IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 36/95

COR: THE HON MR JUSTICE FORTE, J A
THE HON MR JUSTICE WOLFE, J A
THE HON MR JUSTICE HARRISON, JA (AG.)

GEORGE STEWART VS. REGINAM

**Paul Ashley for Appellant**

**Kent Pantry, Q.C., Senior Dep. Director of Public Prosecutions and Mrs. Janice Gaynor for the Crown**

**18th March & 20th May, 1996**

**HARRISON, J A (AG.)**

The appellant was convicted in the St. Elizabeth Circuit Court on the 8th day of March, 1995 before Pitter J, and a jury for the offence of murder. He was sentenced to a term of imprisonment for life at hard labour, and it was recommended that he be not eligible for parole until he had served a term of fifteen (15) years. On the 18th March, 1996 having heard the arguments of counsel we treated his application for leave to appeal as the hearing of the appeal. We allowed the appeal, quashed the conviction and set aside the sentence. A verdict of manslaughter was substituted and a sentence of twelve years imprisonment at hard labour was imposed to commence on the 8th day of March, 1995. At that time we promised to put our reasons in writing. This we now do.

The facts are as follows. On the morning of the 3rd day of April, 1994 the appellant was in his field at Giddy Hall in the parish of St. Elizabeth along with one Dawn Campbell described as his girlfriend, when a cousin of Dawn, one Beverley Thomas, with whom the appellant then lived, came to the said field. A quarrel

developed between Beverley and Dawn, during which the appellant assaulted Beverley with stones and a stick. One Dermot Stewart, the uncle of the appellant and brother of the deceased, came to the field and spoke to the appellant; this resulted in an act of wrestling to the ground between the two men. They separated. Beverley left the field. Dermot left and returned with the deceased Wilfred Stewart, the father of the appellant. The deceased greeted the appellant and Dawn, enquired and was told of the earlier event involving Beverley. An argument developed between the deceased and the appellant, who accused the deceased of unfairly treating him in the sharing of the proceeds of sale of cow calves to which he the appellant was entitled. The appellant threatened the deceased with stones, then grappled with him and they wrestled to the ground. They were separated by Dermot and Dawn. Deceased got up picked up his machete which he had brought with him and left. The appellant was then released. He went to his field picked up his machete and despite futile attempts by Dermot and Dawn to prevent him he went in the direction that the deceased had gone. Shortly after Beverley called Dawn who went and saw the deceased lying on his side on the ground and the accused sitting on him and chopping the deceased several times, in the area of his head, with a machete. The deceased sustained chop wounds to the body, face, cheek, chin, and the back of the head and one of his fingers was completely severed; he died from those wounds.

The appellant, in an unsworn statement, agreed that the said morning he was in his field with Dawn when Beverley came to the field and had an argument with Dawn. He spoke to Beverley, he did not agree that he hit Beverley with a stick. Dermot, came spoke to them and left. Beverley left. Dermot then returned to the field with deceased, who had his machete. Deceased cursed him the appellant about his treatment of Beverley, in preferring Dawn and unkindly advised him to "... gwaan and live with

animal ...". He protested, took up two stones and threw at the deceased, they did not hit him. The deceased who the appellant described as sixty-seven years old and "a very strong man" grabbed him "in his chest", they fell to the ground with deceased on top of him. Dermot and Dawn separated them. He, the appellant, subsequently left the field, his machete under his arm, and went up to his yard, where he saw his father, the deceased "standing underneath the garage." The deceased, who was then about two yards away from him, raised his machete "in a chopping position". The appellant, took a nearby stick to ward off the blow. The deceased chopped at the appellant's head. The appellant put up "my hand with my machete", and the deceased's machete chopped his appellant's left little finger "down to the bone." The deceased chopped at the appellant's head, a second time and he "...blocked it with my left hand and got a deep cut on my left forearm." The deceased chopped at him a third time and he "... got one over the right shoulder".

They both fell to the ground. Deceased's machete fell to the ground. Beverley pulled the appellant off the deceased. Both the appellant and the deceased walked towards the deceased's machete which was then on the ground. The appellant said that he the appellant reached it first and "the deceased rushed in with his machete, threatening me to chop me with it again. I chopped him twice. It caught him in his forehead. He fell to the ground." He concluded, "I never killed my father in cold blood... I was acting in self defence. I am innocent of this charge." The medical evidence disclosed that the appellant, who was examined on the said day of the incident, was suffering from a four (4) centimetre cut to the left posterior arm penetrating deep into the muscles, to the bone, and another deep laceration of approximately ten (10) centimetres long to the top of the thumb, and which severed the

thinner muscles reaching the bones; considerable force was used to inflict these injuries.

In the first of two reformulated grounds of appeal, Mr. Ashley for the appellant complained that:

> "The learned trial judge in the course of his summing-up omitted to refer to certain aspects of the evidence and thereby failed to relate the law to the evidence on which the jury could have returned a verdict of manslaughter on the ground of provocation."

He argued that the learned trial judge highlighted one set of facts, that is, the verbal exchange in the appellant's field, between the deceased and the appellant, as the evidence in the determination of the question of provocation, and failed to refer to the other facts, the physical acts, which could have been considered by the jury as capable of amounting to provocaton.

