**[2019] JMCA Crim 38**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL 79/2012**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

**NORVAL WRAY v R**

**Miss Jacqueline Cummings for the applicant**

**Miss Maxine Jackson and Miss Natalie Malcolm for the Crown**

**18 and 19 November 2019**

**MORRISON P**

[1] This is an application for leave to appeal against a conviction and sentence, after a trial before F Williams J (as he then was) and a jury, for the offence of murder. The trial took place in the Circuit Court for the parish of Portland between the dates of 9-12 July 2012 and the applicant was sentenced to imprisonment for life on 13 July 2012. The judge stipulated that he should serve a minimum of 20 years before becoming eligible for parole.

[2] The applicant applied for leave to appeal against both the conviction and sentence. The application was considered on paper by a single judge of this court on 13 August

2018, when it was refused. As he is entitled to do, the applicant now renews the application before the court.

[3] Despite the fact that the applicant himself filed other grounds, Miss Jacqueline Cummings who represents him now relies on only one of them, which is that:

> "… during the trial the prosecution failed to put forward any piece of evidence to justify the offence of murder instead of manslaughter."

[4] The single issue which therefore arises on this application is whether the judge ought to have left the issue of provocation for the jury's consideration.

[5] There is no dispute about the facts, a summary of which we will gratefully take from the skeleton arguments filed on behalf of the prosecution. On 1 December 2008, the applicant fatally chopped Mr Garfield Forgie (the deceased) in his head with a machete. The deceased and the applicant were farmers at the material time, owning lands which were adjacent to each other. The sole eye-witness was Mr Linton Crossdale, a Minister of Religion and close friend of the deceased. On the day in question, according to Mr Crossdale's evidence, he and the deceased were walking together on the road. The applicant, who was the aggressor, accosted the deceased in the road and blocked their path. He hurled abusive language at the deceased, threw a stone which hit him and, when the deceased responded in like manner, the applicant approached the deceased menacingly and used his machete to chop the deceased in his head. The applicant's version was that the deceased, after the stone-throwing exchange, chased him, held a machete over his head, making him fearful of his life and left with no other recourse,

whereupon he swung his machete at the deceased and by that means inflicted what turned out to be the fatal injury to his head.

[6] The judge gave full directions on the issue of self-defence. No complaint is made about them. The judge invited the jury to give careful consideration to the opposing evidence of Mr Crossdale and the applicant, who gave evidence in his own behalf. At the end of the summing-up, the judge left the case to the jury on the following basis:

> "So, here you have, madam foreman and your members, two different versions and this is why I am saying to you it is going to be very important for you to, in a sense, play back the evidence of both witnesses as to the facts in this case in your mind and come to a decision as to whose evidence you accept, because, as I indicated previously, based on what Mr. Crossdale is saying, it would have been Mr. Wray who was the aggressor throughout the incident. It was Mr. Wray who came in an aggressive manner using indecent language who would have thrown the stone first at Mr. Forgie and at the end of the day when Mr. Forgie stopped, took off his knapsack, would have walked down Mr. Forgie and chopped him.
>
> So, it is going to be very important for you to assess that evidence and see how it ties in with the definition of murder and of self-defence I gave you. Remember, you need to ask yourself the question, especially when you are looking at the defence advanced by Mr. Wray. His evidence, I will remind you, is that it was really the other way. He had approached Mr. Forgie and it was Mr. Forgie who became aggressive and loud. Both of them were, as he put it, ignorant persons but he threw a small stone, Mr. Forgie threw a much bigger one and then it was after that it was Mr. Forgie who was chasing him and in self-defence he swung.
>
> So, you will look at it and see whether or not, it will be a matter for you which one of two accounts you accept at the end of the day and to see whether or not self-defence would have been made out. Remember, what you have to look for is honest belief of Mr. Wray based on reasonable ground [sic].

> So, depending on which account you accept, you will have to ask yourself the question, based on the issue of the facts that I take into consideration, would Mr. Wray have had an honest belief that he was about to be attacked and chopped by Mr. Forgie and based on the view of the facts I take into consideration, would there be reasonable ground for him to have had this honest belief?"

[7] As will have been seen, the judge said nothing at all on the issue of provocation. Miss Cummings submits that, in the light of the clear evidence of provocation which emerged on both the case for the prosecution and the case for the defence, the judge erred in not doing so, thereby leading to a possible miscarriage of justice. Miss Maxine Jackson, who appears for the prosecution, agrees. She points out that there was evidence in the case giving rise to the question of whether the applicant was, or may have been, provoked, notwithstanding the fact that he did not himself distinctly raise the issue as part of his defence.

[8] The basis of these submissions is section 6 of the Offences Against the Person Act, which provides as follows:

> "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 take into account everything both done and said according to the effect which in their opinion, it would have on a reasonable man."

