JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 65/89

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

R. v. DELROY SAMUELS

Tom Tavares-Finson & Dr. Paul Ashley for Appellant

Miss Paulette Williams for Crown

21st January & 11th March, 1991

FORTE, J.A.

The appellant was convicted for the offence of murder in the Home Circuit Court sitting in the parish of Kingston, on the 17th May, 1989. An application for leave to appeal was heard before us and granted on the 21st January 1991. The application was treated as the hearing of the appeal. The appeal was allowed, the conviction quashed, a verdict of manslaughter substituted therefor and a sentence of 10 years hard labour imposed.

The appeal turned on only one ground of appeal which reads as follows:

> "The learned trial judge misdirected himself on the law relating to provocation and thereby denied the appellant/defendant the opportunity for a verdict of manslaughter."

To determine the question raised, an examination of the facts is necessary.

The incident which ended in the death of Robert Findlay, had its beginning in the Odeon Cinema in Half-Way-Tree on the evening of the 24th July 1988. In proof of its case the prosecution relied mainly on the evidence of Courtney Bennett.

The evidence on both sides, however established that two different groups of persons attended the Cinema on that fateful night and that there was a disagreement between them over the occupation of two seats therein, causing two persons to be put out of the theatre by the security guard. Those two persons were the deceased Robert Findlay and Dayton Watkis, who along with Melverton Findlay, the brother of the deceased, the witness Courtney Bennett, a lady called Marie, and a gentleman called Teddy formed one of the groups. The witness Bennett testified to the fact that when his group left the theatre, he saw the deceased and Watkis waiting outside the theatre, apparently having not left when they were put out. At this time he saw the appellant ahead of him walking with his (the appellant's) group towards the 35 bus stop on Eastwood Park Road. His group walked behind, ostensibly on their way home. However, as he neared the bus stop he crossed the road to enter a nearby bar with the intention of refreshing himself. Before entering the bar he saw Dayton Watkis, go towards Richard Trowers who was then standing at the bus stop. Trowers was a member of the appellant's group with whom the argument in the theatre had taken place. At this time according to Bennett, he did not see Teddy nor Melverton, but did see the deceased standing about a chain from Richard Trowers. When he returned two minutes after entering the bar, he saw Dayton running and heard "ratchet start to mourn". He then saw the appellant, Elvis Trowers (who was jointly charged with the appellant but was acquitted) and "some more" running after the deceased Robert Findlay. They caught up with him and tripped him causing him to fall to the ground. They began kicking him and at a time when he rolled over on his belly the appellant

stabbed him in his back with a knife. He then got up and ran. The appellant again ran after the deceased, passed the witness Bennett, who then armed himself with two stones. As he was passing Bennett, however, he was heard to say "a get stab". This wound he had received from Derrick Carthy o/c "Brown Dog" who while the men were kicking deceased went over to them, and told them to leave him alone. This witness, however gave no detailed account of how "Brown Dog" came to stab the appellant but "Brown Dog" who gave evidence for the prosecution admitted to having cut the appellant but only to defend himself when attacked by the appellant. That was in substance, the case for the prosecution.

The appellant in his defence gave an unsworn statement in which he admitted to being at the bus stop, but alleged that a man came up and "drape" Richard Trowers, and then he got kicked to the ground and while trying to get up he was attacked from "backways" and stabbed. Though, not expressly, he did deny, by inference that it was he who stabbed the deceased during the incident. He called a witness who supported his account of the incident i.e. Jacqueline Spence o/c Sandra who along with Richard and Elvis Trowers and Joan Taylor made up the appellant's group.

On these facts the learned trial judge withdrew the issue of provocation from the consideration of the jury when he stated:

> "Now if you remember what I told you about the draping up, the attack, the surprise, according to Delroy, that he got kicked down and a man attacked him, he hasn't given any evidence about any provocation, because provocation is something that a man must tell you that something was done to him which caused him to lose his self-control. You have heard nothing in this case, any issue raised about any provocation because what Delroy is telling you is that he wasn't doing anything to anybody.

