JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 98/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA vs.
RUPERT JOHNSON

Delroy Chuck for the applicant

Rupert Reece for the Crown

November 20 and December 8, 1997

PATTERSON, J.A.:

On July 30, 1996, the applicant, Rupert Johnson, was convicted in the St. James Circuit Court of the offence of non-capital murder and was sentenced to imprisonment for life. The Court specified that he should serve a period of fifteen years before becoming eligible for parole. On November 20, 1997, we granted his application for leave to appeal against conviction and sentence, and we treated the hearing of the application as the hearing of the appeal and allowed it. We quashed the conviction for murder and set aside the sentence of imprisonment for life, and substituted a verdict of manslaughter and a sentence of imprisonment for

ten years at hard labour. We now give our reasons for so doing.

The case for the prosecution was quite simple. At about 7:30 p.m. on September 30, 1995, the applicant, a man named Raymond and the deceased were on a road in Canterbury, St. James. Raymond used a knife to cut the applicant on his neck and then ran off, leaving the deceased standing a short distance behind the applicant. The applicant walked off and then returned to where the deceased was and said to him, "You see what you friend cause?" Another man spoke to the applicant who then used an icepick to inflict injury to the deceased and ran off. The deceased fell to the ground and was later pronounced dead. A post mortem examination revealed the cause of death to be a stab wound to the right side of the chest penetrating the upper lobe of the right lung, resulting in bleeding into the chest cavity. The doctor opined that the injury could have been caused by an icepick used with a moderate degree of force.

The applicant was arrested by Corporal Waldron Francis at the Montego Bay Police Station. He said before arrest, he cautioned the applicant and informed him of the report he had received about the killing, whereupon the applicant said, "me stab the wrong man." When he was arrested and cautioned he said, "Mi never mean to kill him."

The applicant's sworn testimony was somewhat different to the prosecution's case. He said that he was walking along the road and saw six persons whom he knew quite well. He had

had "something" with one of them earlier in the day. As he passed by them, he was slapped and then chopped on the neck. He was held by the deceased and they fell to the ground and rolled over. The other men, including Raymond, were stabbing at him and then he heard the deceased shout saying, "A me unoo stab, a me unoo stab." He escaped and started running, but the men continued stabbing at him and one such stab caught him on his right leg. He denied having any weapon whatsoever, and said he did not kill the deceased.

The learned judge left the issue of self defence for the consideration of the jury, and in closing his summing-up, this is what he said:

> "There are two verdicts open to you, guilty as charged or not guilty. I will not be generous, as learned Counsel for the accused man mentioned in his address, by leaving any other verdict open to you. Guilty of murder as charged or not guilty."

Mr. Chuck was granted leave to argue two grounds of appeal. The first ground was this:

> "1. The learned trial judge failed to leave the issue of Manslaughter to the jury which was a relevant issue in the circumstances of the case and the admission of the applicant that 'mi never mean to kill him' thereby depriving the applicant of the lesser verdict of manslaughter."

Mr. Chuck submitted that on the prosecution case there was sufficient evidence to warrant the learned trial judge giving directions to the jury that it was open for them to return a verdict of manslaughter if, bearing in mind the statement of the applicant, "mi never mean to kill him", they

concluded that he did not in fact intend to kill the deceased or to cause him grievous bodily harm. He referred to the evidence of the prosecution witness which established that the applicant and the deceased were friends. He argued that the stabbing of the deceased by the applicant could be looked at as a spontaneous reaction, he having been injured by another person.

It does not appear to us that the learned trial judge saw the evidence in that light. It is clear that the defence was contending that the applicant did not make the statement to the arresting officer. This is how the learned trial judge directed the jury on that issue:

> "So, I have to caution you. I have a responsibility to caution you, that you are to be very careful how you consider this evidence given by Corporal Francis, because one, he made no note of what he is telling you that the accused man said, although he had a notebook and pen on him. Two, he recorded, he kept whatever he is saying was said in his mind and then recorded it sometime later, and he has not been able to tell you when it was that he recorded it in his statement. So my duty is to caution you to be very careful in your consideration of that evidence.
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> Of course, if you find that the accused man did make that statement, it would be for you to decide what you understand it to mean. Is it that he is saying that he had no lawful excuse, no good reason for stabbing the deceased, that would be a matter for you to determine. Any statement that you find the accused man made you have to decide whether it is an admission, and you decide what weight and what value you place on it."

No further directions were given to the jury in the event they found that the applicant did make the statement. It is clear that the prosecution tendered the statement as an admission that the applicant did in fact stab the deceased. Such an admission was without doubt admissible for the purpose intended by the prosecution, but the statement also gave rise to the consideration of the applicant's intention. It seems, therefore, that the jury were entitled to consider not only its adverse effect on the applicant, but also the explanation as to his lack of intent. This is not to say that his stated intent, in the absence of other evidence, must be taken as true. In ***R. v. Storey*** [1968] 52 Cr. App. R. 334 at pages 337, 338 Widgery L.J. said this:

> "We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial."

