JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 212/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

NEVILLE COLLINS

Delroy Chuck for the Appellant

Miss Paula Llewellyn for the Crown

June 8 and July 13, 1992

ROWE P.:

This is an appeal from a conviction for the murder of Valda Baker in the Manchester Circuit Court, Mandeville, on the 25th October 1988, before Wolfe J. and a jury. On June 8, 1992 we allowed the appeal, quashed the conviction for murder, entered a verdict of guilty of manslaughter, sentenced the appellant to twelve years imprisonment at hard labour and, as indicated then, we now put our reasons in writing.

At the trial, the prosecution led evidence which indicated that the appellant Neville Collins (otherwise called "Barnabas") and the deceased, Valda Baker (otherwise called "Rose") once lived together as man and wife. However they separated either in November or December of 1987.

Chancelyn Baker, the sister of the deceased, stated that on the night of the 19th December, 1987 she and the deceased went to a party. There they saw the appellant who later followed them home and was pleading with the deceased to accompany him to his home. The deceased refused to do so whereupon the appellant threatened her that if she did not go with him he would cut her throat. This threat was also ineffective in persuading the deceased to accompany him.

Chancelyn Baker further stated that on the 22nd December 1987 the deceased left her home at about 7 p.m. wearing a pair of white pants, a yellow guernsey blouse, a big light blue shirt-blouse and a pair of red earrings. On the same evening an aunt of the deceased, Agatha Dennis, while standing at her gate, saw the deceased walking on the road. That very evening another aunt of the deceased, Ionie Williams saw the deceased walking in the company of the appellant. Ionie Williams testified that the appellant and the deceased seemed, when she saw them, to be quite comfortable and relaxed in each other's presence. She stated that the deceased said to her: "I am going up by Barnabas house" and the appellant said: "Come on Rose". That was the last time the deceased was seen.

Curtis Collins who lived in close proximity to the house of the accused stated that early in the morning of the 23rd December 1987 at about 4:30 a.m. he was alerted by the barking of his dog. He proceeded to look through his window. On doing so he observed that the house of the appellant was on fire.

Chancelyn Baker and Agatha Dennis discovered later on the morning of the 23rd December 1987 that the house of the appellant had been burnt to the ground in the course of the night. Agatha Dennis, on visiting the scene of the fire saw some burnt bones which appeared to be human bones.

On the 23rd December 1987 Detective Sergeant Cleston Pinnock received a report at the Christiana Police Station, as a result of which he went to the burnt premises of the appellant. Among the rubble he found the burnt remains of a human body, and then in the surrounding area of the building he found a single red earring. (Chancelyn Baker identified that earring as being one of those which the deceased was wearing on the 22nd December 1987). He also observed a small piece of yellow cloth resting somewhere on the chest region of the burnt remains.

On the 1st February 1988 Detective Sergeant Pinnock arrested and charged the appellant for the murder of the deceased.

Dr. Glen Day performed a post-mortem of the remains of the burnt body found on the premises of the appellant. From his examination he was able to conclude that the body was that of a female as he was able to find breasts, a uterus and ovaries inter alia. He said that he was unable to determine whether the person had died before being burnt or was actually burnt to death.

The appellant gave an unsworn statement. He too recalled attending a party on the 19th December 1987 at which he saw and spoke with the deceased. The appellant however denied having followed the deceased and her sister home early on the 20th December 1987.

In his statement the appellant said that at about 6 p.m. on the 22nd December 1987 he saw the deceased. She indicated to him her desire to speak with him at his home and he acquiesced. At his house she pleaded with him to allow her to return to live with him. He refused. They both left the house after the conversation.

To the surprise of the appellant, at about 10 p.m. on the night of the said 22nd December 1987 the deceased returned to his home. She again pleaded with him to consider a resumption of their relationship. He told the deceased that he would not consider it and that he already had another woman pregnant. According to the appellant, on hearing this news the deceased boxed him, pulled a knife and tried

to cut him. He retaliated by pushing her. She fell, hit her side, and developed a cramp. The appellant offered to help her up, she refused his assistance and so he went away from the house. On his return he found his house on fire.

The defence urged the Court to believe that the accused had nothing to do with the fire and knew nothing about it. Defence further urged that the fire must have been started accidentally when the deceased was attempting to leave and overturned a kerosene lamp.

The Crown alleged that although there was no direct evidence, an inference could be drawn from the conduct of the appellant as to the cause of the fire and the death of the deceased. A reasonable inference that could be drawn was that when the appellant left the deceased, lying on the floor, cramped in her side, he then deliberately set the house afire intending to kill her or cause her serious bodily harm. Unable to move she was burnt to death.

After the summing-up of the learned trial judge the jury found the appellant guilty of murder.

Leave was sought and granted to argue two supplementary grounds of appeal, viz.:

> "1. The learned trial judge failed to leave the issue of provocation for the jury's consideration which would have arisen if the killing was a consequence of the deceased's acts of provocation.
>
> 2. The learned trial judge failed to leave the issue of manslaughter for the jury's consideration which arose naturally from the applicant's unsworn statement. If the fire started accidentally (or even deliberately) then the death of the deceased may not have been intended."

