JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 143/91

COR: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

R v MILTON STEPHENS

Lord Gifford, Q.C. for Applicant

Lloyd Hibbert & **Herwin Smart** for Crown

11th & 12th October and 20th December, 1993

GORDON, J.A.

In the Saint Catherine Circuit Court on 11th December, 1991 before Rowe, Chief Justice (Acting) the applicant was convicted for the murder of Delroy Clarke on 23rd September, 1990. Two witnesses testified on behalf of the Crown and the applicant gave sworn testimony on his own behalf. The facts may be briefly stated.

The deceased Delroy Clarke lived with his "adopted" father Horace Banton at Windsor Heights, Central Village in St. Catherine. About midday of the 23rd September 1990 Mr. Banton said he was sitting by his shop in his home while Clarke sat a few yards from him painting figurines. Mr. Banton was alerted by the sound of his dog barking and on going to investigate he saw the applicant on his knees in his premises with fishing spear gun in hand aimed at the unsuspecting back of the deceased. The applicant had apparently gained entrance to the premises through a hole cut in the surrounding fence. Before Mr. Banton could raise an alarm to alert the deceased the applicant released the shaft of the spear gun and this struck the hapless victim in his back. The applicant then

dropped the spear gun, drew a machete and went at Mr. Banton who ran. Banton was overtaken by the applicant and when he stopped the applicant struck (slapped) Mr. Banton with the machete and said "You should ah dead too you know boy". The applicant ran away. The injured Clarke was rushed to the Spanish Town Hospital but he succumbed to his injuries. The witness Banton refuted suggestions that he, Clarke and others attacked the applicant, the applicant then loaded the fish gun and was struck on the arm and the gun went off accidentally and injured the deceased.

Dr. Clifford performed the post mortem examination. He found the spear had entered the left posterior chest of the deceased below the left scapula and perforated the left lung and the descending aorta causing massive haemorrhage and death.

The applicant gave evidence and said that on the morning of the 21st September, 1990 he discovered his workshop had been broken into and 24 wall plates stolen therefrom. He went out investigating and saw the deceased with the plates he lost. He asked deceased how he got them and the deceased told him to depart from his gate. He threatened to call in the police but did nothing about it. The applicant said he went to Kingston that day and sold plates and returned home at about 10.00 p.m. He saw the deceased on the road and the deceased attacked and wounded him in his left side and under his left eye with a knife saying "Ah whose name you carry go to station." He hit the deceased in his face with a wall plate and ran to his home. He went to the hospital and his injuries were sutured. On the 23rd he was on his way to the river to spear fish. He had his spear gun. He was passing a home when he was attacked by Banton, two friends, Delroy Clarke and Tone Tone, Banton's son.

Banton he said had a machete, Tone Tone a piece of stick, Delroy an ice pick. They backed him up and one said: "You ran

yesterday, run now". Another said "Lick the b.... c.... boy." Delroy picked up a stone and was looking for another, his back to the applicant, when the applicant felt a blow on his hand and the spear gun went off. The gun fell and he ran away. He said he tried to scare his attackers away with the gun which he loaded when he was surrounded. He said the incident occurred in the morning and not at midday as the prosecution witness asserted.

The first ground of appeal urged by Lord Gifford Q.C. was that a careful direction was required as to the credibility of the witness Horace Banton. He submitted that the learned trial judge "failed to mention that there was a danger of partiality owing to the deceased being the witness' adopted son."

Mr. Hibbert in response relied on **R. v. Beck** [1982] 1 All E R 807 pointing out that this witness Banton was not a person who was in some way involved in the crime which was the subject matter of the trial. The case of **Linton Berry v R** 1992 3 W L R 153 was also cited by Mr. Hibbert. There the Board of the Privy Council held: "Their Lordships rejected the adoption of any rule which would impose new obligations on trial judges in their approach to the consideration of witnesses' evidence and they refer to the judgment delivered by Ackner L J in **R v Beck** [1982] 1 W L R 461 as well as to his speech in **R v Spencer** [1987] A.C. 128 133-142."

