Privy Council Appeal No. 45 of 2000

Robert Smalling *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 20th March 2001

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Hutton
Lord Millett
Sir Patrick Russell

*[Delivered by **Lord Bingham of Cornhill**]*

1. On 14 November 1997 in the St Elizabeth Circuit Court the appellant (Robert Smalling) was convicted on three counts of murder. He was sentenced to death on each count. His application for leave to appeal to the Court of Appeal of Jamaica was refused on 30 October 1998. Special leave was granted to the appellant by the Board to appeal against conviction, but such leave was restricted to the single issue of provocation.

2. The prosecution case against the appellant can be briefly summarised. The appellant, who is now aged 32, had previously had a relationship with a woman, Maud Turner, who had two children: a three-year old son Ojay, of whom the appellant was not the father, and a four-month old son Robert

(Junior) of whom he was. After living together for a time the appellant and Maud Turner had separated, although he continued to see her. She shared the house in which she lived at Santa Cruz with Dorothy Borth, who saw her alive at about 8.00 p.m. on Saturday 6 April 1996 and found her dead body at about 5.00 p.m. the following day, Sunday 7 April.

3. At some time on that Sunday the appellant visited the police station at Santa Cruz and said that he had heard his baby's mother was dead and her two children missing and that he had come to find out if it was true. He mentioned that he had spent the time between Saturday evening and mid-day on Sunday at his mother's home. He was not detained but the police (to whom the death of Maud Turner was reported) visited her house and found her body.

4. On the following morning, Monday 8 April, the police visited the appellant's home in Beadle's Boulevard, Santa Cruz. The officer challenged the appellant's statement that he had been to his mother's house over Saturday night, and he said he had made a slip. At 2.00 p.m. that day the police went to premises on Beadle's Boulevard (about a half a mile from Maud Turner's home) where, in some bushes, they found the bodies of two young children. The younger had no head, and the head was not seen. The older had a nappy round his neck. These bodies were later identified as those of Robert (Junior) and Ojay.

5. At 5.30 p.m. that day the appellant was questioned. In answer to questions he said: "Officer, a ganja mek me kill dem. Mi a go tell you how it go". He was cautioned, and a justice of the peace was summoned to witness the taking of his written statement. It was in these terms:

"I get a spliff from a guy and wen I burn it till it finish. So when I finish burn it a go up di house and a go inside di house and lie on di bed. And wen a lie on di bed, she sey she was going outside. So she go outside and she come back in and tell me sey she have a boyfriend outside. So when she tell mi sey she have a boyfriend outside and she going back outside and I asked her why she going back outside and she say she want her boyfriend fi stay with her so mi must go wey. Mi tell her mi not going. When mi tell her say mi not going away, mi just close the door. When a close the door the weed say mi fi

hold her and squeeze her, an mi hold her in a her throat an squeeze her till she strangle an den her little 2 year old boy started to call her, and when him call her, mi say the weed tell me fi strangle him to and mi strangle him same like how mi strangle him mother, Maud Turner, and mi tie a piece of white cloth around his neck and den a took him up and put him a di doorway, and then a took up the small youth wey a fi mi baby and the weed say mi fi tie him mouth and carry him home. Meanwhile carrying him home, I sey to mi self, a don't know wey mi a go do with him, and the weed say mi fi carry him over di wall and him mouth was tied same way. So when mi carry him over di wall, I throw away the first one, an him a di 2 year old one and mi did carry him same time with fi mi baby and then a sit over the wall with him. Dat a my baby, and den a say mi nuh know wey mi a go do wid him, and if a carry him home im a go cry. After a say, if a carry him home a go cry down the whole place. So, it come inna mi mind fi kill him to, and den a never ave no tool pon mi, so when a si say mi never have nuh tool pon mi, a did have a piece of three quarter machete, and a tek it and cut his throat same time and den a tek him and throw 'im over di wall same place, which part mi throw the next youth, and just throw the machete wey, an den a lef and went home."

6. On the next day, Tuesday 9 April, the appellant was asked by a police officer to take him to where he had cut off the baby's head and where he had thrown the machete. The appellant directed the officer to Beadle's Boulevard and led him to a place where he said he had held down the child. The officer noticed what appeared to be blood stains on the grass. The appellant showed the officer a place where he said he had thrown his machete, but no machete was found.

7. A post mortem examination was performed on the three victims. The findings were that Maud Turner and Ojay had been strangled. The younger child had been decapitated. The doctor's opinion was that the child's head appeared to have been wrung, and not cut, off.

