JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 240/88

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. DAVE RICHARDS

Miss Janet Nosworthy for appellant

Bryan Sykes for the Crown

December 3 and 11, 1990

WRIGHT, J.A.:

On December 3, we treated the hearing of the application for leave to appeal as the hearing of the appeal because it involved a point of law. We allowed the appeal, quashed the conviction for murder, set aside the sentence, substituted a conviction for manslaughter and imposed a sentence of ten years imprisonment at hard labour. Our reasons for so doing are set out hereunder.

The appellant had been convicted for murder in the St. James Circuit Court on December 8, 1988, before Wolfe, J., and a jury and sentenced to death. The single ground of appeal complained that the trial judge was in error when he withdrew the issue of provocation from the jury, although there was evidence fit to be left to the jury's consideration on that issue.

On the back of the indictment four prosecution witnesses were listed - three eye-witnesses and one Police

witness. The trial began at 10:20 a.m. and at 11:02 a.m., after calling one eye-witness, Merle Brown, sister of the deceased, and the Police witness, counsel for the prosecution announced that he would not be calling the other two eye-witnesses because he did not think they would take the case any further but that they were present and would be made available to the defence.

The evidence of Merle Brown was that on August 13, 1987, at about 9:00 p.m., Winston Jackson, the deceased, Andrea Sutherland ("Wringy"), Sandra Samuels and herself were walking along St. James Street, Montego Bay, when they came upon the appellant ("Ray-Ray") leaning against a motor car in front of the Woolworth store. Miss Brown and her brother, the deceased, had been to the Police Station to report an incident in which a man had injured a woman with a machete. The machete had been taken to the Police Station but for some unexplained reason the Police did not take it from her so, on leaving the station, she handed it to her brother and he had stuck it in his pants waist beneath his shirt. It is not clear whether the two other eye-witnesses had been to the Police Station as well, but when they came upon the appellant, Andrea Sutherland recognized him and said, "Yuh si dah bwoy deh weh waan rape mi out a beach one time". It was established that the appellant was eight feet away. What followed appears from the following extract from Miss Brown's evidence:

> "Q: Did you know who she was talking about when she said, 'Yuh si dah bway deh, weh wah rape mi out a beach one time'?
>
> A: Yes, sir, Micky.
>
> Q: After "Wringy" spoke did anybody else speak?
>
> A: Winston turn 'round and sey, 'Yes, a dah same bway deh did dig off 'round here suh.'

"Q: Did dig off where?

A: Him shoulder, '... here suh, dung a jail.'

Q: Now, after Winston spoke did anybody else speak?

A: Micky turn to Winston and sey, 'Hey bway, how yuh gwan like yuh a bad man fi mi suh.'

Q: After Micky said this did anything happen?

A: When Micky sey, 'Hey bway, how yuh gwan like yuh a bad bway fi mi suh,' Winston sey, 'Yuh a idiot, bway.'

Q: After Winston said this, did anything happen?

A: Micky tek out a ratchet and stab him right here and run. Him grab him and sey, 'Yuh a bad bway fi mi.'

Q: Wait a little, Micky took out a ratchet and stab him where?

A: Sey, 'If yuh a bad bway fi mi?' And him just tek out a ratchet and stab him right here (indicating) and run.

Q: When you say 'a ratchet' is it a ratchet knife you are talking about or what?

A: Ratchet knife."

In these few lines she related the tragic drama of how a human life was destroyed with what bears the hallmark of unmitigated savagery. Thereafter, said she, Sandra took off her slip and used it in an effort to stanch the bleeding and they took him to the hospital where he was pronounced dead by the doctor after which a report was made to Detective Acting Corporal Lesga Miller, who testified that when he arrested and cautioned the appellant on February 26, 1986, the appellant said, "Mr. Miller, mi do it sah, but a life".

It needs to be noted that it was in cross-examination that Miss Brown first disclosed that the deceased was in

possession of the machete that night and when questioned as to its final disposition she replied that she took it from him -

> "After me go at hospital .... because him have it and him bleeding and mi just tek it from him .... because him going in to the doctor mi jus tek it."

She denied the suggestion that they had passed the appellant when the deceased stopped and then went back to where the appellant was. She disclosed that the deceased had only that day been released from jail after being in there for about three months. The true duration is not clear because she said he had been away for a long time "because he was at approved school". Following upon her earlier denial, she denied, too, that the deceased pulled the machete from his waist and chased the appellant around the car, chopping at him and that it was during this chase that the appellant drew his knife and made the fatal stab. She did admit, however, that the stabbing did take place beside the car. After that she said it was "right on the piazza".

In filling out the details of the incident, she said, referring to the deceased -

> "Him have a machete but him don't use the machete because him didn't get no time, Micky just drape him."

But, almost in the same breath, when questioned about the draping, she denied using the word and then said it was a mistake to have so said. On her account it was a swift, sudden and unprovoked move by the appellant which left the deceased no time to use the machete.

In an unsworn statement, the appellant related that he was standing by the car smoking a cigarette when he saw a group of five persons approaching and as they passed him one, whom he called Nadine Sutherland, remarked, "Si the boy Micky dey whey try fi hole on pon me over beach". This was

followed by the deceased, Jackson, saying, "A dah boy deh mi want chop off he hand for him beat me up dung a jail". His account continued:

> "So mi nu 'ena pay him no mind, but 'im still insis' and rushing at me. Yes ... seh 'im waan chop off the boy hand. So 'im sister dem hole on pon 'im and seh 'behave yuself'. Dem hole on pon him and seh 'behave yuself; yu jus a come from jail'. So dem hole 'im and walk round two chain away from me. Yes, Sir. They insis' more - push away - 'im insis' more pushing away 'im sister dem, and rush at mi. So when 'im rush at mi, push away 'im sister dem and a run come, mi si 'im draw out 'im cutlass out a 'im waist. So I was standing agens a car. He came chasing me round the car. So he keep chasing me round the car, a rush round the car, and keep rushing round the car, and stop suddenly. 'im chop at mi. So when 'im chop at mi, miss mi, me round back the car agen. 'im keep chasing me said way. Two time 'im chase mi in the last two seconds before him stop chasing mi. 'im chop agen, so I figure this man woudda kill mi, so I have mi knife, mi tek out mi ratchet knife out a mi pocket. So he chop at mi the last time, so I duk and shub" (motioning).