We agree with the submissions made by Mr. Hibbert. This ground of appeal fails.

The second ground urged that the conviction of the applicant cannot be supported having regard to the evidence. Lord Gifford Q.C. submitted that the learned trial judge should have piloted the matters which the jury should use as indicators of truth or falsity and that it was not sufficient for him to have given the general directions on burden of proof.

We have scrutinized the summing up and find no support for the propositions of the applicant's counsel. The summing up of the learned Chief Justice (Acting) was clear, fair, accurate and the jury could have had no difficulty in following the directions given and arriving at a verdict. As the case was presented to the jury there was on the prosecution's version a cold blooded cowardly attack on the hapless victim. On the defence the applicant was attacked and in preparing to defend himself the deceased was accidentally struck. There is in our view no merit in this second ground of appeal.

The third ground raised an issue which we have considered at length, having reserved our decision.

This ground was presented thus:

> "3. The Learned Judge misdirected the jury on the issue of provocation, in that he limited his direction as to potentially provocative conduct to the action alleged to have been done by the deceased two days before the fatal incident:
>
> The Learned Judge ought to have directed the jury that the following acts alleged against the deceased and his associates shortly before the fatal event were capable of founding a defence of provocation, namely:
>
> (a) Five men surrounding the Applicant and 'backing him up.'
>
> (b) One of the five saying 'yuh run yesterday, run now nuh.'
>
> (c) One of the five saying 'lick down the b.... c.... bwoy man'
>
> (d) The deceased taking up a stone."

The directions which the learned trial judge gave on the defences of accident, self-defence and lack of intent were eminently correct and were accepted as such by Lord Gifford Q C. The directions on provocation were equally apt but he complained that in relating to the facts on which provocation could arise the learned trial judge referred only to those testified to by

the applicant as having occurred on the night of the 21st and the incident of the 23rd which had more contemporaneous and direct provocative acts was omitted. Lord Gifford, Q C submitted that there was abundant authority for the proposition that facts which are relied on in support of a defence of self-defence can also provide the basis for provocation should the self-defence be rejected. In those circumstances the trial judge is obliged to give appropriate directions on provocation leaving that issue for the jury's consideration.

Mr. Hibbert submitted that there was no room for provocation in the Crown's case but there was evidence by the applicant that he was attacked. He submitted that authorities in this jurisdiction indicate that "not in every case where self-defence is raised should the issue of provocation be left to the jury" relying on **R v Ansel Williams et al** S.C.C.A. 63 & 64/84 delivered on 7th April 1986 and **Palmer v R** [1971] 12 J L R 311.

He conceded (i) there were acts which could be described as provocative acts; (ii) provocative acts are to be found wherever self-defence is raised. He submitted there was no evidence directly or inferentially and no evidence of loss of self-control and that provocation should not have been left to the jury on the basis complained of by the applicant.

Lord Gifford, Q C had in his submissions relied on the cases of **R v William Hopper** [1915] Cr. App. R 136; **R v. Porritt** [1971] 45 Cr. App. R. 348; **Bullard v R** [1957] 42 Cr. App. R. 1; **R v Hart** [1978] 27 W I R 229; S.C.C.A. 141/89; **R v Michael Bailey** delivered 31st January 1991.

Hopper was convicted for murder by shooting. The defence was accident but the Court of Criminal Appeal found "there was sufficient evidence of facts and circumstances to justify the jury, if they took a certain view of them, in finding manslaughter." Continuing in his judgment Lord Chief Justice Reading said at page 141:

> "The Court is of opinion that, whatever be the defence put forward by counsel, it is for the judge at the trial to put such questions to the jury as appear to him properly to arise on the evidence, even if counsel has not suggested such questions. Here the difficulty of raising alternative defences accounts for counsel having said little on the subject of manslaughter.
>
> We wish further to say, in answer to another argument put forward for the Crown, and based upon the statement by the appellant that he was not angry when he did it, that we cannot agree that this statement necessarily negatives manslaughter. He was giving evidence and trying to shelter himself on the plea of accident; it was open to the jury to take the view that **his** statement that he was not angry was not true. In our opinion the words must not be taken literally to the exclusion of any other possible view of the facts and circumstances. The Court, with the assistance of the jury, must arrive, not at the view presented, but at a true view of the facts. We think, therefore, that the verdict cannot stand."