8. The appellant was charged with the murders of Maud Turner, Robert (Junior) and Ojay. He pleaded not guilty at the trial. The defence challenged the voluntariness and reliability of the appellant's statement, which was said to have been induced by

force and threats, but following a *voir dire* the statement was admitted. Reliance was placed by the defence on discrepancies between the statement and the facts as proved, particularly concerning the injury to the baby and the failure to find any machete. The appellant made an unsworn statement from the dock, challenging the voluntariness and truth of his statement, but he did not give evidence. The trial judge (Panton J) gave a careful summing up, recognising that the prosecution case rested substantially on the appellant's statement and stressing that the jury might not convict unless they were sure that the appellant had made the statement of his own free will and that the contents of it were true. The jury took little time to return a verdict of guilty on each of the three counts.

9. The appellant applied for leave to appeal against conviction. The Court of Appeal (in a judgment delivered by Patterson J A) recorded that counsel for the appellant was quite unable to advance any convincing argument in support of the grounds that he had filed, one of which was withdrawn, and counsel conceded that he could find no real reasonable ground to support the application for leave to appeal. Leave was accordingly refused.

Provocation

10. The ground on which special leave to appeal was granted by the Board was that the trial judge had wrongly failed to leave the defence of provocation to the jury. It is accepted that no defence of provocation was raised by the defence at the trial, and the judge's only reference to provocation was in the course of a formal direction on the ingredients of the crime of murder. The jury was directed that manslaughter was not a possible verdict. No reference was made to provocation or manslaughter by the Court of Appeal. But it is said that the facts as disclosed at the trial were such as to raise a possible defence of provocation which the judge should have invited the jury to consider, whether the appellant put forward the defence or not, and that the judge was at fault in not giving the jury an appropriate direction.

11. In advancing the appellant's case on provocation, Mr Fitzgerald Q C made three main submissions, each of them undoubtedly correct in principle.

(1) Where the evidence produced at trial is such that a jury, properly directed, could reasonably find that the defendant had been provoked to lose his self-control and kill the deceased, the jury should be invited to consider and evaluate that evidence whether a defence of provocation has been advanced by the defence at trial or not. This principle was very clearly and succinctly stated by Lord Tucker, giving the advice of the Board, in *Bullard v The Queen* [1957] AC 635, 642:

"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."

This authority recognises the acute practical dilemma facing a defendant who may have an arguable defence of provocation, giving possible ground to support a conviction of manslaughter instead of murder, but who chooses to deny participation in the killing altogether. Justice requires that consideration be given to a possible defence disclosed by the evidence even if, for reasons good or bad, the defendant chooses not to advance it.

(2) Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose his self-control and act as he did. This principle was laid down by Lord Devlin, giving the advice of the Board in *Lee Chun-Chuen v The Queen* [1963] AC 220, 231-234, recently applied by the House of Lords in *R v Acott* [1997] 1 WLR 306, 310-311 where Lord Steyn said:

> "In the absence of any evidence, emerging from whatever source, suggestive of the reasonable possibility that the defendant might have lost his self-control due to the provoking conduct of the deceased, the question of provocation does not arise.....If in the opinion of the judge, even on a view most favourable to the accused, there is insufficient material for a jury to

> find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self – control, there is simply no issue of provocation to be considered by the jury...."
>
> Thus the defence must be one which a reasonable jury properly directed could accept, and it must be disclosed by the evidence. The jury should not be distracted by directions to consider hypotheses which lack any factual substantiation in the evidence, since that is an invitation to speculate.

(3) If there is evidence fit for the jury's consideration that the defendant was provoked to lose his self-control and kill the deceased, the judge must leave the defence of provocation to the jury and not withdraw it on the ground that a reasonable jury could not properly find that the provocation was enough to make a reasonable man act as the defendant did. This submission is fully supported by the language of the relevant statutory provision applicable in Jamaica, quoted below, and by authoritative expositions of the same provision in other jurisdictions: *R v Davies (Peter)* [1975] QB 691 700; *R v Camplin* [1978] AC 705, 716; *Logan v The Queen* [1996] AC 871; *R v Acott*, above.

12. Applying these principles to the facts of the present case, Mr Fitzgerald submitted that there was evidence of conduct capable of provoking the appellant, of a loss of self-control and of killings by the appellant when so provoked and subject to such loss of self-control. Such evidence existed, he submitted, in relation to the killings of both Maud Turner and Ojay. He recognised the impossibility of addressing this argument in relation to the killing of Robert (Junior).

13. Section 6 of the Offences against the Person Act 1864, as amended, provides:

> "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."

