JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 5 of 1971

BEFORE: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

GEORGE THOMPSON v. R.

C. Leiba for the applicant.

H. Downer for the Crown.

1971 - July 26 & 27: October 15

SMITH, J.A.:-

The applicant, George Thompson, was convicted on January 15, 1971, in the St. Catherine Circuit Court of the murder of Wellesley McIntosh and was sentenced to death. His application for leave to appeal against his conviction was heard on July 26 and 27, when the application was treated as an appeal and the appeal was allowed. The conviction for murder was quashed, and the sentence set aside. A verdict of guilty of manslaughter was substituted and a sentence of 12 years imprisonment at hard labour passed for this offence. We now give the reasons for our judgment.

The charge against the applicant arose out of incidents which occurred on the morning of August 22, 1970 in the district of Thompson Pen in St. Catherine. There was a fight between the applicant and a man named Delroy Thompson, who is called Derrick. They fought on a lane in the district. They were parted. The case for the prosecution was that after the men were parted the applicant took a ratchet knife from his pocket, "flashed" it open and moved towards Derrick, who ran. The deceased held the applicant and tried to take the knife from him asking whether he wanted to get himself into trouble. The applicant resisted the deceased and an unknown man went to the deceased's assistance. All three fell to the ground where there was a struggle to take the knife from the applicant. During the struggle the deceased thumped the applicant two or three times. A woman hit the deceased in his back, apparently

because of this. The deceased let go of the applicant, got up and turned aside to speak to the woman who had struck him. The applicant got up and made as if to walk away then spun around and stabbed the deceased in his neck with the knife which he still had. The deceased received a wound in the region of the right claviole which penetrated the subclavian vein and entered the upper tip of the right lung. He died from resulting haemorrhage. In an unsworn statement at the trial the applicant, short of expressly admitting that he stabbed the deceased, admitted in substance the case for the prosecution. He gave the reason for the fight with Derrick. He said that on that morning he was on his way to the river when he saw Derrick "hold up" a girl. He told him to let her go "because they rape her the night before." Derrick boxed him and this started the fight.

The learned trial judge left it open to the jury to find a verdict of guilty of manslaughter on the ground of provocation, but on the question of whether or not the applicant was provoked to lose his self-control he expressly withdrew from the jury's consideration any provocation that might have arisen from the fight with Derrick.

When the application for leave to appeal came on for hearing on July 26, Mr. Leiba, for the applicant, told the Court that after careful consideration of the record of the trial he could find nothing about which he could properly complain before the Court of Appeal. After consultation, the Court invited learned counsel for the applicant and for the Crown to consider whether the learned trial judge was right in directing the jury on the issue of provocation to leave out of account the fight between Derrick and the applicant. The matter was then stood over to be argued on the following day.

In dealing with the law on provocation in his summing-up the learned trial judge told the jury as follows (at pp. 50 and 51 of the record):

> "If the accused man was provoked by something said or by something done or by both something said and something done by the deceased or by someone who was acting with the deceased and if he was so provoked that he loses his self control as a result of that provocation and then kills the deceased, it would be for you to consider whether, in your opinion, the provocation was such as to cause a reasonable

man to lose his self control and act as the accused did, and if you believe that the provocation was such as to cause a reasonable man to lose his self control and act as the accused did, then the accused man would be acting under provocation, then he would be guilty not of murder, but of manslaughter.

Now, counsel for the accused, in his address to you suggested that provocation can arise from anything, it need not arise from the deceased. Well, this is not quite correct Members of the Jury. In other words, provocation to justify the defence of provocation, as I may so refer to it, must arise from the deceased personally. In other words, if the accused man was provoked by something done by somebody else, he cannot, as a result of that provocation, kill the deceased and say 'I acted under provocation'. The provocation normally must arise from the deceased person, but it can arise from somebody who was acting along with the deceased. In other words, if the deceased and somebody else were acting together and that somebody else provoked the accused so that he loses his self control and having lost his self control, kills the deceased, the provocation from that other person could be regarded as provocation of the accused if, in your opinion, it was sufficient to cause the accused to lose his self control and to act as he did.

