JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 5/92

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

R. v. WINSTON BARRETT

Jack Hines for the Applicant

Mr. Kent Pantry, Snr. Dep. Director of Public Prosecutions & Martin Gayle for the Crown

25th October, 1993 & 10th January, 1994

GORDON, J.A.

On the 16th December 1991 in the St. James Circuit Court the applicant was convicted for the murder of Hector Wallace on 16th August, 1990 in the parish of St. James. The medical evidence showed that the deceased sustained a lacerated wound 12.5cm long and approximately 3cms deep extending from below the left eyebrow medially to above that eyebrow laterally. Internally the superior orbital ridge above the left eyebrow below the wound sustained a comminuted fracture and there was haemorrhaging below the laceration. There was also pulmonary oedema or fluid in the lungs as a result of aspiration. Dr. Codrington concluded that death was due to cranial injury complicating a wound to the left eyebrow. Aspiration was a contributory factor. The injury could have been inflicted by a machete wielded with a moderate to great degree of force. The body also had abrasions over the left shoulder.

The incident which culminated in the infliction of the injury on the deceased occurred at Barnett Lane in the parish of St. James on the morning of the 16th August, 1990. The deceased and the applicant lived on opposite sides of the Lane.

At about 10.00 a.m. that day the deceased stood at his gate, the applicant sat on a wall by his gate. An argument developed between them in which each abused the other using invectives. The applicant left the wall, went into his house and came out with a machete. The applicant challenged the deceased to meet him but this the deceased declined to do. On the prosecution's case the applicant approached the deceased who squared for battle. Both men chopped at each other, the deceased giving ground as he retreated into his premises. In his retreat the deceased stumbled, tripped by the root of a tree, he fell on his back, and the machete fell from his hand. The applicant then chopped him in his eyebrow while he lay on his back and walked away.

The deceased rose bleeding from the injury. He was assisted to a car and taken to hospital. On the prosecution's case the applicant first hurled indecent words at the deceased who in turn repeated the words to the applicant.

The applicant in an unsworn statement said he was hailed by the deceased who had a machete in hand. The deceased called him names, used indecent **language** to him and threatened to slap or "chop him even if he went on his motor cycle." The applicant said he went towards his motor cycle and he saw the deceased coming towards him. He said he went to his home for his machete explaining "The reason why mi really goh fi my machete a just through him get me scared because him tell me say if me even goh pon mi bike him a goh chop me off." They faced each other and the deceased chopped at him. He parried the blow and the weapon of his opponent wounded him. They began chopping at each other ... "we was chapping sword fight." He declared he did not know how the deceased was injured and he denied entering the yard of the deceased. He admitted the deceased retreated to his yard stumbled and fell. He said however he never lost the machete.

While "standing at the gate," he saw the deceased rise from his fall "like him want to come rush me with his machete," then he became aware of the injury to his eye and sought attention.

He concluded his statement with:

> "M'Lord, the reason why I really goh fe my machete is just through the man get mi scared and mi coward, because him tell mi sey if me even goh pon mi motor cycle, him a goh chop mi off. Just like that, sir."

The defence thus raised as issues self-defence and provocation. The two witnesses for the prosecution were at variance in two details. Mr. Locksley Smith said when he first saw the deceased who was called Shawa, Shawa had a machete in hand. Miss Nicola Gillette said that it was after the word throwing incident and after the applicant armed himself with his machete that Shawa went for his machete. These witnesses corroborated each other in testifying that Shawa never went beyond his gate and he backed into his yard under attack from the applicant. He fell in his yard and was chopped by the applicant as he lay defenceless on the ground. Mr. Smith in cross-examination said his memory on the details was not clear but asserted that Shawa was chopped before he fell.

The applicant in his unsworn statement said he was attacked by Shawa and as he defended himself they chopped at each other and Shawa retreated into his yard stumbled and fell. Thereafter he stood at Shawa's gate and saw Shawa rise.

To get to Shawa's gate the applicant had to cross the road that lay between their respective gates. On either the prosecution or the defence presentation the applicant was armed with his machete when he crossed the road, and, the inescapable inference is that Shawa sustained the fatal injury at the hand of the applicant after he had crossed the road.

Mr. Hines in his first ground of appeal complained that a passage in the learned trial judge's directions -

> "... must have had an enduring and devastatingly, prejudicial effect on the case of the defence, and in addition must have coloured and belittled and thus eroded his defence and inordinately affected the independent assessment by the jury of the evidence they heard notwithstanding the learned judge directing that it was for them to decide."

The passage complained of appears at page 80 of the record and runs thus:

> "Neither Mr. Smith nor Miss Gillette was cross-examined to the effect that the accused didn't go into the yard. It was the accused who said it in his statement for the first time. And then you must ask yourselves the question, members of the jury why is he trying to make you believe that he never went into the yard and the chopping never took place into the yard."