This reproduces, exactly, section 3 of the English Homicide Act 1957. The dichotomy developed at common law between the subjective condition (relating to the conduct of the particular defendant) and the objective condition (relating to the reasonable man) is preserved. To satisfy the first, subjective, condition there must be four ingredients:

> (1) provocation (whether by conduct or words or both), and whether on the part of the deceased or another party (*R v Twine* [1967] Crim LR 710; *R v Davies*, above);
> (2) a loss of self-control by the defendant;
> (3) a causal connection between (1) and (2);
> (4) a causal connection between (1) and (2) and the killing by the defendant of the deceased.

The jury's consideration of the objective condition ("whether the provocation was enough to make a reasonable man do as he [the person charged] did " assumes a finding that the provocation was enough to make the defendant do as he did. But at the stage of summing-up the judge is not of course concerned to decide whether those four ingredients are present but only with the vital but preliminary question whether "there is evidence on which the jury" could properly find that they are.

14. Mr Fitzgerald, relying on the appellant's statement, submitted that there was clear evidence of potential provocation in Maud Turner's statement to the appellant (as related by him) that he must go away to make way for her boyfriend. In some factual contexts such a statement could undoubtedly be provocative. The Board has some doubt whether it was provocative in the present case, given the appellant's description of the incident, the earlier relationship of Maud Turner with Ojay's father, the appellant's separation from her and the detached nature of their continuing relationship. But Mr Fitzgerald was right to submit that the trial judge was only concerned with factual possibilities, and it is proper to assume in the appellant's favour that the conduct of Maud Turner was capable of amounting to provocation.

15. It is then necessary to ask, first considering the killing of Maud Turner, whether (assuming such provocation) there was evidence that it caused a loss of control to which the appellant was subject when he killed her. In the Board's opinion such evidence could be found, if at all, only in the confession statement of the appellant, the immediacy of the killing following the assumed provocation, or the nature of the attack on Maud Turner (or of course all three together).

16. Even assuming that Maud Turner's statement was provocative, the Board finds nothing in the appellant's confession statement to suggest that it caused him to lose his self-control and kill her. The appellant's explanation was throughout to a different effect. As recorded above, the appellant's first admission, prompting the summoning of a Justice of the Peace to witness the taking of his written statement, was "Officer, a ganja mek mi kill dem". He stuck to this explanation in his written statement when he said " ....the weed say mi fi hold her and squeeze her....". He gave the same explanation when describing the death of Ojay: "the weed tell mi fi strangle him....". He gave it again, in a context having nothing to do with provocation, in relation to his own son: "....the weed say mi fi tie him mouth and carry him home...". Yet again, it seems in relation to Ojay, he said: "....the weed say mi fi carry him over di the wall and him mouth was tied same way...". Up to the killing of Robert (Junior), the appellant thus attributed this series of actions to the direction of "the weed", which is plainly inconsistent with an uncontrolled response to provocation.

17. The fact that one event follows hard on the heels of another does not necessarily suggest that the one is caused by the other. It may or it may not. Sometimes the shortness of an interval between provocation and killing will strongly point to a causal link between the two. But all depends on the circumstances of the particular case. Here, as already pointed out, the appellant gave an altogether different explanation of his motivation. Were the judge to invite the jury to reject this explanation in favour of another explanation which there was no evidence to support he would be inviting them to speculate.

18. There are cases in which the very manner of a killing will suggest that the defendant was at the time of the killing in a state

of uncontrolled frenzy. *R v Rossiter* [1994] 2 All ER 752 is an example of such a case. But there is nothing in the nature of his killing of Maud Turner to suggest that the appellant was in such a state. He killed Ojay in a somewhat similar way. And the most horrific killing of the three, that of Robert (Junior), was done when it is clear beyond argument that the appellant was not provoked to act as he did.

19. The killing of Maud Turner was, of course, part of a continuing story. It is not suggested that Ojay's calling of his mother could have been in any way provocative. Yet the appellant killed Ojay, it seems just after killing his mother, and in much the same way. Although, for purposes of section 6, the defendant need not be provoked by the deceased, there was no evidence to suggest that the assumed provocation offered by Maud Turner caused the appellant to lose his self-control and kill Ojay. As already noted, his own statement contradicted that hypothesis.

20. The appellant's argument is undermined still further, and fatally, when the killing of Robert (Junior) is considered. It was separated in time and place from the assumed provocation. The appellant did not on this occasion attribute his conduct to the weed. Instead, he explained the killing as a means of making sure that the baby did not cry. Nothing suggests a lack of self-control, still less any causal link with the assumed provocation. That a man should so act when not, even arguably, provoked to do so leaves no room for an inference that the earlier killings can plausibly be explained as a response to provocation.

