JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 55/96

BEFORE: ***THE HON. MR. JUSTICE RATTRAY, PRESIDENT***
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA

VS.

RAYMOND HENRY

Dr. Bernard Marshall for the appellant

Kent Pantry QC for and Mrs. Sharon Gordon-Townsend for the Crown

June 23, 24 and November 10, 1997

RATTRAY P:

On Sunday the 26th of January 1993, several persons were gathered at the Beachway Tavern at Rocky Point in Clarendon eating and drinking. Among them was the proprietor Mr. Dereef Clarke and Mr. Howard Thorpe both of whom had spent very many of their years in the United Kingdom and had returned to reside in their homeland. Included also in the gathering was Mr. Wally Henry the father of the applicant Raymond Henry and Mr. Jervis Gordon the deceased.

Mr. Clarke was at the back of his premises sorting out utensils when he heard a noise coming from the front. He went to find out what was happening and saw Mr. Wally Henry and Mr. Jervis Gordon shouting at each other. They

were facing each other but were not touching. They appeared to be having a dispute over money. He told them that they could not behave that way in his place and they stopped. He left them and went to the back of the premises. When he returned to the front of his business place he saw a small group of persons standing over someone lying in the middle of the road. As it turned out it was Mr. Jervis Gordon.

This evidence does not help in establishing the circumstances in which Mr. Gordon met his death since Mr. Clarke was not present at that specific time. It only shows a dispute prior to the death between Mr. Jervis Gordon and Mr. Wally Henry.

The eye-witness evidence comes from Mr. Howard Thorpe. He saw Mr. Jervis Gordon and Mr. Wally Henry drinking together and arguing in the bar. Mr. Henry became aggravated and "stormed" out of the bar and was outside walking up and down. Mr. Gordon followed him outside. Mr. Thorpe then went outside as well to try to get Mr. Henry to come back in and have a drink with them. Mr. Gordon held on to Mr. Henry trying to persuade him to return inside the bar and have the drink. Mr. Thorpe in an attempt to be a peacemaker held both men, one with his right hand and the other with his left hand trying to get them into the bar. The trial judge described what happened afterwards as follows:

> *"Mr. Thorpe said that while he was doing that, holding on to these two men, he suddenly saw a figure come from around the corner of the bar. The figure ran towards where the three men were and the figure - to use Mr. Thorpe's words - let go of a stone. ... which caught Mr. Gordon to the left of his head. ... Well, Mr. Thorpe said the stone struck Mr. Gordon to the left side of his head."*

The stone thrower was identified by Mr. Thorpe as the applicant Raymond Henry the son of Mr. Wally Henry. Mr. Gordon fell to the ground. He was taken to the Lionel Town Hospital where he died as a result of fractures of the skull. There is no doubt that the deceased died as a result of injuries received from this stone flung by the applicant Raymond Henry. In cross-examination Mr. Thorpe said that he never saw Mr. Gordon with a knife in his hand.

In an unsworn statement from the dock the applicant told the Court as narrated by the learned trial judge in his summing up:

> *"On the 26th of January, 1992, he walked past Mr. Clarke's bar where he saw Jervis Gordon and his, the defendant's father, with a knife in his hand about to stab his father. That is how he said it, but I think what he meant to say was that he saw Jervis Gordon with a knife in his hand to stab the defendant's father.*
>
> *The defendant went on to tell you that he took up a stone and he flung it to scare Gordon off his father and to save his father's life."*

The defence then was that the applicant was acting in defence or protection of his father whom he believed to have been in danger from the deceased.

Having given the directions in law on self-defence the learned trial judge left the following questions for the determination of the jury:

> *"1. Was the defendant's father being attacked that day by anybody? If you say that you do not believe there was any attack, I suggest to you the next question that you ask yourselves is this:*
>
> *2. Did this defendant honestly believe that if his father was being attacked that day? Because in fact his father was not being attacked but from all that he saw, he honestly believed that his father was being attacked, then the defence of self-defence would avail him."*

The learned trial judge directed the jury that in this case provocation did not arise and so he gave no direction in this regard.

Dr. Bernard Marshall, Counsel for the applicant has urged the Court to hold that provocation arose on the facts of the case and that the learned trial judge was in error in withdrawing this defence from the jury and not giving the relevant direction.

Section 6 of the Offences against the Person Act provides as follows:

> *"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 has been long settled that where there is any evidence of provocation whether or not the issue of provocation is specifically raised by Counsel for the defence, or the accused himself so stating in his defence that he was provoked, a person on trial for murder has the right to have the issue of manslaughter arising from provocation left to the jury.

Dr. Marshall relies upon the dictum of Russell LJ in ***R v Rossiter*** *[1994] 2 All ER 752 at p. 758, in reference to the United Kingdom legislation which is similar to section 6 of our Offences against the Person Act already cited:*

> *"The emphasis in that section is very much on the function of the jury as opposed to the judge. We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling upon it."*

The question therefore must be as to whether there is in this case any material capable of amounting to provocation.