The learned trial judge in dealing with the issue of provocation said, at page 9 of the transcript:

> "Now, I did mention to you about provocation, that if you reject self-defence you look on the evidence to see whether, or what could have spurred the accused to have acted as he did, and if you find that he was provoked and in response to that provocation he used his machete to chop his father, then that would reduce the charge of murder to one of manslaughter.
>
> Now, is there any such evidence? It is for you to determine whether you find that there is provocation. You recall the accused man told you that his father had a machete in his hand, 'He began to curse me how I take on Dawn and don't have any use for Bev and I told him he shouldn't come into this, shouldn't come to my farm to molest me and he said I should go and live with animal.' Now, is this, do you

> consider this to be provocation on the part of the father? Because provocation is some act or series of acts done, and/or words spoken which caused in the accused a sudden and temporary loss of self-control, and which would cause a reasonable person to lose his self-control and behave as he did. Therefore, you have to consider whether the alleged provoking conduct, that is these words used, would cause the accused to lose his self-control and you go on further to find whether that conduct would have caused a reasonable person to lose his self-control and behave as the defendant did.
>
> Now, you should take into account everything that the accused man has told you and the effect in your opinion it would have on a reasonable person. ... You must consider the provocation received and the manner of the retaliation and ask yourselves whether a reasonable person, provoked in that way as the accused was provoked, would retaliate as he did. ...
>
> You will recall he never told you that, he didn't tell you that he was provoked, but if there is evidence which suggest that there was some provocation, you may act upon it." [Emphasis added]

The learned trial judge here quite correctly directed the jury how to determine the issue of provocation in terms of section 6 of the Offences against the Person Act, a statutory refinement of the common law principles laid down in **R. v. Duffy** [1949] 1 All E.R. 932.

The section reads:

> "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. " [Emphasis added]

Later in the summing-up, at page 31 of the transcript, the learned trial judge returned to the treatment of the question of provocation. He said:

> "If you reject the defence of self-defence and find that the accused did in fact murder the deceased but at the time that he inflicted these injuries on the deceased he was acting under provocation - you will recall what I told you in law what provocation is - then it would reduce the charge from one of murder to manslaughter."

The trial judge has a duty to relate the law to the evidence. In **Harvey v. Regina** [1972] 12 JLR 1003 Smith J.A., said at page 1008:

> "It is of course not obligatory in every case for a trial judge to relate the facts of the case to his directions on the law, though it is desirable that this should always be done." See also **R v Campbell** [1973] 12 JLR 1160.

In the instant case, though the learned trial judge correctly told the jury that the words used to the appellant by the deceased in the first incident in the field, could amount to provocation, he omitted to instruct them that the circumstances of the later incident at the yard as described by the appellant and particularly the alleged attack by the deceased on the appellant with the machete, was also evidence capable of amounting to provocation and should also be considered by them in that regard. By emphasizing the words only, to the exclusion of the later incident, the learned trial judge was thereby circumscribing the area of consideration of the jury, thereby delimiting the jury's

function to consider, "... everything both said and done. " He confined the jury to one aspect of the incident that day, namely the words used in the field. This deprived the appellant of the further consideration by the jury of the later incident, as evidence of provocation which could reduce the offence from murder to manslaughter. Mr. Pantry, for the Crown, during the course of his argument conceded that this ground was not without merit. We agree with this concession, and for the reasons already expressed, find that the learned trial judge fell into error. On this ground alone we would have allowed the appeal, and made the order which we did. However, the second ground of appeal argued by the appellant's counsel is of equal merit. This ground was that the learned trial judge failed to direct the jury that if they were satisfied that the appellant committed an offence but were unsure if the offence was manslaughter or murder they should return a verdict of the lesser offence of manslaughter.

The learned trial judge, at page 31 of the transcript having told the jury that having rejected self-defence and finding that the appellant was acting under provocation it would reduce the offence from murder to manslaughter, continued, and said:

> "If you are not sure as to what happened, that 'A', you are not sure that the accused acted in self-defence, then it would mean that the prosecution would not have discharged that burden of negativing self-defence. You would have to resolve that doubt in favour of the accused man, George Stewart.
>
> If on the totality of all the evidence you are not sure as to what really happened then you are entitled to acquit him. He would be guilty of nothing at all.
>
> I am now going to ask you to retire and consider your verdict. Your verdict can only be guilty or not guilty of murder or guilty or not guilty of manslaughter."

This imprecise direction, though seemingly generous to the appellant may have confused the jury.

Certainly, the jury was not told as they should have been, (i) that if they were in doubt that the appellant was acting under provocation they should find that he was so acting, and return a verdict of manslaughter; (ii) that if they were satisfied that the appellant had committed a criminal offence but were not sure whether the offence amounted to murder or manslaughter they would be obliged to convict him of the lesser offence.

These omissions amount to non-direction by the learned trial judge.

The jury clearly rejected the defence of self-defence and there was ample evidence on which they could find that the appellant was acting under provocation sufficient to reduce the offence committed from murder to manslaughter.

In the event we allowed the appeal and made the orders already stated.