So then, three things are necessary for provocation to be established, the first is a loss of self control. The accused must have lost his self control for provocation to arise, if there was no loss of self control, then provocation does not arise. If there was a loss of self control, it must have been as a result of something said or something done or both something said and something done either by the deceased or by somebody who was acting with the accused. If the accused had lost his self control as a result of something said or something done by some person other than the deceased who was not acting together with the deceased, then provocation cannot arise."

He told them further (at pp. 52 and 53):

"Well now Members of the Jury, it is for you to say whether what this man did, these two or three thumps in the head, if you accept this evidence, which the deceased man delivered to the accused accordingly with his holding him down on the ground along with this other unknown man, was the sort of conduct which, in your opinion, would have caused a reasonable man to lose his self control and to act as the accused did. If the accused man lost his self control as a result of this previous fight with Delroy Thompson or with Derrick, that is

not sufficient provocation to be established Members of the Jury, unless you feel that Delroy or Derrick was acting along with this deceased man and the only evidence to suggest that comes from the accused who says that Delroy had this bottle, broken bottle and stone in his hand and that same time that the deceased was getting up Delroy was coming towards him with the bottle and the stone. Well, if you believe that and you believe that this deceased man and Delroy were acting together, then it would be open to you to take into consideration whatever Delroy might have done, this approach with the bottle and the stone, as well as what the deceased man did, in deciding whether there was sufficient said or done or both said and done to cause a reasonable person to lose his self control and to act as the accused did. Also, as I think I have told you, if, as it appears, this deceased man and this other unknown man who was holding down the accused were acting together, it is for you to take into account what either or both of them did or said in order to decide whether sufficient was said or done by either or both of them to cause a reasonable man to lose his self control and to act as the accused man did. This is something which you have to decide and, as I told you, you also have to decide whether in fact the accused man did lose his self control and you also have to decide whether he lost that self control as a result of something said or done or both something said and done by the deceased or by one who was acting with the deceased."

There was no evidence on which it could be said that the deceased was acting with Derrick during the fight between the applicant and Derrick.

After due consideration, learned counsel for the applicant said that on the state of the authorities and in principle he could not urge anything on the Court to impeach the directions given by the trial judge to which his attention had been directed by the Court. He submitted that if there is no provocation coming from the deceased either independently or in concert with someone else it is not open to an appellant to complain or ask the Court to reduce murder to manslaughter on the ground of provocation. In support of this submission reference was made to R. v. Simpson (1915), 11 Cr. App. R. 218; R. v. Hall (1928), 21 Cr. App. R. 48 and Fowler v. R. (1960), 2 W.I.R. 503. Learned counsel for the Crown supported the trial judge's directions. He submitted that the principle that the provocative act can come from someone other than the accused person has two exceptions at common law, viz., in adultery cases and in common design cases, as in R. v. Hall (supra). He contended that any further extension at this point

of time should be by the legislature and not the courts.

The authorities support the proposition that at common law provocation was limited to acts done by the victim to the accused. In East's Pleas of the Crown, Vol. 1 at p. 232 the topic "Of Homicide from Transport of Passion or Heat of Blood" is dealt with.

It is there stated as follows:

> "Upon this head it is principally to be observed, that whenever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter: if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder."

In considering what was a sufficient provocation "to extenuate the guilt of homicide" the learned author said, at page 233, that "words of reproach, however grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous or insulting actions or gestures without an assault upon the person, nor is any trespass against lands or goods." And he continued, ibid:

> "But any assault made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, if it be resented immediately by the death of the aggressor, and it appears that the party acted in the heat of blood upon that provocation, will reduce the crime to manslaughter."

