JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 10/93

COR: THE HON MR JUSTICE WRIGHT J A
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE PATTERSON J A (AG)

REGINA VS ZIPPORAH HANCEL

Lord Gifford Q C for applicant

Kent Pantry, Deptuy Director of Public Prosecutions and Miss Carolyn Reid, Crown Counsel, for Crown

November 24 & December 6 1993

PATTERSON J A (AG)

On February 2 1993, at the Circuit Court at Kingston, the applicant was convicted of the non-capital murder of Pamella Green and sentenced to imprisonment for life. She applied for leave to appeal against that conviction on the ground that the judge misdirected the jury on the issue of provocation. Her application was granted and the hearing of the application was treated as the hearing of the appeal. The appeal was allowed, the conviction of murder quashed and a conviction of manslaughter substituted therefor. A sentence of seven years imprisonment at hard labour was substituted for that of life imprisonment. These are our reasons for so doing.

The case for the Crown was this. Sometime in the afternoon of the 16th January 1990, the sole eyewitness for the prosecution saw the deceased running from a shed attached to a shop at Willie Henry Avenue, in Kingston. The appellant who was in hot pursuit, caught up with the deceased in the middle of the road. A fight ensued and the appellant, who was armed with a knife, inflicted a stab wound to the chest of the deceased, which penetrated the left

ventricle of the heart and proved fatal. The deceased was not armed at anytime and appeared to have been acting in self defence.

The appellant's evidence painted a quite different picture. She was the mother of two children by one Cedric Campbell, the proprietor of the shop at Willie Henry Avenue. They once lived together as man and wife and although they had parted, nevertheless, they were still seeing each other. She became aware that the deceased also was friendly with Cedric Campbell and about two months before the incident, the deceased attacked her on West Avenue in Greenwich Town. The next time she saw the deceased was on the morning of January 16, 1990 at Sixth Street and the deceased said to her "Hey gal, you a go dead dis year, you better buy you black frock and put down." She went to Cedric Campbell's shop and reported the incident to him. She also asked Campbell for money for her baby and he told her to return later. She returned to Campbell's shop sometime after 3:00 p.m. that day and noticed that as she approached Campbell turned away from her. She noticed further that the deceased was in the shop. She got as far as the shed, and there the deceased started to stab at her with a knife. She avoided being wounded and in self defence, she pulled a knife from a bag she was carrying; a fight ensued under the shed and it was then that the deceased was wounded. She said she was afraid of the deceased because the deceased was much bigger than her, and the deceased had threatened her on several occasions before.

In his directions to the jury, the learned judge identified the issues that arose for consideration to be self defence and provocation. These were live issues that arose from the testimony of the appellant, and there was no complaint with regard to the directions on the issue of self defence. Lord Gifford quite frankly admitted that the learned

judge's directions in law on the issue of provocation, could not be faulted. He further said that the learned judge correctly directed the jury's attention to the evidence which could be considered as giving rise to provocative conduct, taking into account the evidence of the earlier incidents and the background leading up to the afternoon's fatal stabbing. However, he submitted that the learned judge thereafter, in one sentence, eroded those directions by telling the jury that what he had said was dependent on whether or not they accepted the contention of the appellant that the deceased had a knife. He contended that that was a misdirection which had the effect of precluding the jury from returning a verdict of manslaughter based on an interpretation of the evidence which rejected the appellant's evidence of a knife in the hands of the deceased.

What the learned judge had to say in directing the jury as to the evidence of the provocative acts was as follows:

> " Now, what is the provocative act? I think that the evidence which you could consider, if you so wish, that would amount to be provoking conduct, that is if you accept what she says, is that when the accused came to the shop she was being abused, that the deceased was cursing her, using abusive language. The other aspect of the evidence which you may wish to consider is the attack with the knife. So, it is for you to say that an ordinary woman of the same age and sex, and taking into account her social status and the background from which she came, if that conduct, firstly, would have caused her to lose her self control, and would have caused a reasonable person to behave as she did.
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> Now, Mr. Foreman and members of the jury, because the burden of proof is always on the prosecution to prove the defendant's guilt, it is not for the defendant or the accused to prove that she was

> provoked. Once the issue has been properly raised as it has been in this case, it is for the prosecution to satisfy you so that you feel sure that the accused was not so provoked before you can convict of murder. If you are satisfied that she was provoked or if you think that she may have been provoked, only then you can convict of manslaughter.
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> The argument has been put forward by counsel for the defence that you must bear in mind the circumstances. Here it was a man having two ladies, therefore the emotion of jealousy was high. Here it is the deceased threatened the accused earlier that morning. There it is that the accused is going to her baby father for money to buy baby food, sees her competitor there. There it is that the accused is subject to abuse, if you accept her evidence."

Then the sentence complained of follows:

> "All this is based on whether or not you accept what she is saying there that it is a knife which is being used to stab at her."

This aspect of the directions was concluded by his saying:

> "Those are factors which the defence urged that you should accept."

Mr. Pantry's valiant effort in trying to persuade us that the learned judge was, in those words, reminding the jury of the argument put forward by counsel for the defence did not find favour with us. We were of the view that the learned judge was quite right in directing the jury that provocation in this case consisted of both spoken words and acts done, viz, the use of abusive words and the cursing by the deceased, and the attack with the knife. In reminding the jury of the circumstances leading up to, and including the use of the provocative words, (the abusive language and the cursing), the learned judge qualified it all by saying that it was dependent on their accepting that the deceased was using a knife to stab at the appellant. It was our view

that the jury could have understood the learned judge's direction to be that, unless they found that the deceased had a knife stabbing at the appellant, the provocative words on their own could not give rise in law, to legal provocation. That, in our view, was clearly a misdirection and the jury may have been misled by it.

It was open for the jury to consider the question of legal provocation on the evidence of either the conduct of the deceased in using a knife to attack the appellant (having regard to the background evidence) or the words used, or both conduct and words. The appellant was deprived of the jury's consideration of her defence of provocation based on the use of words alone by the deceased. We were unable to say, whether in those circumstances, the jury would not have returned a verdict of manslaughter based on legal provocation, had the issue been properly explained to them. For those reasons, we came to the conclusion that has already been stated.