JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 138/90

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (Ag.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

REGINA vs. ANTHONY WILSON

L. L. Cousins for applicant

Miss Marcia Hughes for the Crown

22nd and 30th April, 1991

BINGHAM, J.A. (Ag.):

On the 6th of October, 1990, after a trial on the 5th and 6th days of October, this applicant was convicted for the murder of one Marlon Vincent. Sentence of death was imposed on him.

The facts out of which the charge arose were that the applicant and one Ann Marie Kettle had a visiting common law relationship for about six years. Two children were born to her during this period, the last being Damion born some seven months before the incident on 6th October which lead to Marlon's death. The deceased who was two years and six months was not the applicant's child.

On the 6th October, 1990, about 6:30 p.m. Miss Kettle was on her way to a bus stop in the Riversdale area of Saint Catherine accompanied by her two children and a nephew Jason. On the journey there was an altercation between Miss Kettle and the applicant during which he received a cut on his right

wrist. Miss Kettle ran and sought refuge in a nearby shop. The applicant in a fit of temper caught hold of Marlon and was seen to run off with him down a train line. This was the last time that the young child was seen alive. The following morning his dead body was discovered by the police in a gully about 10 to 12 chains from the scene of the incident between Miss Kettle and the applicant. There were several stab wounds seen on the body, three of which had pierced the neck and left side.

The applicant was later arrested and upon being cautioned admitted responsibility for the killing.

At the trial, the Crown relied upon the evidence of Miss Kettle and an eyewitness, one Anthony Gordon, in establishing the charge. The applicant, in exercise of his rights, elected to offer no evidence in his defence. Through his counsel, who then, as now appears for him, the defence sought to rely upon the cumulative effect of three statements made by the applicant, which while admitting his responsibility for the killing, raised the issue of provocation.

Before us, Mr. Cousins for the applicant filed some six grounds of appeal, of which he sought to argue ground 4, which stated -

> "(4) That the summing up of the Learned Trial Judge on the issue of provocation was inadequate and must have misled and confused the Jury and that he failed to specify and itemise the facts on which the Defence relied
>
> (a) Statement of Anne Marie Kettle next day went back to Railway Track where we started the fight.
>
> (b) Statement of Anthony Gordon 'The girl drop the baby and use other hand to hold on to him and both were fighting.'
>
> (c) The chopping of accused with the cutlass by Anne Marie Kettle.

" (d) Statements of accused to Detective Sgt. Moore 'Me jook him with me knife but me never do it fe kill him'

and

'The woman chop me and me lose me temper'."

Although he sought valiantly to argue this ground, when examined his submissions were focussed on the treatment by the learned trial judge as to the manner in which this issue was left to the jury. There was no complaint advanced by counsel as to the directions of the learned trial judge as to the law. The narrow area of his complaint was that the learned trial judge did not deal with this issue in a manner which was both adequate and fair, in that, he failed to specify the acts of provocation.

He relied upon **R. v. Trevor Lawrence** (unreported) S.C.C.A. 11/88 delivered on 10th July, 1989. When this case is examined, however, it did not assist counsel's arguments as in that case the learned judge withdrew provocation from the jury.

In this case, the learned trial judge, in our view, quite correctly left provocation for the consideration of the jury when he said at page 78, "In this case it is things done by Miss Kettle", but he was not content to stop there. In reviewing the facts and highlighting the words or conduct capable of forming part of the provocative incident and relating the facts to the law, the learned judge went on to say at pages 79 to 80 that:

"You had the evidence of this lady, according to Miss Kettle she had the children there and <u>there was this argument</u>. According to her <u>he threatened</u> her and then chopped at her. He had the cutlass in his hand, raised it above his head. <u>She held on to the hand with the cutlass</u>, he pulled a knife from his pocket. <u>She let go the cutlass</u>, he put back the knife in

"his pocket. She let go the cutlass, he put back the knife in his pocket. When his father was passing things stopped and after the father passed he said you are not going down tonight. He chopped at her with the cutlass, it caught her in her palm. She held on to the cutlass then this wrestling. He flashed her three times. She flashed him back three times.

She chopped at him, well she says it didn't catch him. He took up this iron thing from the car and when he chopped at her - hit at her with it she chopped him and it caught him in his palm. That's what she said. And you remember the question of the baby falling. According to Mr. Gordon the baby drop, she drop the baby and she ran off and left the baby there, ran to the shop and leave him there.

You must say, Mr. Foreman, remember Mr. Gordon told you that she dropped the baby and Steve, it was, who picked up the baby and took it up and gave her. Mr. Gordon says that they were both fighting for the cutlass. She got away the cutlass from him and he stepped back - she stepped back. He moved towards her and she waved the cutlass at him. He can't say whether it chopped him and when she ran off, he ran behind her and he came up to him - this time he took up a pan and he, Mr. Gordon, held him and said, 'Roy, behave yourself,' and he shook him off and ran towards the lady who had ran behind the shop.

Well, you look at all those circumstances and you ask yourselves, taking everything into consideration together - it was suggested to her that he had asked her to take the child to show his father and she had refused - taking all these facts into consideration, was that sufficient to let him lose his self-control? Those are matters for you. Did he lose his self-control and having lost it, would a reasonable man have done what the accused man did? That is entirely a matter for you." [Emphasis ours]

The above directions, which was a faithful and accurate representation of the evidence, makes it demonstrably clear that the learned trial judge, far from failing to specify and itemise the words or conduct capable of forming part of the provocative incident gave the jury adequate assistance as to how to approach their task and to arrive at their verdict. There exists, therefore, no rational basis for this Court to interfere with the decision at which the jury came.

The application for leave to appeal is accordingly refused.