This principle was approved by the Privy Council in **Bullard v The Queen** (supra). In delivering the opinion of the Board Lord Tucker said at page 5:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and, whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. See such cases as Hopper, 11 Cr. App. R. 136; [1915] 2 K.B. 431, at p 435, and Kwaku Mensah v. The King [1946] A.C. 83, at p. 93."

This statement was made at the commencement of the judgment. Continuing at page 7 he said:

> "Conduct which cannot justify may well excuse. ... Every man on trial for murder has the right to have the issue of manslaughter left to the jury 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. Their Lordships are accordingly of opinion that the verdict of Guilty of murder cannot stand in this case."

In **R v Porritt** (supra) **R v Hopper** and **Bullard** v R were followed. In **R v Hart** (supra) this court followed **Bullard v R** and **Lee Chun Chuen v R** [1963] 1 All E R 73.

It is the law that for the defence of provocation to arise there must be a credible narrative of events suggesting the elements:

(a) evidence of provocative conduct; and

(b) evidence from which it may be inferred that as a result the killing was due to a 'sudden and temporary loss of self-control'.

It is the function of the jury to decide whether or not a reasonable man would **have** reacted to the provocation in the way the applicant did: [R v Hart]

It is the law that 'for a charge of murder to be reduced to manslaughter on the ground of provocation it must be shown that the provocative conduct relied upon had suddenly and temporarily deprived the defendant of his power of self-control:' R v Sara **Thornton** [1993] 96 Cr. App. R. 112.

The applicant testified that he was surrounded by persons armed with various weapons and threatened with physical violence. He in these circumstances energised (set) the spear gun and on receipt of a blow to the elbow the shaft was despatched from the gun. He thereafter fled unimpeded and uninjured from the cordon.

The jury rejected accident and self-defence. The question is: Could they have formed the view that the applicant in the circumstances suddenly and temporarily lost his self-control and acted deliberately in injuring the deceased fatally?

In giving directions on provocation the learned trial judge told the jury at page 57:

> "You see, something can happen to a person and because it happens a person can make a deliberate decision for revenge, and if a person makes a decision for revenge and carries out that decision at some time later on, the person cannot any longer rely upon the provocation ... You see, what the accused, Milton Stephens has told you is that on the Friday night he was attacked by Delroy Clarke, he was stabbed twice. He was stabbed to his side and he was stabbed to his eye, and he had to run away. Those could be acts of provocation, but that was Friday night. You have to ask yourself if that happened? Mr. Banton cannot tell you anything about that. He says that he knows nothing about that.
>
> If that in fact happened on that night, could he still be acting under the loss of self control on Sunday midday? Was it an act of revenge? If it was an act of revenge it would destroy provocation. Provocation does not make a person not guilty. What provocation does is to reduce murder to a lesser charge, manslaughter."

In concluding his summation he charged the jury at page 60:

> "But when you are considering this defence of provocation, you must take into consideration the time lapse between the 21st and the 23rd of September, and ask yourself if it did happen that way, was it revenge or was it a person acting under provocation, was it a person still acting under provocation?

The question posed is one that should have been considered by the jury. Having regard to the instrument used - a fish gun, the area of the injury - in the back; the place where it was used - on land; the person against whom it was used - he whom the applicant accused of stealing his goods and wounding him, the

jury may have rejected provocation. It is idle to speculate. The jury were not allowed to consider provocation in the light of the incident on the 23rd September and we hold that for that reason the conviction for murder cannot be allowed to stand.

We therefore have treated the application for leave to appeal as an appeal, we allow the appeal quash the conviction for murder, set aside the sentence imposed and substitute a conviction for the crime of manslaughter and impose a sentence of imprisonment at hard labour for ten years.