On the presentation of the defence the Crown's case that the chopping incident took place in Shawa's yard was never challenged. It was suggested to Mr. Smith that he never saw what happened because he came on the scene after the incident ended. This Mr. Smith denied. Miss Gillette denied the suggestion that Shawa was the aggressor and that he was chopped before he fell. The statement of the applicant informed that Shawa retreated into his yard through his gate during the chopping incident as given by the applicant. The impression the applicant's story conveyed is that the applicant himself never entered Shawa's yard. Against that background the learned trial judge posed a question the jury could raise in their deliberations. We do not accept that the question thus posed had or could have the effect learned counsel sought to urge. The remark of the learned trial judge does not fall within the category proscribed

in **R. v. Dave Robinson** S.C.C.A. 146/89 (unreported) delivered 29th April 1991 as the jury's independent assessment of the evidence could not have been adversely affected. We find no merit in this ground.

The second ground of appeal states:

> "That the learned trial judges' (sic) direction in regard to the defence of provocation (see from page 89 to 'examine the prosecution case' 7 lines from the end of page 90) was wholly inadequate in that:
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> (a) it failed to put at all the evidence of the defence and or the defence case from which provocation could clearly arise and this failure meant inter alia that there must have been an erroneous impression in the mind of the jury that in this case provocation arose for consideration from words alone when had he put the defence case the jury would have had to consider the following acts as regards provocation:
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> (a) That the deceased who it is accepted had a machete came toward*the accused with it and (b) chopped at him first and actually wounded him. This failure meant that the jury were denied the opportunity of a fair, impartial and total consideration." *(sic)

Mr. Hines had no complaint against the learned trial judge's direction on the legal definition of provocation. He complained that in relating the law on provocation to the facts the directions were inadequate as the defence case from which provocation could arise was not put; thus denying the applicant of a fair consideration of manslaughter by the jury.

The directions at page 89 of the transcript are as follows:

> "... Now you have to examine the prosecution's case also from the point of view of what the deceased is alleged to have said to the accused that day. So that if you find that when the accused used the words to the deceased, the deceased did in fact use words to him to the accused to the effect, 'A you a pussy hole', or used words to the effect that, 'Pussy hole Frenchie you have fi get a chop', and in

> "those circumstances the accused at that time got up off the wall and went for his machete and came back into the road, then you may find that in those circumstances those words used by the deceased to the accused are capable of causing him to have lost his self-control, in those circumstances.
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> Now, those words are capable of amounting to what is called words that can be regarded as causing a man to lose his self-control and act under what is called legal provocation. Now, the law views it in this way.
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> An accused man may in circumstances where words are used to him or acts are committed towards him, and those words are of such that he lose his self-control, and a reasonable man, that is an ordinary responsible person to whom words are used in those circumstances would have lost his self-control in those circumstances and did what the accused man did. Now, you must be satisfied that the words were used in those circumstances; you have to be satisfied also that the accused man did in fact lose his self-control in those circumstances and that an ordinary responsible person capable of reasoning, if those words had been used to him in those circumstances, he could have lost his self-control and do what the accused man did, according to the prosecution's case. Now, if an ordinary responsible person if those words are used to him, would not have lost his self-control and go for his machete and come out on to the road and call out to the man, and when the man comes and stands at his gate with his machete, the ordinary man would not have gone with his machete and go to his yard and when he fell, chopped him in his forehead and so killed him, if an ordinary man would not have behaved like that, it means that legal provocation would not help him."

All the issues that arose for the jury's consideration were left for their decision. The issue of provocation was left to the jury on the basis of the words used in the course of the incident. The evidence is that the applicant left the wall on which he sat and entered his home, armed himself with the machete and returned to the arena.

The assertion that the applicant was cut during the machete wielding that followed his arming himself is not a factor in the provocative conduct. That which caused him to arm himself is what matters. Thus the jury had placed before them evidence of words, abusive, insultive words and the applicant's reaction to them.

The applicant said he was cut by Shawa while he was defending himself from Shawa's attack. The Crown witnesses did not support this assertion. But even if this were so the applicant's act of arming himself and engaging in machete wielding are factors in the provocative incident namely; sudden and temporary loss of self-control, and, retaliation following on provocative conduct of the deceased. On the other hand the Crown, while not admitting that the applicant was injured, say, if he were so injured it was while Shawa was defending himself from the applicant's attack. In the final analysis the jury had to consider the Crown's case and the defence. The applicant's call to arms was the exemplification of the loss of self-control and the machete play the retaliation. The choice was between the Crown's case and the defence and the verdict registered a total rejection of the defence and an acceptance of the Crown's case. There was no legal or evidential support for the applicant's contention. There was no basis for the learned trial judge to suggest or the jury to find that the injury the applicant allegedly sustained was the provocative act. In our view this ground also fails.

The third ground of appeal in which Mr. Hines complained that the directions on self-defence were incomplete was not vigorously pursued. The defence case was an attack with a machete, hence defensive action with a machete is not unreasonable. The question of weighing necessary defensive action does not arise.

On the totality of the evidence the summing-up of the learned trial judge was clear, fair and adequate and the grounds of complaint unsupportable. We therefore refuse the application for leave to appeal and confirm the conviction. Having regard to the provisions of section 7 of the Offences against the Person Act we adjudge this a case of non-capital murder, set aside the sentence of death imposed and substitute a sentence of imprisonment for life. We direct that the prisoner be not considered eligible for parole until he has served a period of 12 years of his sentence.