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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 93 & 94 of 1986

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

REGINA

VS.

MARCIA PASSLEY

&

ADLIN PASSLEY

F. M. G. Phipps, Q.C., Wentworth Charles
and Miss D. Satterswaite for the applicants

Garth McBean for the Crown

November 9 & 10, 1987 and July 18, 1988

KERR, J.A.:

In the Portland Circuit Court before Gordon, J. and a jury, the applicants were jointly charged and tried on indictment for the murder of one Basil Remnaught. Marcia was convicted of murder and sentenced to death while Adlin was convicted of manslaughter and sentenced to five years imprisonment with hard labour.

We treated the applications as the hearing of the appeals and in the case of Marcia Passley the appeal was allowed, the conviction of murder set aside and a conviction for manslaughter substituted and a sentence of eight years imprisonment with hard labour was imposed. In the case of Adlin Passley the appeal was dismissed and the conviction and sentence affirmed.

On July 30, 1986 about 10:30 a.m. the deceased was in a group of young men on the public road at Shrewsbury District in

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Portland. According to the crown witness, Mavis Roye, she was sitting on her verandah and saw when both appellants came along the road and accosted the deceased. They sounded as if they were quarrelling with him but as her radio was playing she could not hear what was being said. The deceased walked off followed by the appellants. He went across the road and picked up two stones and went to a shop piazza when he told them to leave him because he did not want to go to jail for any of them. An aunt of the appellants advised them to leave the deceased. However, it was the deceased who left and came and sat on Roye's verandah. The appellants followed to the gate and challenged him to come out. He remained on the verandah and they left for their aunt's shop. Sometime after, he left the verandah and went to the roadway in front of a nearby shop. While there speaking to his aunt, Sonia Mitchell, the appellants returned. There was a further altercation and Marcia hit the deceased with her hand and deceased and Marcia started to fight. The other appellant then held his two hands behind his back and as he struggled to free himself Marcia drew a knife from her waist and gave him two stabs. One of the stabs was in the back of the struggling deceased. The deceased eventually got away, ran off, picked up a stone which he flung hitting Marcia in the side. She then said "Come back, come get more stab". The deceased then fainted and was lifted up by one Keith and placed on the piazza. The Police Jeep came up shortly after and he was taken to the Port Antonio Hospital. In cross-examination Mavis Roye admitted that the deceased had the stones when he came to her verandah. Suggestions that at the second incident Marcia knocked from the hand of the deceased a stone which he had rubbing her nose, that the deceased had another stone which he took and hit Marcia in the head causing a wound, that this second stone fell from the hand of the deceased and that as he bent to pick it up it was then the appellant Marcia stabbed him, were positively denied. She reiterated that Adlin held the deceased while Marcia stabbed him twice.

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Sonia Mitchell said she came upon the deceased and the appellants in heated argument; they were accusing him of stoning their aunt's house the "previous night". She corroborated Mavis Roye as to how the deceased received the wounds while he was held by Adlin. She said that the stone that the deceased flung at Marcia after he was wounded caught her in the head inflicting a wound. In cross-examination she said the deceased hit the appellant Marcia in the head before he ran off. It was not during the course of the struggle that Marcia was wounded by the deceased. Deceased was not stabbed when he bent down to pick up the stone.

According to Dr. Parvatoneni who performed the post-mortem examination on the body of the deceased, the stab wound to the back penetrated the chest cavity, cutting the root of the left lung. Death was due to internal bleeding from this wound which severed several blood vessels. He also saw a skin deep incised wound to the left forearm. The wounds to the chest and arm were separate and distinct injuries. Death would occur within a few hours of the injury to the chest.

In her statement from the dock, Marcia Passley said that there was an argument between her sister and herself and the deceased. The deceased went across the road and picked up two stones from the gutter. When he aimed to throw the stone they moved closer to him to prevent him throwing the stones. Deceased left and sat on Dorothy Williams' verandah and they left and went to their aunt's shop. Sonia Mitchell and Andrea Mitchell came down the road quarrelling. Adlin went to speak to Sonia. She followed. The deceased then approached her with two stones in his hands. He pushed one in her face bruising her nose and used indecent language. She boxed his hand, one stone fell. A struggle ensued. He wounded her in the head with the other stone. This stone fell. Graphically she said: "He bent to pick it up. I felt as if my life was in danger. I had a knife. I defend myself. He then ran off in the middle of the road, picked up a stone, throw

it at me. It did not catch me". She said that her sister was not involved in the struggle.

Adlin Passley in her unsworn statement said she did not hold the deceased. She heard the noise behind her and as she turned she received a blow on the back of her head and someone held on to her dress. She did not see the struggle between Marcia and the deceased.

With respect to Marcia Passley, the only ground pursued was to the effect that the learned trial judge, although he left the issue of self-defence, wrongly withdrew the issue of provocation from the jury. Mr. Wentworth Charles submitted that on the totality of the evidence and having regard to the nature and conduct of the defence the issue of provocation arose and the learned trial judge erred in withdrawing that issue from the jury. In support he referred to the following amongst other cases Glasford Phillips v The Queen [1968] Cr. App. R. 132; R v Hart [1978] 27 W.L.R. 229; R v Brown [1972] 56 Cr. App. R. 564.

Counsel for the Crown conceded that from the nature of the defence as maintained by the statement from the dock there was sufficient material to raise the issue of provocation. However, it seemed that since on the evidence of the prosecution witnesses, there was no room for provocation, the jury's verdict was only explicable on a rejection of the defence and implicit in that there would be rejection of provocation even if it was left to the jury. This reservation on Counsel's concession found no favour with us. As was said in R v Hart (supra) "Our concern here is with the existence of the issue and not with the probability of the jury finding provocation". In our view there was sufficient evidence to raise the issue for the determination of the jury and the learned trial judge erred in expressly withdrawing it from the jury.

For Adlin Passley, first it was argued that from the evidence, it was open to the interpretation that Adlin was

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unaware that Marcia had the knife and accordingly in those circumstances she would be entitled to an acquittal and there were no specific directions to that effect. Reference was made to R v Anderson & Morris [1966] 2 All E.R. 544.

Secondly, the evidence was capable of the interpretation that she was merely restraining the deceased from attacking her sister.

It is enough to say that neither the evidence for the prosecution nor the nature of the defence supported these interpretations. It was the evidence that despite his struggles to free himself, despite the fact that he had been cut on his hand, this appellant continued to hold the deceased. The defence was to the effect that she was not engaged in his struggle with her sister. It all happened behind her back. Accordingly there, therefore, was no evidential bases calling for the directions indicated by Counsel.

For these reasons we determined these applications as set out above.