> "So the case, Mr. Foreman and Members of the Jury is murder or nothing. I am not leaving any provocation to you which would have reduced murder to manslaughter. I am not leaving that."

These words clearly indicate that the learned trial judge withdrew the issue of provocation, on the basis that it was not raised by the appellant in his defence, and that he gave no consideration to the question whether it arose on the case for the prosecution.

In doing so he was clearly wrong. The principles governing the law in respect to provocation have been frequently enunciated in the judgments of this Court, but it appears that there is need to re-emphasize them.

The question was considered in the cases of **R. v. Hart** (1978) 27 W.I.R. 229 and **R. v. Phillips** (1969) 53 Cr. App. R. 132, both of which were again affirmed in the unreported cases of **R. v. Fabian Moses** S.C.C.A. 98/89 delivered on the 18th June 1990 and **R. v. Crafton Tomlin** S.C.C.A. 101/89 delivered on the 16th November, 1990.

Lord Diplock in delivering the judgment of the Board in **R. v. Phillips** (supra), specifically laid down the principles governing the issue of provocation in these words:

> "The test of provocation in the law of homicide is two-fold. The first, which has always been a question of fact for the jury, assuming there is any evidence upon which they can so find is: Was the defendant provoked into losing his self-control? The second, which is not one of fact but of opinion, 'Would a reasonable man have reacted to the same provocation in the same way as the defendant did'?"

In **R. v. Hart** (supra) following the dicta of Lord Diplock, Kerr, J.A. explained thus:

> "..... What is required is evidence of provocative conduct on the part of the deceased and evidence from which it may be inferred that as a result the killing was due to 'a sudden and temporary loss of self-control'. If there is such evidence then it is the duty of the judge to leave the issue to the jury for them to determine with due regard to the two-fold test as laid down in **Phillips v. R.**"

Though citing this passage, with approval Rowe P, in delivering the minority judgment in **R. v. Fabian Moses** (supra) was careful to correctly explain:

> "Although Kerr J.A. referred to provocative conduct on the part of the deceased, he is not to be understood to be saying that only the acts or words of the deceased can be relied upon by the defence as provocative conduct. Section 6 of the Offences Against the Person Act provides no such limitation."

In so far as Kerr, J.A. spoke of evidence from which it can be inferred that the killing was due to a sudden and temporary loss of self-control, he was echoing the opinion of the Privy Council in the case of **Lee Chun Chuen** (1963) 1 All E.R. 73 per Lord Devlin to the following effect:

> "Their Lordships agree that the failure by the accused to testify to loss of self-control is not fatal to his case. **R. v. Harper** [1914-15] All E.R. Rep. 914 [1915] 2 K.B. 431. **Kwaku Mensah v. R** [1946] A.C. 83. **Bullard v. R** [1957] A.C. 635; [1961] 3 All E.R. 470 n. and **R. v. Porritt** [1961] 3 All E.R. 463 were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self-defence as well as provocation. The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-

> "control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

In our view in directing the jury in the instant case in the following words:

> "..... provocation is something that a man must tell you that something was done to him which caused him to lose his self-control",

the learned trial judge fell into error in two important aspects:

(i) that the appellant had to give direct evidence that he had lost his self-control, **R.v. Hart; R. v. Lee Chun Chuen (supra);**

(ii) that in the absence of direct evidence from the appellant that he was provoked, the issue of provocation did not arise.

As to (ii) above the point has been long settled, but for the purpose of emphasis the dicta of Ashworth J., in **R. v. Porritt** [1961] 45 Cr. App. R. 348 at page 350 dealing with this aspect of the law, is worth repeating:

> "..... The leading case, so far as chronology is concerned, is the case in this court of Hopper (1915) 11 Cr. App. R. 136; [1915] 2 K.B. 439, but the same principle has been emphasized in a number of other cases and, for convenience, one can read what I think is the last of them, **Bullard v. R.** (1957) 42 Cr. App. R. 1; [1957] A.C. 635. In that case Lord Tucker, giving the judgment of the Privy Council at pp. 5 and 642 of the respective reports said:

> " 'It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused had said in terms that he was provoked, 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 reasonable doubt that the killing was unprovoked'."

