The order of the court therefore is that the appeal is dismissed as regards conviction, as regards sentence the appeal is allowed and the sentence varied. The sentence of seven years hard labour is substituted. The sentence commences from 30th August, 1989.