CRIMINAL LAW — Murder — whether evidence of provocation — whether Judge should have left manslaughter to jury based on provocation and lack of intent — whether sufficient evidence and direction on identification (Overwhelming evidence to sustain conviction) — Application for leave to appeal refused.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 6/84

No case referred to.

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

REGINA

VS.

WINSTON FORBES

Messrs. Maurice Saunders and Delroy Chuck for the Applicant

Mr. John Moodie for the Crown

February 16 and 20, 1987

WRIGHT J.A.:

The applicant was convicted in the Home Circuit Court on the 25th day of January, 1984 before Vanderpump J. and a jury on an indictment charging him with the murder of Michael Brown, and sentenced to death. The application for leave to appeal against that conviction was refused on 16th February, 1987 and in fulfilment of our promise we now put our reasons in writing.

The facts of the case upon which the conviction is based are these. The deceased Michael Brown and the two eye-witnesses to this most brutal and callous murder, Franklyn White and Eustace Stephenson, were at the material time employed at the Crystal Theatre, Spanish Town. The accused, who was known to these witnesses as "Winnie Bag", lived at Rivoli Avenue, Spanish Town, about five minutes walk from the Crystal Theatre but sometimes slept at his father's blacksmith shop at Manchester Lane about four chains from the theatre. It is well to note that the applicant testified that he knew the witness Franklyn White for eight years but after denying that he knew Eustace Stephenson, who said he knew the applicant from the time they

both were students at the Spanish Town Junior Secondary School, he admitted knowing Stephenson, adding that they fought a lot. It was the applicant's testimony that he frequented the Crystal Theatre.

On the 6th day of May, 1982, the applicant did pay a visit to the theatre. Evidence advanced by the defence was that at 6 p.m. that day the applicant was in the vicinity of the theatre and saw the deceased who said to him: "How you a P.N.P. and a deal with Labourites?" to which the applicant replied that he was free "to deal with anyone equal". The deceased responded: "All right" and walked away. According to the applicant he also left after some time to his father's shop at Manchester Lane. There was no indication, even from the accused who testified on oath, that there was any quarrel or even a heated discussion.

Later, after show-time which was 8 p.m., according to the prosecution witnesses, the applicant came to the theatre and, without paying, tried to get in. At that time Alvin Comrie whose job it was to check the tickets of those entering was at the door and so was the deceased Michael Brown. The applicant pushed Comrie away from the door and entered. The deceased thereupon closed the door and went to the side of the cashier's cage and questioned the applicant as to the basis on which he thought he could enter. Comrie opened the door and resumed his position. The applicant again apparently confronted Comrie whereupon the deceased said to him: "Why you don't leave the big man alone and let him breathe?" The applicant's response was to rush at the deceased, grab him in his shirt collar and say to him: "You want me shoot you?" Understandably alarmed, the deceased retorted: "All right, you a threaten me, you a threaten me, you a go shoot me" and then left through the door followed by the applicant. About ten minutes later the deceased returned accompanied by the manager for the theatre and about five minutes thereafter two uniformed policemen arrived in a radio car but as events were to prove the brief time which they spent there was woefully inadequate.

Within five minutes of the departure of the policemen the applicant returned. At that time the deceased and the witness Eustace Stephenson were in the cage. On the outside of the cage were the witness Franklyn White, another worker one Mr. Grant and Alvin Comrie.

It will be useful to call attention to the structure of the cage and the lighting conditions that night. The cage was protected by metal grills and pipes. In the roof of the cage were two long fluorescent bulbs and on the outside of the cage was a bulb of the usual type. All these bulbs were lighted when the applicant first arrived at the theatre and remained so up to the fateful moment when the deceased was shot. In testifying about the lighting the witness Stephenson said: "Light is there because is money have to pay". This is at once a comment on the need for and the quality of the lighting.

When the applicant returned after the departure of the policemen, Stephenson was sitting beside the deceased in the cage and White was sitting in a seat near a door beyond the cashier's cage which was reached by a winding corridor. From that point although the door near to him was closed the witness White testified that he was able to see into and beyond the cage by looking through the grills. According to this witness he saw the applicant come to the cage and addressed the deceased thus: "Hey boy, you bring police pon me, you bring police pon me." He said that the deceased did not reply but Stephenson who was much nearer the deceased stated that the deceased replied: "Yes, because you threaten me that you going shoot me". The applicant who was then standing about six feet from the deceased apparently heard all he needed to hear. In the words of Eustace Stephenson:

> "Winnie Bag say to him, him going to shoot him. Then after a si him kinda ease off back little an him come up an him go like this with the gun, an after him go like this with the gun ..... From him go like this with the gun, the cage have a door which the cage door never lock. When time him go like this with the gun me go like this (indicating) an say to Michael Brown 'Watch out', after me shub the cage door and jump out. Before me jump out of the cage him shoot Michael Brown; me frighten an jump out ..... I hear a explosion. Before the explosion I did see the gun .... a short one."

Franklyn White also witnessed the shooting. After this cold-blooded shooting the applicant fled from the scene and the deceased, blood streaming from his side, walked from the cage and fell into the arms of Franklyn White. He was taken to the Spanish Town Hospital but died that same night.

The police began their search for the applicant but he was nowhere to be found in Spanish Town. Much later in the month he was picked up in Ocho Rios and taken back to Spanish Town where, on the last day of the month he was confronted by Detective Acting Corporal Leslie Ashman with the warrant which, in the meantime had been issued for his arrest. He promptly denied that he was the person named in the warrant but said instead that he was Paul Wright from Central Village. The police put an end to his caper by summoning his father Newton Forbes to the Station and he identified the applicant as his son Winston Forbes otherwise called "Winnie Bag".