[9] With slight adaptations, we will also adopt Miss Jackson's very helpful summary of the effect of the very many authorities in which section 6 has been considered by this court and others:

> (a) If the defence do not raise the issue of provocation, and even if they prefer not to because it is inconsistent with and detracts from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked.
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> (b) The issue should be left even if the evidence of provocation is slight or tenuous in the sense that the measure of provocative acts or words is slight.
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> (c) If on the evidence, be it the prosecution's or the defence's, there is evidence of provocation to be left to the jury, 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 a reasonable doubt that the killing was unprovoked.
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> (d) Evidence adduced to support an unsuccessful defence of self-defence may be relied on, wholly or partially, as giving rise to the provocation which would reduce the crime from murder to manslaughter.
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> (e) Every accused on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict could be given. To deprive him of that right must, of necessity, constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.
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> (See, for example, **Joseph Bullard v The Queen** [1957] AC 635, **R v Benjamin James Stewart** [1966] 1 Cr App R 229, **Dwight Wright v R** [2010] JMCA Crim 17 and **Delroy Barron v R** [2016] JMCA Crim 32)

[10] In this case, both Mr Crossdale and the applicant gave evidence of an altercation between the deceased and the applicant. The altercation arose out of what was obviously

a long-standing dispute between them as to the deceased's goats being allowed to go onto the applicant's property and there damage his crops. Both men were armed with machetes. During the course of the altercation, each man threw a stone at the other. The stone thrown by the deceased hit the applicant on his hand, causing it to bleed (and, on his account, requiring several stitches). The applicant testified that both himself and the deceased were cursing each other. As the applicant put it (transcript, page 89):

> "Him start blaze up and the two of us is two ignorant person …
> the two of us very ignorant ... The two of we start blaze up."

[11] On both accounts, there was a point during the altercation at which the deceased deliberately removed the knapsack which he was carrying from his back and approached the applicant. And, according to the applicant, "[m]i never plan fi kill him but him plan fi kill me so …"

[12] In these circumstances, we are of the view that the applicant was entitled to have the issue of provocation left to the jury, on the basis that there was evidence from which it could find that he was provoked (by both things done and said), to lose his self-control, and that he did so lose his self-control. The judge accordingly fell into error in this regard.

[13] So the question which now arises is what should this court do in these circumstances? Initially, Miss Cummings rather faintly suggested that there should be a re-trial. However, she quickly retreated from this position when it was pointed out to her by the court that, in relation to an offence which was allegedly committed in 2008, the applicant had already served seven of the 20-year minimum period of incarceration to

which he had been sentenced. In the light of this, Miss Jackson quite properly told us that the prosecution did not contend for a re-trial in this case. Both counsel therefore submitted that we should substitute a conviction for manslaughter and sentence the applicant accordingly.

[14] Section 24(2) of the Judicature (Appellate Jurisdiction) Act provides that:

> "Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[15] Speaking for the court in **Shirley Ruddock v R** [2017] JMCA Crim 6, paragraph [20], Brooks JA observed that this court has on this basis substituted convictions for manslaughter for verdicts of guilty of murder in several cases over the years (see, for example, **R v Aaron Scott** (1971) 12 JLR 625 and **Daryeon & Vaughn Blake v R** [2017] JMCA Crim 15). We will therefore grant leave to appeal in this matter and, instead of allowing the appeal, substitute a verdict of guilty of manslaughter in place of the verdict of guilty of murder found by the jury.

[16] On the question of sentence, both counsel submitted for a sentence of the order of 10 – 12 years' imprisonment. The statutory maximum sentence for manslaughter is

also life imprisonment, but the Sentencing Guidelines[1] suggest a normal range of 3 – 15 years, with a usual starting point of 7 years.

[17] The applicant was just short of 53 years of age at the date of the offence. He has been gainfully engaged as a farmer and animal-rearer virtually all his life, having started working at age 16. Apart from two previous convictions for assault occasioning bodily harm in 1982 – 1983, he had stayed clear of the law for most of his working life. These are all factors in his favour. But, on the other hand, in sentencing the applicant at trial, the judge reminded himself of the doctor's evidence, which was that the chop wound inflicted by the applicant "was inflicted with ... a severe degree of force".

[18] There is therefore a mix of mitigating and aggravating factors in play in this matter. In the circumstances, taking all things into account, therefore, we consider that a sentence of 10 years' imprisonment would have been appropriate in this case.

[19] The order of the court is therefore as follows. The application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal. The conviction for the offence of murder is quashed and a conviction for the offence of manslaughter is substituted therefor. The sentence of imprisonment for life is set aside and the applicant is sentenced to serve 10 years' imprisonment in its stead. The sentence is to be reckoned from 13 July 2012.

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[1] Sentencing Guidelines for use by judges of the Supreme Court of Jamaica and the Parish Courts, issued December 2017