RE: GROUND 2:

In considering the possibility of the fire having been started accidentally Wolfe J. said at p. 105 of the Record:

> "... before you can convict him, ... the prosecution must make you feel sure that it was not by way of accident that she came to her death."

He further stated at p. 114:

> "If you are in doubt about whether or not it was an act of his which brought about her death you must acquit him. If you feel sure that she did not die as a result of an act done by the accused man you must also acquit him, ..."

With regard to the intention of the appellant, the learned trial judge at p. 105 also stated:

> "Then the prosecution must prove that at the time when the act was done which resulted in her death, the person, and in this case the prosecution is saying it is the accused, intended ... either to kill her or to cause her serious bodily injury. Intention is a state of mind. ... Intention has to be proved by drawing inferences from either what the person did or what the person said or both.
>
> ... If you were to find that this accused man set fire to that house ... in circumstances in which she was unable to escape from the house, then, knowing how deadly a fire can be, what would be his intention? Must it not be either to kill her or to cause her serious bodily injury?"

In respect of this ground, Mr. Chuck submitted that whether the fire was started accidentally, that is to say by an unsuccessful attempt by the deceased to escape from the room or to seek help in the course of which the lighted kerosene lamp overturned, or deliberately by the appellant, it may be that the appellant did not have the intention to kill or to cause serious bodily harm. This, he said, is so even though the appellant may have intended to hurt or to frighten her and consequently the learned trial judge ought to have left the issue of manslaughter due to lack of intent.

This was an untenable proposition. If the appellant had left the deceased in the house and his mind had not been adverted to the possibility of a fire occurring due to some act of the deceased, he could not be criminally responsible for the consequences. Both actus reus and mens rea would be non-existent in respect of the appellant. And that is why the learned trial judge gave the directions quoted above, that is, that the jury should acquit the appellant if they found that the fire started accidentally. This was undeniably a correct direction.

On the facts of this case, the appellant knew that the deceased had received a cramping injury which would reduce her mobility. If in those circumstances he deliberately set fire to the house in which the deceased was, it would be fanciful to suggest that he only intended to hurt or to frighten her.

We think that the learned trial judge correctly directed the jury as is reflected by his words in the quotations above.

There was no room for a direction such as that suggested by Mr. Chuck which could embrace an intention merely to hurt, albeit not seriously, or to frighten.

RE. GROUND 1:

Section 6 of the Offences Against the Person Act reads:

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

In R. v. Pennant S.C.C.A. 126/84 (unreported), 15th May, 1986, this Court approved the test adumbrated by Lord Devlin in Lee Chun Chuen v. R. [1963] A.C. 220 at 231, viz.:

> "Provocation in law consists mainly of these elements: that act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation."

The Court in R. v. Hart [1978] 27 W.I.R. 229 held that:

> "If there is evidence of provocative conduct on the part of the deceased and 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 duty of the trial judge to leave the issue of provocation to the jury."

A trial judge has a duty to leave to the jury all issues that arise on the evidence whether these issues are specifically raised or not. Kerr J.A. in R. v. Johnson [1978] 25 W.I.R. 499 at p. 503 stated:

> "It [the duty] arises even when such evidence is slight or tenuous. ... In a case where the reality or existence of the issue is doubtful, it is to be expected that a cautious judge would err on the side of the accused."

Kerr J.A. in R. v. Hart (supra) also emphasized that the concern of the Court of Appeal "is with the existence of the issue and not with the possibility of the jury finding provocation."

Was the issue of provocation raised in the instant case? In his unsworn statement the appellant said:

> "Same time she box me and I pitch her. Same as how me pitch her she come back to me and draw a knife outta her waist and come down on me and cut me on me hand, here so and she come again fe go stab me with the knife again and me pitch her 'way; ..."

Evidence had been led earlier by the prosecution that the appellant greatly desired a resumption of cohabitation with the deceased whose attitude was ambivalent towards him. On the one hand she would not accompany him home on the night of Saturday, December 19, 1987, yet on the following Tuesday she went to his home to get his

dirty clothes which she took to her aunt's house to be laundered.

Further, on the evening prior to her death, the deceased was seen walking in the company of the appellant and indicating that she was accompanying him to his home. It can therefore be inferred that some dispute arose at the appellant's home which led him to set fire to his own house in the process of destroying the person for whom he professed love.

The conversation which preceded the alleged attack upon the appellant together with the acts of aggression of which he spoke could amount to acts of provocation. It was open to the jury to infer from the exaggerated acts of retaliation that the appellant had lost his self-control induced by the provocative acts of the deceased. It was therefore a matter for the jury as to whether a reasonable man provoked as the appellant was, would retaliate in the manner in which he did.

We were quite unable to say that no reasonable jury properly directed would return a verdict of manslaughter in the instant case, and as in our view the issue of manslaughter clearly arose on the unsworn statement of the appellant, we decided to substitute a verdict of manslaughter for the verdict of murder and imposed the sentence of twelve years imprisonment at hard labour.