So, in our view, the jury should have been invited to look at the admission in the context of the whole case, and decide

whether the applicant's stated lack of intention to kill the deceased could be believed. A possible verdict of manslaughter which would have followed if the jury concluded that the applicant may not have intended to kill the deceased or to cause him grievous bodily harm, was therefore wrongly excluded from the consideration of the jury.

The other ground of appeal urged on behalf of the applicant was that the learned trial judge failed to leave the issue of provocation for the jury's consideration thereby depriving the applicant of a verdict of manslaughter. Mr. Chuck submitted that the chop inflicted to the applicant's neck was indeed evidence of provocation and the evidence that he lost his self-control can be seen from his action which followed almost immediately after he got the cut. He argued that provocation arose on the prosecution's case, and even if there was some lapse of time between the provocative act and the infliction of the injury to the deceased, the issue should have been left for the consideration of the jury to decide if the act was done under provocation or whether there was a sufficient cooling-off time. Mr. Reece, on the other hand, submitted that although there was evidence of a provocative act, there was no evidence of a loss of self-control. He argued that the action of the applicant showed a revenge attack on the deceased after the person who injured the applicant had fled the scene.

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

> "6. 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 the duty of the trial judge to leave for the consideration of the jury all issues which properly arise on the evidence, even though the defendant may not have canvassed the issue or relied on it in his defence. Where the charge is murder, a defendant may not consider it prudent to advance a defence of provocation, (which would reduce the charge to manslaughter) when there is some other defence that may result in his acquittal, for example self-defence or accident. Nevertheless, it is the duty of the judge to decide on the issues that arise from the evidence and to leave those issues upon which there is evidence fit for the consideration of the jury. Section 6 of the Act requires a trial judge, in every case of murder, to consider whether the issue of provocation arises. There are two questions that he must consider and decide in the affirmative if the issue is to be left for the consideration of the jury:

> **(1)** is there any evidence of provocation, and
>
> **(2)** is there any evidence that the provocation caused the defendant to lose his self-control.

Even if the trial judge forms the view that no reasonable jury could possibly conclude on the evidence that a reasonable person would have been provoked to lose his self-control and that a verdict of manslaughter would be perverse, he is obliged, nevertheless, to leave the issue of provocation for the consideration of the jury. (***See R. v. Gilbert*** [1978] 66 Cr. App. R. 237). On the facts of the instant case, there was evidence of a provocative act on the prosecution's case. The eyewitness testified that one Raymond had cut the applicant on his neck and ran off. It matters not that the provocative act emanated from someone other than the person killed. The evidence of loss of self-control arises from a consideration of the actual mental attitude of the applicant shortly after he had been cut. There is no direct evidence of loss of self-control in this case, and that may be what Mr. Reece meant in his submission. But that is not fatal to the issue. In ***Lee Chun-Chuen*** [1963] 1 All E.R. 73 (at pp. 79-80) Lord Devlin authoritatively stated as follows:

> "Their Lordships agree that the failure by the accused to testify to loss of self-control is not fatal to his case. ***R. v. Hopper*** [1914-15] All E.R. Rep. 914; [1915] 2 K.B. 431, ***Kwaka Mensah v. R.*** [1914] A.C. 83, ***Bullard v. R.*** [1957] A.C. 635; [1961] 3 All E.R. 470 n and ***R. v. Porritt*** [1961] 3 All E.R. 463 were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self-defence as well as provocation. The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused

> in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied.'

So is there any material in the narrative of events from which the jury could have inferred a possible loss of self-control consequent on the provocative act? The evidence on the prosecution's case established that the applicant was walking along the street, and that both Raymond and the deceased approached him, and for no obvious reason, Raymond cut the applicant on his neck with a knife and ran off, leaving the deceased standing behind the applicant. The applicant then said to the deceased, "You see what onuu friend do", and when another man spoke, the applicant stabbed the deceased with an icepick. As was stated before, the applicant and the deceased were friends, and it could be inferred that as a result of the provocative act, the applicant might reasonably have lost his self-control and acted in the way he did. The applicant did not admit stabbing the deceased, but as Lord Devlin pointed out in ***Chun-Chuen*** (supra), "an accused is not to be convicted because he has lied." In his defence he testified on oath that he was slapped and then cut on the neck as he passed by

six men on the road, and then the deceased engaged him in a wrestle and they were both rolling over while others were stabbing at him, and that was how the deceased got the stab. He did not stab the deceased. So although the applicant testified as to the provocative acts meted out to him, he stopped short of admitting the killing or, indeed, to a loss of self-control. Nevertheless, as we have pointed out, on the prosecution's case we are of the view that provocation in law arose. Therefore, in our judgment, the learned trial judge failed in his duty to direct the jury on the issue of provocation and to leave it to them to determine whether the applicant did lose his self-control as a result of the provocative act and whether the provocation was enough to make a reasonable man act in the manner that he did.

It may well be that had a proper and relevant direction been given in this regard, the jury may have returned a verdict of guilty of manslaughter. In the circumstances, we concluded that the only safe course was to set aside the verdict of guilty of murder, and substitute one of manslaughter.

It was for the foregoing reasons that we disposed of the matter in the manner stated above.