This Court dealt with this question in **R. v. Errol Morgan** [1972] 12 J.L.R. 1033 which was cited with approval in **R. v. Crafton Tomlin** (supra)

In **Morgan's case**, the following words which fell from Fox J.A. is relevant to the point of law on review, and to the particular facts of this case:

> "It is also important to realize the full implications in the right of a jury to accept or reject the whole or a part of the evidence of any witness. This right entitles a jury to consider that an account of an incident has been incomplete or was exaggerated, but that, although unacceptable in its entirety, such an account enables conclusions of fact which depart substantially from the line pursued at the trial by the prosecution or the defence. Finally, it is essential to understand that the defences to a criminal charge which must be left a jury are not only those which the evidence confidently asserts, but as well those which the evidence may have left in doubt."

In the case before us, the appellant in his defence denied that he had stabbed the deceased, and contended that he himself was the subject of a violent attack, by one of those persons identified by other witnesses as being a member of the group in which the deceased was at the time of the incident. The denial, in view of the cases cited above, cannot

deprive him of the right to have the issue of provocation considered by the jury if of course it otherwise arises in the case.

The question therefore upon which the appeal has to be determined is, whether there was evidence of provocation arising in the case which required the learned trial judge to leave the issue of provocation for the consideration of the jury.

Counsel for the appellant contended that such evidence existed in -

(i) the evidence of Melverton Findlay, and to some extent

(ii) the appellant's unsworn statement and the testimony of the defence witness.

1. **EVIDENCE OF MELVERTON FINDLAY**

This witness was called by the prosecution and testified as to the incident in the theatre, and to the occurrences after both groups had left the theatre, but in examination-in-chief by counsel for the prosecution alleged that he did not see who stabbed the deceased. An application was made and granted for this witness to be treated as hostile and he was thereafter cross-examined by the counsel for the prosecution, to establish that he had said previously that he saw the appellant stab the deceased.

In this cross-examination, no challenge was made of the evidence he had given up to the moment of his decision not to give incriminating evidence against the appellant. At the end of the case, that evidence still remained unchallenged.

This is how the learned trial judge dealt with it in his summation:

> "The next witness was Melverton Findlay and the least said about him is the best, because he made a complete fool of himself. I don't know why, all sorts of reasons why witnesses come and make fools of themselves. I don't know why he did it, but he did it and the prosecution had to treat him as hostile. So his testimony is of no moment; complete fool of himself. When the prosecution is pressed that you have to treat a witness as hostile, anything which you heard him say is of no moment. It is not evidence. All that it shows is that he is unreliable; unrelaible, you can't put any stock on what he says; ..... . So his testimony is of no avail; .....".

This raises the question whether once a witness has been treated as hostile, the whole of his evidence becomes unreliable, and that no part thereof can be used in determining the issues in the case. It has been long settled that in every case, the evidence of a witness can be accepted in part and rejected in part having regard to the particular circumstances.

In a case such as this, where the challenge of hostility related only to one aspect of the witness' testimony, then it would be open to the jury to reject that part as being unreliable but nevertheless accept that part which has remained unchallenged. For this proposition we find support in the case of **R. v. Pestano and Others** reported in [1961] C.L.R. 397. In that case, four appellants were convicted of rape. In the course of his evidence a principal prosecution witness, having incriminated two of the appellants, in part resiled from his deposition in so far as it affected the other two appellants. Prosecution counsel then asked varicus questions designed to show that the witness was lying before making a successful application to treat him as hostile. He was then asked about his deposition and another deposition in a different case. The witness did not return to the account given in his deposition but the prosecution nevertheless continued to rely on his evidence in so far as it advanced their case.