The words underlined seem clearly to limit the provocative acts to those of the victim. Then in R. v. Simpson (supra), at page 220, the Court of Criminal Appeal in England said: "No authority has been cited to support the proposition that provocation by one person, followed by the homicide by the person provoked of another person, is sufficient to reduce such homicide to manslaughter. There is no such authority" (per Reading, L.C.J.). Finally, in R. v. Duffy (1949), 1 All E.R. 932, the same court quoted a passage from the summing-up of Devlin, J. in that case which was described by Lord Goddard, C.J. (at page 933) as "as good a definition of the doctrine of provocation as it has ever been my lot to read." Devlin, J's directions in that case have since been accepted as the classic definition of the doctrine of provocation at common law. In it he said, inter alia: "Provocation is some act, or series of acts, done by the dead man to the

accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control ....."

In spite of the limitations described above, in R. v. Hall (supra) the Court of Criminal Appeal held that the defence of manslaughter on the ground of provocation ought to have been left to the jury in circumstances where the provocative acts come from a third party, or third parties, and there was no direct evidence of any provocative act on the part of the deceased. This decision, it has been said, is justified because on the evidence it is possible that the deceased was involved in a previous concerted attack on the appellant. The decision in Fowler v. R. (supra) is, in terms, based on the fact that the deceased was, on the appellant's evidence, a party to a previous concerted attack upon the appellant. Learned counsel for the Crown, Mr. Downer, submitted that the departure in these cases from the limitation to acts of the deceased is justified on common law principle, the acts of those acting in concert with the deceased being in law regarded as acts of the deceased.

It is not at all clear that the decision in R. v. Hall (supra) was based only on the possibility that the deceased might have been a party to the previous attack on the appellant. The case for the prosecution was that Hall, the appellant, had, after a previous fair fight on a bridge with one Mark Sines, made an unprovoked attack upon Shipton and Belcher Sines, brothers of Mark, inflicting fatal injuries on Belcher. According to the evidence of Hall it was not a fair fight; instead, he said that he was attacked and assaulted by a crowd on the bridge. The judgment of the Court of Criminal Appeal, delivered by Hewart, L.C.J., referred (at page 53) to the grave difficulties in the way of the defence of provocation which was developed in the course of the trial. Not the least difficulty, it was said, was the strong contrast between the evidence for the prosecution and that for the defence about what took place upon the bridge, the evidence for the defence depending on the appellant's testimony alone. Another and more serious difficulty, it was said, was the interval which had elapsed between the acts which were said to have given the provocation, and the act with which the appellant was charged. The judgment continued, ibid:

> "The learned judge, in the circumstances, was of the opinion that there was no evidence to go to the jury on the question of provocation. It may well be that that was because, as the case appeared to him, the provocation had come from one man, and another had been killed.
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> The question for us is whether upon this evidence the defence of manslaughter ought to have been left to the jury. No doubt if the preliminary question of fact: Is the version of the prosecution correct or is the version of the appellant correct? was decided in favour of the prosecution, the defence of provocation became difficult indeed; but it appears to us that it was necessary that the jury should decide, upon that conflict of testimony, what it was that had happened, and in like manner with regard to the interval of time which had elapsed between the incidents on the bridge and the stabbing of Belcher Sines. It was, as we think, for the jury to consider whether in those circumstances provocation could be said to have continued."

After reference to passages in the summing-up of Chief Justice Tindal in R. v. Hayward (1833) 6 C. & P. 157, the judgment continued, at page 54:

> "So here, it seems to us that it was for the jury to consider first of all what the true version of the facts was, and secondly to consider as precisely as the evidence permitted, what was the interval that had elapsed, and thirdly to consider, when they had made up their minds upon those questions, whether it was true to say in this case that the prisoner, when he committed the act with which he was charged, was smarting under a provocation so recent and so strong that he was not, at the critical moment, the master of his own understanding. Unfortunately, however, that defence was never submitted to the jury."

