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IN THE COURT OF APPEAL
SUPREME COURT CRIMINAL NO. 36/71

B E F O R E: The Hon. Mr. Justice Fox - Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham-Perkins

ANDREL VASSELL v. REGINA

R. Baugh for the Appellant.
S. Panton for the Crown.

13th January, 1972.

FOX,J.A.

The applicant was convicted in the Home Circuit Court on the 22nd of March, 1971 for murder. On the evidence of the Crown, the applicant had entered premises occupied by the deceased and had inflicted several blows with a knife without any provocation upon his defenceless victim. The motive for this crime being jealousy arising from the circumstance that the lady friend of the applicant and the mother of his child had transferred here affections and her favours from the applicant to the deceased.

The applicant made an unsworn statement in his defence. In this statement, he alleged that as he entered the premises occupied by the deceased, he was set upon by the deceased and the deceased's brother. His resistance was subdued by them and whilst he was being held by the deceased, the deceased's brother had fetched a machete at the invitation of the deceased and had used that machete to deliver blows which he intended should have struck the applicant. The applicant said that he was able to avoid these blows and that they fell upon the deceased whom he had placed in the position of a shield.

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The applicant wished the jury to understand that this accidental injury to the deceased had resulted because of the incident having happened in a darkened kitchen. A witness gave evidence on behalf of the applicant which substantiated the applicant's statement that he had been attacked by the deceased and his brother.

In the course of his summing up, the learned trial judge specifically withdrew from the Jury's consideration the issues of self defence and provocation. The complaint on appeal is as to this course. Mr. Baugh submitted that it was open to the Jury to consider that the blows struck by the applicant were for the purpose of self defence or as a result of provocation thereby rendering possible a verdict of complete acquittal or guilty of manslaughter. He relied upon a number of cases of which it is necessary to mention only two, namely, R. v. Porritt (1961) 45 Cr.App.R.,248 and Bullard v. R.(1957) A.C.635. These cases make it clear that an accused is entitled to have put to the jury every defence which fairly arises from the evidence either directly or indirectly. This is so even where the particular defence is not specifically relied upon at the trial. Those cases make it clear also that the defence must be put even if it is not consistent with the defence being relied upon, and even if the evidence in support thereof seems tenuous.

Mr. Panton's contention on behalf of the crown was that on the evidence, the issues of self defence and provocation did not fairly arise. We disagree. In our view, Mr. Baugh's submissions are correct and should be upheld. This court is of the view that in the circumstances disclosed by the evidence, these issues of self defence and provocation should have been left to the jury. There is no question of applying the proviso. The issue of self defence was specifically raised up during the presentation of the crown's case by suggestions in cross-examination to the witnesses. It was also provided with a foundation by the evidence adduced by the defence. As was said by Edmond Davies, J. in R. v. Badjan (1965) 50 and Cr.App.R.141, at 144 -

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> "Where a cardinal line of defence is placed before the Jury and that finds no reflection at any stage in the summing up, it is in general impossible, in the view of this court, to say that the proviso can properly be applied so as to say that the conviction is secure in those circumstances."

In our view, those observations apply in the circumstances of this case. In relation to the issue of provocation, the statement of Earl Jowitt in Bullard (ibid at 644) is apposit.

> "Every man on trial for murder has the right to have the issue of manslaughter left to the Jury as if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the Jury would have reached."

The application is therefore granted. It is treated as an appeal. The appeal is allowed. The conviction is quashed and the sentence set aside. A new trial is ordered to take place at the current session of the Home Circuit Court. The appellant is to remain in custody pending his retrial.