JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 103/93

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE PATTERSON JA

REGINA VS BRENTON ROACHE

Delroy Chuck for appellant

Miss Deborah Martin for Crown

26th September & 9th October 1995

CAREY JA

On the 26th September last, we treated this application for leave to appeal as the hearing of the appeal which we allowed but substituted a verdict of manslaughter and imposed a sentence of 15 years hard labour. We promised reasons for our decision and these now follow.

The appellant was convicted in the Manchester Circuit Court on 25th October 1993 before Ellis J and a jury for non-capital murder. On the indictment he was charged with one Merlene Powell who was convicted of manslaughter. She has not appealed and our concern is with the appellant Roache, solely.

The short facts are that the appellant used a stick to hit his victim, Steve Dyer, an 18 year old youth, in his head, while the co-accused slit his throat at the instigation of this appellant. The appellant said nothing in

his defence. It is this fact coupled with the fact that he was unrepresented at the trial which gave concern to the single judge and induced him to grant leave to appeal.

At this trial when the matter was called on, counsel who had been assigned to appear (not counsel before us), informed the trial judge that he was not prepared to represent a client, especially having regard to the nature of the charge in the absence of a signed statement by the client. The appellant had promised him on the preceding Saturday that he would have signed the statement that very morning but had failed to keep his word, giving as his excuse that he needed to see a doctor first and that lawyers who accepted legal aid assignments represented the State. Counsel interpreted the latter to mean the appellant did not repose a deal of confidence in him. The learned judge endeavoured to persuade the appellant to sign the statement to enable the trial to proceed. But the appellant balked. He said that he had not refused to sign, that he needed to talk to his lawyer, and that the lawyer had not completed the statement. The trial judge allowed some time (seven minutes) for the appellant to speak to his lawyer and adjourned the court.

On the resumption, counsel advised the court that the appellant had refused to sign the statement and sought permission to withdraw. It was also brought to the attention of the trial judge that the attorney who had previously been assigned, had also sought and obtained permission

to withdraw from the case. It appeared that counsel would have been the fourth attorney to have withdrawn by leave after being assigned. Leave to withdraw was indeed granted counsel and the appellant was advised by the trial judge that he would be required to defend himself. Arrangements were set in train to enable the appellant to obtain the depositions and to have them read to him. Time was also given to permit this to take place. Thereafter the trial proceeded with the appellant being unrepresented.

The Poor Prisoners' Defence Act provides in rule 14 of the Poor Prisoners' Defence Rules (in the Third Schedule of the Act) as follows:

> "14. A person who refuses to accept the services of counsel or a solicitor assigned to him under a legal aid certificate in respect of any proceedings shall not be entitled to have another counsel or solicitor assigned in respect of those proceedings."

The effect of this rule is that there was no obligation on the part of the judge to grant further legal aid, once the prisoner had dismissed his counsel or refused to accept the services of counsel. This appellant by his intransigence, as it seems to us, was refusing to accept the services of counsel assigned to him. No counsel can conduct the defence of a client in the absence of proper instructions which means at the very least a duly signed statement. But having said that, we are of opinion that the judge, representing the State, should assist the prisoner to defend himself. He could do so by declining to allow counsel to withdraw but to require

counsel as an officer of the court, to remain in court and assist the prisoner by tendering to him such advice as he might require. We accept unreservedly that counsel cannot, in honour, represent a client who does not wish his services, but we can see no objection to the course we suggest. We add that the prisoner would have to be asked if he consents to such a course. If he does not choose to do so, we do not think, he could be heard to argue in this court that any Constitutional right he may conceive that he has, would have been infringed.

We venture to rely on a requirement of the Constitution viz, section 20(6)(b) which provides as follows:

> "(6) Every person who is charged with a criminal offence -
>
> > (b)shall be given adequate time and facilities for the preparation of his defence;" ...

The State's obligation to assist a person charged to prepare his defence, can hardly be satisfied by allowing that person, especially where he is illiterate as was the status of this applicant, to fend for himself and especially so, where the charge attracts a long mandatory sentence. It seems to us the State has an obligation to protect the ignorant even from themselves. In circumstances such as occurred in this case, we think that counsel should not be granted leave to withdraw once assigned but should be required to remain in court and assist the accused to the extent of proffering advice. Although he would not be representing the accused,

his fees should still be paid from the Consolidated Fund. The presence of counsel would, we think, assist in ensuring a fair trial to which every accused is entitled.

We are supported in this view by **Dunkley & Robinson v R** dated 4th October 1994, a recent decision of the Privy Council in which the Board observed that a trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. There, counsel withdrew because of some contretemps with the trial judge. In the instant case, the appellant did not wish to be represented. Their Lordships in the course of their judgment, said:

> "... Their Lordships would, however wish to make it clear that while the facts in this case warrant the foregoing conclusion it by no means follows that the same consequences would flow when the appellant's only complaint was that he had been left unrepresented at some stage in a trial."

It must be emphasized so that there may be no doubt in the matter, that this appellant deliberately chose to be unrepresented. His refusal to accept the services of a number of counsel, his intransigent conduct and his uncooperative attitude all lead to this conclusion. Accordingly, there is no basis for holding that the fact of his being unrepresented should result in our interfering with the conviction. Nevertheless, this leads us to a consideration of the appellant's defence which he plainly was quite incapable of putting forward in any coherent

fashion, and in fact, he made no defence. We wish to make it abundantly clear that the learned trial judge at whom we level no criticism was in an altogether difficult position. He did endeavour to assist this appellant by suggesting to him, for example, a line of cross-examination in respect of damning evidence against him but it could not be said that the appellant's defence emerged from his cross-examination of the Crown's witnesses but a glimmer of it did emerge when he cross-examined his co-accused that he was suggesting that she was having an affair with the slain youth.

In our view, if counsel had appeared for the appellant or if he had been in receipt of advice from counsel who could be on hand to assist, provocation could have been raised in a more explicit form. We have no hesitation in saying that since provocation arose (albeit obliquely) in the course of the defence, that issue should have been left to the jury. Learned Crown Counsel generously conceded that the issue arose and should have been left to the jury for consideration. That was not done and accordingly the verdict cannot stand for the appellant was deprived of the opportunity of an acquittal of murder. Where an accused is unrepresented, a trial judge must exercise the greatest care to understand the real defence which an accused may be attempting to put forward, so that it might be put before the jury. Undoubtedly it calls for a deal of patience, tact and understanding. We feel impelled to say that if an

accused is to be accorded the fair trial which the Constitution promises the judge is expected to promote its achievement.

We did invite Mr. Chuck to address on sentence, and having heard him we imposed a sentence of 15 years imprisonment at hard labour. The appellant had used a stick to inflict a terrible wound in the victim's head which had caused the skull to become sunken into the brain. He, it was, who ordered the other accused to slit the victim's throat. It was indeed a callous and brutal crime.