The grounds of appeal before the Court of Appeal were inter alia that the prosecution should not have been allowed to cross-examine the witness on his depositions and that once he had contradicted his earlier statement his entire evidence should have been disregarded.

It was held, inter alia, that the evidence was for the jury to consider, subject to a proper warning from the judge as to the weight, if any, which could be attached to it.

In the Australian case of **Driscoll v. R** (1977) 51 A.L.J.R. 731 in dealing with the effect of a previous inconsistent statement on the value of the testimony given by an hostile witness in court, Gibbs J., treated the question thus:

> "The whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable. In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony. For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable. The statement to that effect in **Reg. v. Golder, Jones and Porritt** was obiter, because in that case the trial judge had in fact warned the jury that the evidence was unreliable and the Court of Criminal Appeal was concerned only with the judge's failure to direct the jury that they could not act on the unsworn statement.

> "It cannot be accepted that in cases where a witness has made a previous inconsistent statement there is an inflexible rule of law or practice that the jury should be directed that the evidence should be regarded as unreliable."

This Court, in the case of **Solomon Beckford v. R** S.C.C.A. 41/85 dated 10th October, 1985 (unreported on this point) examined the relevant authorities on the effect of the testimony of a witness treated as hostile, including the cases cited herein as also the case of **Regina v. Golder, Jones and Porritt** [1960] 3 All E.R. 457 referred to in the Judgment of Gibbs J., in **Driscoll v. R** (supra). Carey J.A. in expressing a preference for the approach of Gibbs J., had this to say:

> "We take the view then that there is no rule of law that where a witness is shown to have made previous statements inconsistent with the statement made by that witness at the trial, the jury should be directed that the evidence given at the trial should be regarded as unreliable. It cannot however be too often stressed that a witness' credit is entirely a matter for the jury and not the judge. Each case will depend on its own circumstances."

The instant case is demonstrative of the correctness of the approach in **Driscoll v. R.** and **Beckford v. R.** (supra) as the challenge to the credibility of the witness rested on only one aspect of his testimony and left untouched the greater part of his account of the incident. In those circumstances, a jury may very well think that his contradiction in relation to whether he saw the appellant stab the deceased made his evidence on that aspect unreliable, but nevertheless accept as true his account in relation to the background, and commencement of the altercation which ended in the death of the deceased.

In our view the learned trial judge fell into great error when he withdrew from the jury any consideration of that testimony in the following words:

" .... anything which you heard him say is of no moment, it is not evidence."

Having regard to the fact that the greater part of the testimony was not challenged it should have been left with the jury to give it whatever weight they thought fit, with a warning that they should be cautious in acting upon it.

WHAT THEN WAS THE TESTIMONY OF THIS WITNESS AS IT MIGHT HAVE RELATED TO THE ISSUE OF PROVOCATION?

The deceased was his brother, and he had gone to the cinema in the same group as his brother and the witness Bennett. He too spoke of the quarrel in the cinema, resulting in Dayton Watkis and the deceased Findlay being put out of the theatre. He however added that he had gone outside at the time and had seen the guard box Dayton. After the show, his group walked behind the appellant's group in the direction of Burger King on their way to the bus stop.

Then in examination-in-chief he stated:

"Q. Did anything happen while you were on your way to Burger King?

A. Those two and his friend them was in front of us.

Q. Yes?

A. And them meet at the bus stop on Eastwood Park Road.

Q. Who?

A. Those two and him friend and ....

Q. Yes?

A. .... and Dayton Watkis go to him and his friend them and say, 'You remember me? You mek the guard run me outta the show.'

Q. When Watkis went up to these two and dem friends, where were you?

A. I was there too.

"Q. I see. Was any other member of your group also at that point when he spoke to these two and their friends?