21. Because, it appears, of the order in which the killings were charged against the appellant in the original indictment, the special leave granted by the Board related to the killings of Maud Turner and Robert (Junior). It seems quite clear that the leave was intended to cover the killings of Maud Turner and Ojay. The Board will accordingly extend its grant of special leave to cover the case of Ojay. But for the reasons already given the Board concludes that there was no evidence on which a properly directed jury could reasonably have found that the appellant had been provoked to lose his self-control when acting as he did in killing any of the three victims. The Board will accordingly humbly advise Her Majesty that the grant of special leave to appeal should be extended to cover the case of Ojay but

that the appeal in respect of all three convictions should be dismissed.

Fresh medical evidence

22. On 2 February 2001 Dr P L G Gallwey, an experienced and distinguished psychiatrist now practising in Devon, examined the appellant in St Catherine's Prison. He prepared a report dated 6 February, which the Board has been invited to consider. During his examination the appellant performed a paper test which in the doctor's judgment revealed a high probability that the appellant suffered from a degree of brain damage. This was consistent with the appellant's personal history as recounted by him to the doctor. The appellant's account to the doctor of what happened on 6-7 April 1996, although contradicting any suggestion of provocation, did lead the doctor to give weight to the hypothesis that the appellant had suffered a drug-induced psychotic mental state with discontrol caused by an unusually and excessively high consumption of drugs. Had a psychiatric examination been conducted at the time of the trial or before, the doctor considers it more likely than not that a plea of diminished responsibility would have been advanced. The possibility of a defence based on involuntary intoxication by drugs might also have been open.

23. Mr Fitzgerald accepts that the Board cannot evaluate the cogency and effect of this evidence, and does not ask the Board to admit it. Instead he asks that the case should be remitted to the Court of Appeal in order that the evidence may be considered and appropriate directions given. The English representatives of the prosecution find themselves at an obvious disadvantage in responding to Dr Gallwey's report, which reached them very shortly before the hearing, giving no time to take detailed instructions or seek expert medical advice. Mr Guthrie QC for the Crown submits that the Board should not remit the case to the Court of Appeal but that the appellant should, if so advised, make representations to the Governor-General under section 29 of the Judicature (Appellate Jurisdiction) Act 1962.

24. The Board notes that the Court of Appeal may, under section 28 of the 1962 Act, receive fresh evidence if they think it

necessary or expedient in the interests of justice to do so. There are various matters to which, by analogy with section 23 (2) of the English Criminal Appeal Act 1968, the Court of Appeal might think it right to have regard in considering whether to receive fresh evidence from Dr Gallwey or any other psychiatrist on whom the Crown might wish to rely: whether the evidence appears to be capable of belief; whether it appears to the court that the evidence may afford a good ground for allowing the appeal; whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; whether there is a reasonable explanation for the failure to aduce the evidence in those proceedings. The practice of the Court of Appeal Criminal Division in this difficult field was reviewed in some detail in *R v Criminal Cases Review Commission Ex p Pearson* [1999] 3 All ER 498.

25. The Board is of the clear opinion that Dr Gallwey's report merits consideration by the Court of Appeal, for two main reasons: first, because unless modified or rebutted, the report gives ground for doubting whether the appellant was fully responsible for his conduct at the time of these killings, whether because of pre-existing brain damage or because of excessive consumption of drugs or because of a combination of the two; and, secondly, because the conduct of the appellant on this occasion, in a man of hitherto good character, suggests to the lay mind some real possibility of mental derangement. It is of course true that the matters now relied on could have been advanced at the trial had the appellant not chosen to deny all participation in the killings and had the necessary evidence been available (which, so far as the Board is aware, it was not). But there is nothing to suggest that the failure to rely on diminished responsibility or involuntary intoxication was a tactical decision, and the Board would endorse the observation of the Queen's Bench Divisional Court in *Ex p Pearson*, above, at 517:

> "the overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed and not for psychological failings to which they may be subject".

26. Mr Fitzgerald submitted that the absence of a routine psychological examination of defendants awaiting trial on grave

capital charges in itself infringed the appellant's right to a fair trial. This submission was unsupported by evidence or authority. The Board readily acknowledges the desirability of examining any defendant whose fitness to plead or whose criminal responsibility may be in doubt but cannot presume to prescribe how any sovereign state shall deploy its human and material resources.

27. The Board will humbly advise Her Majesty that the special leave granted to the appellant should be extended to cover the issues of diminished responsibility and involuntary intoxication, and that the case should be remitted to the Court of Appeal in order that that court may consider the exercise of its powers under section 28 of the 1962 Act and make such orders as it considers appropriate in all the circumstances. The Board does not wish to circumscribe the judicial discretion of the Court of Appeal in any way, and is confident that the issues now raised will be fully and fairly considered. Effect must not be given to the sentences imposed upon the appellant until the Court of Appeal has had an opportunity to respond to the Board's invitation and has made a final order.