JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 9/96

BEFORE: THE HON. MR. JUSTICE FORTE, J. A.
THE HON. MR. JUSTICE PATTERSON, J. A.
THE HON. MR. JUSTICE BINGHAM, J. A.

R. V. DAVE GRANT

Paul Ashley for Appellant

Kent Pantry and Miss Carol Edwards for the Crown

7th October & 4th November, 1996

FORTE, J.A.

The appellant was convicted on the 15th January, 1996 for the non-capital murder of Dalton Clarke. As is required by law, he was sentenced to life imprisonment, the learned trial judge ordering that he should not be considered for parole, until he has served a period of twenty years imprisonment.

On the 7th October, 1996, having heard the arguments of counsel we reserved our decision, which now follows.

The evidence is brief. On the 6th May, 1995, while the deceased and other men were in the shop of Mr. Bereston Smith, at Lapland in the parish of St. James, playing games (dominoes and cards) the appellant entered the shop armed with a machete and chopped the deceased. The injury caused by the "chop" proved fatal, the deceased succumbing shortly thereafter. The Doctor who performed the post mortem,

examination, testified that there was an incised wound to the left side of the neck extending from the left angle of the jaw to the base of the skull; there was an internal incised wound cutting the muscle and vessels and breaking the bone underneath, i.e. the upper cervical spine and the base of the skull. This injury, in his opinion would have caused the deceased to die "on the spot". Death was due to either the hyporolemic shock (severe loss of blood), or the fracture to the cervical spine.

No one in the shop actually saw when the appellant delivered the blow, but Mr. George Watson testified that he heard the "sound of someone chopping a piece of meat," and when he looked up he saw "the accused moving a machete off the deceased's neck". The appellant was then standing behind the deceased who then had nothing in his hands. Mr. Smith the shopkeeper, was also playing cards, but he heard someone say "But mi nuh give you $20 already this morning?" Sometime after, "before he could realize it" he found himself alone. He was "alone", because upon the appellant attacking the deceased, all the men ran out of the shop. However as it turned out, he was not alone, because he thereafter noticed the deceased "kotched up in a semi-lying position". He also saw the appellant with a machete in his hand and asked him "what happened? What dat? Wey you kill the man fah?" In response the appellant said "If you come, I will f... off your own too." The relevance of this statement of the appellant was the fact that the head of the deceased had been almost severed from his neck. Subsequently, Spl. Cons. Wright went to the home of the appellant, where he recovered the machete, and took the appellant into custody. He cautioned him and asked him what happened and the appellant replied "Officer, a owe him owe me some money and me chop him pan him neck."

Cpl. Russell to whom Spl. Cons. Wright handed over the appellant also cautioned him and also asked him why he chopped the deceased, whereupon he replied "Mi go to him fi money and him sey mi fi go nyam goat shit."

In his defence, the appellant made an unsworn statement in which all that he said was, "I reserve my defence and I am sorry." As a result of the statements allegedly made to the police officers, the learned trial judge left the question of provocation for the consideration of the jury.

It is out of those directions that complaint is made in this appeal, the ground being as follows:

> "That the learned trial judge erred in law by failing to direct the jury that (a) if they were in doubt that the defendant was acting under provocation, they should find that he was so acting, and return a verdict of manslaughter; (b) if they were satisfied that the defendant 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."

As in our our view, in the circumstances of this case both sections (a) and (b) reflect different methods of stating the same complaint they will be dealt with as one. An examination of the summing-up discloses that the learned trial judge did not in fact specifically direct the jury in the terms which form the basis of the complaint. He did however direct them as follows:

> "Now, because the burden of proof is always on the Prosecution to prove the accused (sic) guilt, it is not for him to prove that he was provoked. Once the issue has been properly raised, <u>it is for the Prosecution to satisfy you, so that you feel sure, that the accused was not so provoked before you can convict him for murder."</u> [Emphasis added]

It follows naturally from those words, that the jury would be aware that if they were not sure whether the accused was provoked, then they could not convict the appellant of murder. As to what alternative verdict they could return, the learned trial judge made it clear to them in the following passages, firstly:

> "If you are satisfied that he was provoked and that he retaliated with this machete as a reasonable person would in the circumstances, then you can only convict him of manslaughter."