In ***R. v. Cambridge*** *[1994] 2 All ER 760 Lord Taylor of Gosforth CJ referred to the line of authority which required a judge to leave provocation to the jury even if not put forward specifically as a defence by the accused in a murder trial. He stated at page 764 -*

> *"The line of authority goes back to* ***R. v. Hopper*** *[1915] 2 KB 431, [1914-15] All ER Rep 914,* ***Mancini v DPP*** *[1941] 3 All ER 272, [1942] AC 1 and* ***Bullard v R*** *[1961] 3 All ER 470n, [1957] AC 635. In* ***R.v. Porritt*** *[1961] 3 All ER 463, [1961] 1 WLR 1372, this court approved a passage from the opinion of the Privy Council in* ***Bullard v R*** *[1961] 3 All ER 470 at 470, [1957] AC 635 at 642 delivered by Lord Tucker, as follows:*
>
> > *'It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.'*
>
> *It is necessary to refer to only two other cases. In* ***DPP v Camplin*** *[1978] 2 All ER 168 at 173, [1978] AC 705 at 716 Lord Diplock, having cited s 3 of the Homicide Act 1957, went on:*
>
> > *'... it makes it clear that if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not of law, whether a reasonable man might have reacted to that provocation as the accused did.' "*

He then went on to cite the passage in ***Rossiter*** *on which Dr. Marshall has relied.*

> *"But what sort of evidence gives rise to the duty"?*

asked the Learned Chief Justice:

> *"Clearly, it is not for the judge to conjure up a speculative possibility of a defence which is not relied on and is unrealistic. (See* ***Fazal Mohammed v The State*** *[1990] 2 AC 320 at 332.) There must be some evidence, but of what strength? In* ***Bullard v R*** *[1961] 3All ER 470n, [1957] AC 635 the phrase used was, 'any evidence ... fit to be left to a jury'. It is true that in* ***DPP v Camplin*** *Lord Diplock used the phrase 'however slight', but he used it to describe the measure of the provocative acts or words, not the strength of the evidence that such acts or words in fact occurred and caused the defendant to lose his self control. Likewise in* ***Rossiter,*** *when Russell LJ referred to 'material capable of amounting to provocation, however tenuous it may be', the word 'tenuous' described the provocative acts and words, not the evidence of their existence.*
>
> *There are the two limbs of provocation: first, whether things said or done or both caused the defendant to lose his self-control; and secondly, whether those things might have caused a reasonable man to have reacted similarly."*

After citing section 3 of the Homicide Act 1957 UK the learned Chief Justice continued:

> *"The starting point, therefore, is whether there is evidence on which the jury can find the defendant was in fact provoked to lose his self-control. That is a question for the judge. In our judgment, therefore, there must be evidence on the first limb from which a reasonable jury might properly conclude that the defendant was in fact provoked to lose his self-control or may have been so by some words or acts or both together. If the judge decides that there is not such evidence, he ought not to leave provocation to the jury. If,*

> *on the other hand, he concludes there is such evidence on the first limb of the two-stage test, the statute obliges him to leave provocation to the jury, even if he himself believes the circumstances to be such that no reasonable man would have reacted as the defendant did."*

In Mr. Thorpe's evidence the figure of the applicant suddenly came from around the corner of the bar. Could the scene which the applicant came upon as described by Mr. Thorpe lead him to believe rightly or wrongly that his father was under attack by the deceased? In the circumstances, could a reasonable jury properly conclude that some act of the deceased may have provoked the appellant to lose his self-control?

Mr. Pantry QC for the Crown relied upon ***R v Acott*** *[1996] 4 All ER 443 for his submission that there was no evidence of provocation which could be left to the jury. He cited the language of Rougier J at p. 453:*

> *"... before a judge is required by the statute to leave the issue of provocation to the jury, there must be some evidence of provocation in its active sense, in other words some evidence of what was done or what was said to provoke the homicidal reaction. Such evidence will, in the vast majority of cases, be direct. It is possible that it could arise by inference - for instance if, shortly before his death, the deceased was heard to say that he proposed to go and taunt the defendant upon a matter whereon the latter was known to be particularly sensitive. But it is not enough that the evidence should merely indicate that the defendant had lost his temper, possibly as a result of some unidentified words or actions, for people occasionally work themselves into a fury and erupt with no external provocation at all. If it were otherwise, the jury would have no material upon which they could make the objective judgment demanded by the statute. To direct them to determine whether the provocation in question was enough to make a reasonable man do as the defendant did, without the slightest inkling of what the provocation was, would be to ask the impossible."*

In our view in the context of the analysis by Lord Taylor CJ in ***Cambridge*** *and the dictum of Rougier J in* ***R.v. Acott*** *on the facts of this case there is no evidence on which provocation could arise and the learned trial judge was correct in withdrawing this defence from the jury. However, this does not end the matter.*

The reaction by a person suddenly coming from around a corner upon a scene which he could have misinterpreted as endangering his father's life may also nullify the intent required to constitute the offence of murder, and permit the act of the perpetrator to be categorised as reckless, that is "indifferent to the obvious risk and appreciation of such risk coupled with a determination nevertheless to run it:" (Lane L.J. in ***Stone and Dobinson*** *[1977] Q.B. 354) Furthermore, this lack of intent arises also on the facts of the case from the words of the applicant himself that he took up the stone and flung it "to scare Gordon" (the deceased), which implies that he did not intend to kill or cause grievous bodily harm. In these circumstances the proper verdict would be one of manslaughter. The learned trial judge gave the jury no direction in this regard and he should have done so on the evidence in this case. The verdict therefore of non-capital murder cannot stand.*

Consequently, the application for leave to appeal is treated as the hearing of the appeal which is allowed. The verdict of non-capital murder is quashed and the sentence set aside. We substitute a verdict of guilty of manslaughter and impose a sentence of seven years imprisonment at hard labour commencing on the 23nd April, 1996.