A. Yes.

Q. Who else?

A. All of us.

Q. So all of you went to these two and their friends?

A. Yes.

Q. And Watkis spoke?

A. Yes.

Q. Now when Watkis said that, did any member of that group in which these two men were say anything or do anything?

A. They drape up .....

His Lordship: Who and who drape up?

Witness: Dayton Watkis and his friend them.

His Lordship: Yes?

Q. They draped one another?

A. Yes.

Q. And what happened?

A. The fight began.

.....

Q. Did you see what happen to Robert Findlay at the time of this draping up?

A. He was there with us.

.....

Q. Who and who fought? Who and who fight?

A. Dayton and his friend them, those two friend.

His Lordship: Dayton and his friend was fighting with those and their friend?

Witness: Their friends start to fight with us.

.....

"Q. Was Robert Findlay involved in this fighting?

A. No, Miss.

Q. You were involved in this fighting?

A. Yes.

Q. Robert was?

A. No.

Q. Dayton was?

A. Yes.

Q. Robert wasn't involved?

A. Yes.

His Lordship: What you say, he was involved?

Witness: Yes.

.....

Q. So everybody from your group was fighting with members of the other group?

A. Yes."

None of the above evidence was challenged by counsel for the prosecution after the witness was treated as hostile. This was evidence that painted a picture of aggression by Dayton Watkis, and his group which included the deceased. It showed that the appellant and his friends were peacefully making their way home, waiting at the bus stop when the other group "carried the fight" to them as it were and indeed commenced a violent attack upon them by draping them up and starting a fight.

The appellant in his unsworn statement though not admitting to stabbing the deceased, did make reference to the violence exhibited upon his companions and himself. He said:

> "I see a man come up and drape up Richard Trowers, the man said to Richard, 'Bwoy, ah you mi come for, because you let police box up my friend dem, and tek dem out of the show,' and my surprise, I get a kick from a man; I fell on the ground; I was trying to get up; the man attack me from backway. The man attack me from backways and stab me. Three man what I see was running down Eastwood Park Road. .....".

In her testimony given for the defence, the witness Jacqueline Spence, in describing the incident testified:

> "..... when we were at the thirty-five bus stop, we was standing there, and some guys lean out on the wall - we were on the road, and some guys lean out behind us on the wall, same time Richard was saying something to me, and by him could ah say it to me, mi hear Joan bawl out and seh, 'Dem hold Richard,' and same time mi spin 'round so, me see Samuels come and deh ask, 'Ah wha'?' And when him seh, 'Ah wha'? me hear somebody seh, in a the crowd, 'Ah wha'? Ah tief?' and rush down same time. Mi hear Delroy seh, 'Dem stab me, dem stab me,' and do like this, 'Dem stab me, you know, dem stab me'."

Later in cross-examination, she stated:

> "Q. And when you turned around, what did you see?
>
> A. I saw a guy hold up Richard like this, in his neck with a knife, like soh.
>
> Q. And did you see that guy do anything to Richard?
>
> A. By time he could do anything, Samuels intervene and seh 'ah wha'? and same time the crowd bawl out, 'Ah wha'? 'Ah tief?' and everybody rush in."

All this evidence if accepted is evidence capable of amounting to provocative acts which could have caused the appellant to lose his self-control and therefore the issue ought to have been left for the consideration of the jury.

This case is peculiar in its facts as the acts of provocation would have emanated from a group of persons acting together and directed at another group all of whom were friends, and whom in the circumstances stood in the protection of each other. The acts of aggression upon the appellant's group resulted in a fight between the groups. In our view in such circumstances, the acts of the group including the deceased whom the evidence suggests was present and participating, committed upon the appellant and his group would meet the criteria for provocation set out above and this issue should have been left for the consideration of the jury. This not having been done, we cannot say that the jury if properly directed would not have returned a verdict of manslaughter. For those reasons, we allowed the appeal, quashed the conviction for murder and substituted a verdict of manslaughter.