It is to be observed, firstly, that the Court did not say that the case appeared to them any differently from how it appeared to the trial judge. Secondly, and more importantly, it was not said anywhere in the judgment that if the version of the prosecution was accepted there would have been no legal provocation and that the jury should have been told so. Instead it was said that if that version was accepted "the defence of provocation became difficult indeed." It seems fair to say, from the last passage quoted, that the Court was of the view that on either version of the facts the defence of provocation could arise. This is confirmed, in our view, by a later passage in the judgment in which the different versions are not mentioned. That passage is as follows (vide page 55):

> "In our opinion it was right in this case, upon the evidence, to leave to the jury the question whether the true verdict was a verdict of manslaughter, amongst other questions .....
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> Nobody can consider this evidence without perceiving that the defence of manslaughter was beset by great difficulties arising in particular from the interval which had elapsed, from the weapon that was chosen, and from some at least of the statements which the appellant afterwards made. But however great those difficulties were, it seems impossible to say that if the defence of manslaughter had been left to the jury they would nevertheless certainly have found a verdict of wilful murder."

The court quashed the conviction for murder and substituted one for manslaughter.

The view has been expressed that s.3 of the (U.K.) Homicide Act, 1957 (s. 3C of the Offences against the Person Law, Cap. 268 (Jamaica), as amended) is sufficiently general in its terms to include a case of provocation given by a person other than the victim or someone acting in concert with him. In R. v. Twine (1967), Criminal L.R. 710, 711 Lawton, J. at the Central Criminal Court ruled that under the Act of 1957 the provocation did not necessarily have to come from the victim. (See also - Smith and Hogan Criminal Law, 2nd edn., p. 206). The effect of this ruling is that the common law rule as to the source of the provocative acts has been altered by the statute. But in Phillips v. R. (1968), 13 W.I.R. 356, 359 and 360 Lord Diplock, speaking for the Privy Council, said that "the only changes in the common law doctrine of provocation which were effected by s. 3C of the Jamaica Offences against the Person (Amendment) Act, No. 43 of 1958, were (1) to abolish the common law rule that words unaccompanied by acts could not amount to provocation and (2) to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did."

The question whether or not the ruling of Lawton, J. was right was not fully argued before us. On the view we take of the facts of the case under consideration, it is not necessary to express an opinion on the correctness of Lawton, J's ruling. The case we had to consider was not one in which the victim was innocent of any provocative act. This distinguishes it from Simpson's case (supra). Though the deceased was

a peacemaker and was endeavouring to save the applicant from himself, yet the learned trial judge was, in law, bound, as he did, to leave for the jury's consideration on the question of provocation the fact that the deceased thumped the applicant while the latter was on the ground. The question we had to decide was whether the jury could legitimately add to these acts of the deceased any provocative acts that the applicant may have received from Derrick in the fight with him.

We are of the view that the incidents starting with the fight and ending with the stabbing of the deceased were so closely connected that they could properly be regarded as one entire incident. On the issue of provocation the jury had to consider the state of mind of the applicant when he inflicted the fatal injuries on the deceased. Indeed, the whole doctrine of provocation is referable to the state of mind of the accused judged against the standard of the mind of a reasonable man (see Parker v.R. (1962-63) 111 C.L.R. 610, 615 per Windeyer, J.). Derrick had, apparently, been the aggressor in the fight with the applicant, who appears to have had the worst of the encounter. A prosecution witness, Barrington Dawkins, gave evidence that while the applicant and Derrick were fighting the applicant was trying to get up and Derrick was pushing him down and the applicant's head "knock the ground." The mental state of the applicant after this fight may have been such that the blows from the deceased were all that was required to tip his mind into a state of loss of self-control; though by themselves these blows might not reasonably have been sufficient to place it in that state. In these circumstances where all the provocative acts were done to the applicant in the course of one incident his state of mind when he committed the act of stabbing could not, in our view, fairly be judged without taking all those acts into account. His conduct would, of course, still have to be considered from the standpoint of a reasonable man.

Had the jury been allowed to take into account such provocative acts as arose from the fight with Derrick they may well have arrived at the same verdict, but we could not say that they would certainly have done so. It is for these reasons that the appeal was allowed.