In his defence the applicant admitted the earliest encounter related by the witnesses for the prosecution but claimed he left the area at 8:30 p.m. and went to his father's shop at Manchester Lane where he was in the company of his father until about 11 p.m. when his father left.

The prosecution witnesses put the shooting at some time past 9 p.m. - about 9:35 p.m. - at which time the applicant maintained that he was with his father, who, not unnaturally, testified similarly.

The verdicts left to the jury were guilty or not guilty of murder and it is obvious that they had no difficulty in arriving at their verdict which they did in six minutes.

It is significant that nowhere in the two grounds of appeal occupying six full pages of foolscap size paper has any complaint been made about any direction which the trial judge gave the jury. Rather complaint is made that he did not leave to the jury the issue of manslaughter based both on provocation and lack of intent. Further complaint is about the inadequacy of the directions on the issue of identification.

Mr. Saunders prefaced his submissions on provocation with the remark that there is not a great deal of evidence of provocation but there is some and so the judge should direct the jury thereon and leave the question of manslaughter to the jury. Thereafter he proceeded to identify aspects of the evidence which he submitted are relevant to the issue of provocation and which ought to have been left to the jury as such. Firstly, he solicited support from the trial judge's seemingly generous view of the discussion about politics as appears at pages 160, 174 and 180 from the transcript.

Page 160 (after referring to the discussion about politics the trial judge said):

"Strangely enough they only ask Mr. White about it, they don't ask Mr. Stephenson. Now, White did say that there was some talking about politics by the accused, but I don't know if he said deceased was involved in that conversation. But it should have been put a little better by learned Counsel for the Defence, but it was put in a sort of mild way and only to one witness, so I don't see how they can all make up and only one knows about it. Anyway, that's the defence. The defence is one of alibi."

Page 174 - reviewing the evidence of Eustace Stephenson the trial judge said:

"So, now, this part of the case of the defence about the accused and the deceased talking about Labour Party and P.N.P. wasn't put to this witness. Perhaps it should have been. It wasn't, but it was put to the other witness, White, and White admits it in part. ....."

Page 180:

"Accused held deceased in his collar before and the deceased was afraid but he did not sound vexed when he asked the words about shooting. Then they now come to the very, very important part from the defence' point of view but it could have been put strongly, more strongly than this: 'I hear the young people talk but I don't pay them no mind. They were out there talking. I hear them talking 'bout politics, Labour and P.N.P. I believe the accused talk about it outside the theatre' ....."

Concerning the putting of the suggestion to only one witness, Mr. Saunders submitted that it would have been better strategy to have put it to all witnesses so in that regard the judge's observation was correct. However, the submission ran, if one witness admitted it, it would nonetheless be evidence upon which the jury can be directed to consider provocation. He maintained that the cited passages indicate that the judge saw something - as yet unspecified - which should have been left to the jury but he betrays a lack of clarity of thought when he continued the submission to include the statement that the trial judge misunderstood the value of the confrontation as evidence of provocation.

Two evils are inherent in these submissions: 1. To accommodate these submissions would involve an unwarranted extension of the law relating to provocation. 2. It would require that the testimony of the applicant be ignored by the trial judge. There is nothing to suggest a loss of self-control so that what the trial judge at page 181 of the transcript referred to as "this seemingly innocuous conversation" - a term which earned Mr. Saunders' disapproval - so enraged the applicant as to dethrone his reason and at the same time enable him to remain there for about two and one-half hours (from 6-8:30 p.m. according to his testimony) without any incident and then after another one and one-half hours to return to the scene in such transport of passion that he was still not in control of himself. It is obvious that while reviewing the prosecution's case the trial judge was leaning over backwards to interject the contentions of the defence but was nonetheless mindful of maintaining an appropriate judicial rectitude. These passages are unavailing.

We found ourselves completely unable to perform the mental contortions which would be necessary to enable us to find evidence of provocation lurking in the fact that the applicant lived in a depressed area of Spanish Town and by venturing up-town to the theatre and "given the sociological circumstances at both/the level at which the accused existed in his community as well as at the national level, the challenge by the deceased to the accused was a confrontation and a provocation of the accused."

This submission of the applicant venturing up-town patently ignores the evidence of the applicant that he frequents the theatre.

Further evidence of provocation was identified by Mr. Saunders in the fact that there was a concerted effort to exclude the applicant from the theatre - a place of public entertainment - evidenced by the refusal to let him enter when he wished to do so without paying, a refusal which was later enforced by summoning the manager and the police! Regarding this rather novel submission we content ourselves with the comment that we had not conceived the possibility of such a submission being made and to caution that such a submission comes very close to cloaking rank indiscipline with an aura of legitimacy and respectability.

As to a conviction for manslaughter on the basis of lack of intent we call attention to the fact that the applicant shot the deceased standing six feet from him with the gun in his outstretched hand pointing at him after threatening to shoot him. In those circumstances to talk of a lack of intent to kill is otiose.

The question of identification, in the face of the evidence that the applicant and the relevant witnesses were all known to each other for years and were in contact at the same theatre only hours before the fatal shooting with the lighting as indicated need not engage our time. The same goes for the contention that an identification parade should have been held, farcical though the result would be.

No authorities were referred to during the course of the argument and we doubt that any could be found to support those submissions. However, as a footnote in closing, Counsel did mention a few authorities but it would serve no useful purpose to clutter this necessarily brief statement of the reasons for our decision with references to authorities which, in such a setting, must at best be unhelpful.

For the reason that the submissions all lack merit we refused the application for leave to appeal.