And again:

> "So, Madam Foreman and your members, you will now have to consider whether the accused is guilty of murder as charged in the indictment or whether he is guilty of provocation, or whether he was provoked, so that the charge of murder would be reduced to one of manslaughter. So, if you find that he indeed killed the deceased and that there was no provocation, then he would be guilty of murder. If you find that he did kill the deceased but he was provoked into doing so, that is so, if you consider these words sufficiently provoked a reasonable man, then the verdict would be one of guilty of manslaughter."

On the basis of the evidence only two verdicts were open to the jury i.e. guilty of murder or guilty of manslaughter as a result of provocation. Indeed the appellant in his defence offered no alternative account of the events that led to the death of the deceased, saying in his unsworn statement "I reserve my defence. I am sorry." The passage in the summing up, would have left the jury with the knowledge that if they were not sure that the killing was unprovoked, they could not convict of murder. Consequently, if they were of that mind, the only alternative verdict left to them if they were not sure that he was provoked, would necessarily be, one of manslaughter.

We however refer to the judgment of this Court in **George Stewart v. R** SCCA 36/95 delivered 20th May, 1996 [Unreported] in which we emphasised that trial judges

when directing a jury on a case in which provocation arises, ought to inform them that if they are not sure as to whether the accused was provoked, they must return a verdict of guilty of manslaughter. Mr. Ashley for the appellant in pursuing his arguments, relied on that dicta but though we are in agreement that there was such an omission, for the reasons already stated, we are of the view, that having regard to the particular circumstances of this case, we cannot interfere with the verdict of the jury.

Whether the issue of provocation really arose on the evidence is a question which we would answer in the negative. It was certainly not raised by the defence, the applicant not having given an account of what took place. The issue was left to the jury on the basis of statements made to the police officers by the appellant to wit -

> (i) "Officer a owe him owe me some money and me chop him pan him neck" and
>
> (ii) "Me go to him fi mi money and him sey me fi go nyam goat shit."

The mere fact of owing money to someone cannot be capable of amounting to provocation, as throughout the world there would be a tremendous number of legally provoked persons. It is the latter words then, that would have induced the learned trial judge to leave the issue with the jury. The law on provocation is now settled. In order for a defence of provocation to succeed the jury on the background of the prosecution's burden and standard of proof must find:

> (i) that there was some provocative conduct, either by act or by words;
>
> (ii) that the accused was so provoked by that conduct, that he suffered a sudden and temporary loss of self-control and thereby committed the act;
>
> (iii) A reasonable person in the same circumstances of the accused, being so provoked, would have lost his self-control and did the act which the accused did.

> [See **R. V. Pennant** SCCA 126/84 [unreported] delivered 15th May, 1986 and **R. V. Johnson & Fung** SCCA 177/87 delivered 7th March, 1988 [unreported].

Assuming that the words were accepted as having been said by the deceased and that they are capable of amounting to provocative conduct, was there any evidence to suggest that the appellant lost his self-control? As he has not said that he did, one has to look to the prosecution's case to determine whether there was any such evidence. There is nothing there which would suggest that the accused was not in self-control. When asked why he had killed the deceased, by Mr. Smith, the appellant threatened to do the same to Mr. Smith. In so far as the act itself is concerned, there is no specific feature, which takes it out of the scenario of the appellant chopping the deceased, because as he alleged the deceased refused to pay him money allegedly owed to him. Significantly, none of the witnesses heard any of the words which the appellant alleged was used to him by the deceased. As was said by the Court of Criminal Appeal in England in the case of **R. V. Walch** [1993] Crim. L R 714 at 715:

> "It was no part of the judge's duty and could not serve the interest of justice to put before the jury strained and implausible inferences for the purposes of creating a defence for which in truth there was no basis."

In our view, the learned trial judge was generous in leaving this issue for the jury's consideration, and consequently though the directions in relation to provocation, may, in one respect be inadequate, in the circumstances of this particular case that cannot avail the appellant.

For these reasons, the appeal is dismissed and the conviction and sentence are affirmed.