He continued:

> "When he chop at me I duk and push mi knife. So when mi push mi knife (motions) him start stagga wey - me and him together. So 'im sister dem rush down pon mi. One bruk a bottle in mi head. So I get some chance to break away out a di crowd, Sir, so I ran. So when I ran off down St. James' Street a hear a lot of excitement behind me."

The defence accepted the gift of the two discarded prosecution witnesses and Andrea Sutherland was called to the witness stand. She differed from Merle Brown in recounting the events of the evening in that she said that, after the deceased used the words attributed to him by Merle Brown, he pulled a machete from his waist and she walked off, apparently not wishing to see the outcome. But, in cross-examination,

she succumbed to the suggestion of counsel for the prosecution and said no machete was in fact pulled. However, in re-examination, she maintained that he did have the machete in his hand and that he got it from Merle Brown, who handed it to him during the argument.

Sandra Samuels testified that, as they drew near to the appellant leaning on the car, Andrea Sutherland stopped and drew her attention to the appellant saying, "If mi si that boy there, is him was holding me out a beach". The deceased, who had apparently passed him unnoticed, then turned around, noticed the appellant and exclaimed, "Mi raa, nu di boy de whey beat me up dung a jail". She pleaded with the deceased to come but -

> "he flash out and go dung and go round Ray-Ray with the machete, chop after Ray-Ray, and Ray-Ray hole him, flash and hold him, pull out his ratchet knife and stab Winston in his chest."

The appellant ran off and, as the appellant had said, the deceased called to her to hold him. She did and he staggered to Hylton's Drug Store where he fell. She then took off her slip and tried to check the bleeding.

Cross-examination of her was brief. It elicited the admission that she had not told the Police about the chopping but when, in re-examination, she was asked to account for her conduct she said that, after taking the deceased to the hospital, she had left to her home and while there Merle Brown and the mother of the deceased came and told her that the Police wanted her to come and give a statement and that while on the way to the Police these two ladies asked her not to tell the Police about the machete.

Miss Nosworthy submitted that the trial judge had failed to discharge the duty placed on him by Section 6 of the Offences Against the Person Act in that there was

evidence such as the section contemplates but he did not leave the issue of provocation to be determined by the jury. The section reads as follows:

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

It was Mr. Sykes' submission that, far from the appellant being provoked to lose his self-control, the appellant himself had said he was not affected when he said, "Mi nu 'ena pay him no mind". But such a reading does violence to the context because he continued, "but 'im still insis' and rushing at me". Further, Mr. Sykes contended that to satisfy the section the judge must, as when ruling on a no-case submission, assess the evidence and determine whether the evidence can be interpreted within the terms of the section, but that there was no such evidence.

So far as the evidence goes, there was no doubt about two aspects of the case, viz, that the deceased was in possession of a machete during the incident and that the three witnesses, who testified as to the facts, were indeed present. The dispute related to the point in time when he received the machete from Merle Brown and what part, if any, did it play in the encounter.

In assessing the testimony of the witnesses, the jury could justifiably take the view that bias, springing from the relationship between Merle Brown and her deceased brother, would rather incline her to mitigate his conduct and so not make a full disclosure of the true facts, confronted as her

evidence was by the contrary evidence of the two defence witnesses, whom, although the prosecution could not use, they could not wish away. The jury could, therefore, conclude that the true position was neither as terse and almost emotionless as recounted by Merle Brown nor as pulsating and damning as the defence presented. While such a view would negative self-defence, it would nevertheless leave room for manslaughter based on provocation. It is only too well-known that what does not justify may excuse. If that view were questioned on the basis that there was no evidence of a provocative conduct, then we would call attention to the two charges levelled against the appellant, i.e. assault with intent to rape Andrea Sutherland and that of wounding Winston Jackson - charges which were repeated in the hearing of the appellant and certainly were not intended as peace offerings. Added to that is the very important fact that the three eye-witnesses support the appellant's contention that it was the deceased who addressed the appellant and approached him.

Of relevance, too, is the fact that the deceased, Winston Jackson, had been released from prison only on that very day and was obviously seeing the appellant for the first time outside the prison walls. No judge, dispassionately viewing that evidence and making room for reasonable inferences, which the jury were entitled to draw, should lose sight of the fact that that evidence, which might not justify self-defence, could properly accommodate a verdict based on provocation because not only does a true case of provocation quite often masquerade as self-defence but the same evidence, which fails to support self-defence, very properly, in certain circumstances, sustains a plea of provocation. The judge is, in those circumstances, duty-bound to leave the issue to the jury. This view is well-established: See **Mancini v.**

Director of Public Prosecutions (1942) A.C.I. 28; C.A.R. 65; **Bullard v. R.** (1957) A.C. 635; 3 W.L.R. 658; 42 C.A.R. 1; **R. v. Porritt** 3 A.E.R. 463; **R. v. Cascoe** (1970) 54 C.A.R. 401; **R. v. Hart** (1978) 27 W.I.R. 229 at 238.

For these reasons we were satisfied that there is great merit in the ground of appeal and held that the trial judge was in error when he withdrew the issue of provocation from the jury's determination. We accordingly made the orders previously referred to.