JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 150/05

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A .
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

DERWIN MONTAQUE v R

Mr. Ravil Golding for the appellant.

Mrs. Diahann Gordon-Harrison for the Crown.

November 7, 2006

ORAL JUDGMENT

PANTON, J.A

1. This appellant, Derwin Montaque, was granted leave to appeal by the single judge, for the court to consider whether or not in all the circumstances of the case, the learned trial judge's directions on self-defence and provocation were adequate.

2. This conviction for murder was recorded in the St. James Circuit Court, presided over by Miss Justice Paulette Williams, in September, 2005. The sentence was imposed on September 29, 2005, whereby the appellant having been convicted of murder, was sentenced to life imprisonment at hard labour.

The indictment says 25 years before eligibility for parole. In actual fact, the learned judge in sentencing the appellant, according to page 159 of the transcript, did not express herself in that way as recorded on the indictment. The transcript shows that she said:

> "the sentence of this court is that you be imprisoned and kept at hard labour for a period of 25 years".

So, even if the conviction for murder is to stand, the court would have been obliged to at least amend the sentence as recorded on the transcript.

3. The learned attorney for the appellant, Mr. Ravil Golding, filed 4 grounds of appeal. We gave him leave to argue them, the original grounds having been abandoned.

Grounds of Appeal:

"1. The Learned Trial Judge fell into error when she failed to uphold the submission of no case to answer to the charge of murder at the close of the prosecution's case; in that the prosecution had not negatived the question of provocation.

2. The Learned Trial Judge failed to stop and or restrain the prosecuting Counsel from making improper and or baseless suggestions to the defence witness Ingrid Montaque which improper suggestions had the effect of discrediting the Appellant's defence thereby rendering the trial unfair.

3. That in the circumstances of the case the Learned Trial Judge's directions to the jury on self defence and provocation were confusing and or inadequate.

> 4. The sentence of the Court of 25 years imprisonment was manifestly excessive in the circumstances, in that it was the deceased who was the aggressor, it was the deceased who had initiated a series of provocative acts which resulted in his own demise and having regard to the Appellant's hitherto unblemished record and good reputation."

4. Now, the facts presented by the prosecution came from the mouth of the appellant. In summary, the appellant had reported having told officers who were investigating this killing that he came upon the deceased killing his cow (the appellant's cow), the deceased having killed other cows belonging to him; and that he (the appellant) was attacked, and so too were other relatives of the appellant attacked and chopped by the deceased. Indeed, the appellant himself received injuries.

5. The circumstances do indicate overwhelmingly that there was severe provocation as defined in law. The learned attorney for the appellant argued that at the end of the prosecution's case, the learned trial judge should have withdrawn from the jury the offence of murder, and left for their consideration only, the question of manslaughter. Mrs. Gordon-Harrison for the prosecution, in response to that line of argument, drew our attention to Section 6 of the Offences Against the Person Act, whereby it states that the question of provocation is really one to be left for determination by the jury. She submitted that there would have been no good reason for the learned trial judge to have adopted the course suggested and that, rather, both offences in that sort of

situation, where there was provocation as well as a lack of self-defence being put forward by the prosecution — in that situation it was right for the jury to be the decider. We see that argument presented by Mrs. Gordon-Harrison as being appropriate in the circumstances here.

6. So far as ground 3 is concerned, Mr. Golding did not advance any complaint in respect of the directions in relation to self-defence. However, with the assistance of the court he did point to page 137 of the transcript, whereon the learned trial judge having given perfect directions earlier, allowed herself to be invited to give further directions, and in so doing, there is the clear appearance of an error having been made by her in that, the indication is that she may well have unwittingly given the impression that there was some burden on the appellant to prove an essential fact in relation to provocation. In that situation, Mrs. Gordon-Harrison has submitted that the earlier directions were so comprehensive and clear that even if this were not a typographical error, even if it were a genuine error, this court should in effect apply the proviso, and say that that error would not have caused a change in the verdict. We are not in a position, we feel, to accept that view. We are of the view that these were the last words in the jury's ears. In that situation the appellant ought to get the benefit of the doubt. Now, we are also of the view in any event, that the circumstances here were so overwhelmingly provocative that it seems that the appropriate verdict would have been one of guilty of manslaughter.

7. In light of what transpired after the judge had completed her summation and was then invited by counsel to say more, we are of the view that the conviction of murder should not be allowed to stand. So, we quash tha t conviction and substitute therefor, the conviction of manslaughter. Looking at the sentence that was imposed, in any event, the murder conviction having been set aside, the sentence of 25 years would have had to be set aside also. Given the circumstances, we are of the view that a sentence of 15 years imprisonment ought to be substituted, and we so order.

8. The appeal is allowed. The conviction is quashed. The sentence that was imposed is set aside. The verdict of guilty of manslaughter is substituted. A sentence of fifteen (15) years imprisonment at hard labour imposed. The sentence imposed is to run from December 29, 2005.