JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: S.C.C.A 61/2000

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON MR. JUSTICE SMITH J.A. (AG.)

THE QUEEN V LUMUMBO RANKINE

Ewan Thompson for the Appellant
Miss Tricia Hutchinson for the Crown

May 9; July 20 and 31 2001

BINGHAM J.A:

On March 23, 2000 in the Saint Elizabeth Circuit Court held at Black River, the appellant was convicted of the non-capital murder of Gary Blackwood. He was sentenced to imprisonment for life. No order was made by the presiding judge as to the period to be served by the appellant before he would become eligible for parole. Leave to appeal against his conviction having been granted by the single judge, this appeal was considered by this Court. After hearing the submissions of counsel we allowed the appeal, quashed the conviction for non-capital murder, and set aside the sentence.

We substituted a verdict of manslaughter and deferred the sentence to be imposed pending a Probation Report. At the time of coming to our decision, we promised to put our reasons into writing and this we now do.

The Facts

The Prosecution's Case

On Thursday 18th February 1999, sometime in the morning hours the deceased and the appellant were working at Miss Anet Banton's premises at Mahogany District in St. Elizabeth. Both persons were good friends. A building construction was in progress at these premises. There was an argument between the two men which included calling the name of the deceased's girlfriend "Sus." During the argument the deceased punched at the appellant and his hand caught the appellant on his mouth which started to bleed. The appellant retaliated by taking hold of a shovel which he used to strike the deceased on his head fracturing his skull and killing him on the spot. At the time of the blow with the shovel, the deceased was in the act of moving away from the appellant heading towards a stone to sit down. The shovel hit the deceased to the side of his head. At the time that the blow was struck the appellant was to the back of the deceased.

A post mortem examination was performed by Dr. Audley Hamilton on the body of the deceased on 2nd March 1999, at the Black River Hospital morgue. The body was identified by the deceased's aunt, Miss Jennifer Allen. On external examination the doctor saw a four centimeter long laceration to the back of the head. Associated with this wound was a fracture of the deceased's skull also to the back of the head. The injury would have required a moderate to severe degree of force to cause it. The cause of death was due to the severe head injury. The mention in the post mortem report, from which the doctor refreshed his memory, led learned counsel for

the appellant (who also appeared for the defence at the trial) to challenge the doctor's account as to where the injury was inflicted. In responding the doctor said that the wound he saw was to the back of the head. He demonstrated by moving his hand from (the parietal region,) the side to the back of his head indicating that the blow although delivered from behind encompassed both the back as well as the side of the deceased's head.

The Defence's case

The appellant gave sworn evidence. He recalled going to Miss Anet Banton's house on the morning in question around 7:00 o'clock. The deceased made tea and shared it with him. About 11:00 a.m. there was an argument between himself and the deceased over a bicycle belonging to one Nathan. The appellant said that the deceased told him that "Nathan going to trick him" and he told the deceased "Is not me going get the trick is you for is not me mash up Nathan's bicycle." The appellant said that he told the deceased "Is you and when you get the trick you not going to see Sus." When he said this the deceased came up to him and immediately thumped him in his mouth. He wiped his mouth and saw blood coming from it. The deceased then came up to him. The appellant stepped back, then the deceased grabbed him in his shirt and was still coming at him. He kept stepping backwards until he stepped back into some crotons. The deceased kept coming down on him and he hit him with the shovel. The deceased ducked unto the shovel and it caught him somewhere to the side of his head. The appellant said that he aimed the shovel at the deceased to hit him because he was coming down on him and he wanted to ward him off. He hit

the deceased who fell to the ground and he ran off. The appellant denied that after the deceased punched him, he turned his back and was moving away when he hit him from behind with the shovel.

Given the evidence in the case, the issue of provocation in law clearly arose for the consideration of the jury.

The Crown's case, if accepted as the credible narrative of the events leading to the killing of the deceased, left no room for self defence.

On the most generous view of the evidence given by the appellant, the deceased while advancing on him was unarmed. There was accordingly nothing occurring to lead the appellant to believe that his use of the shovel to strike the deceased with such force to his head was necessary to ward off what up to that point was a threatened attack. The situation with which he was confronted did not call for the use of such force as he in fact applied to the person of the deceased.

In leaving self defence to the jury, the learned trial judge bent over backwards and was overly generous to the appellant. His directions on self defence were in the circumstances not warranted. It is of some significance that learned counsel for the appellant has not resorted to raising any ground of complaint regarding the learned judge's directions in this area.

Learned counsel for the appellant sought and obtained leave to argue the following "Supplementary Grounds of Appeal" viz:

> "**(1)** The Learned Trial Judge failed to properly and adequately put the medical evidence of Dr. Hamilton before the Jury thereby depriving the Appellant of a full consideration by the Jury of one of his strongest points.

(2) The Learned Trial Judge failed to direct the Jury adequately on the evidence of the appellant's good character and or fail to remind the Jury of the evidence of the Defendant's character witness.

(3) The Learned Trial Judge erred in law when he failed to direct the Jury that if they were in any reasonable doubt whether or not the Appellant was provoked then their verdict should be manslaughter and not murder."

On a careful consideration of the Grounds filed, grounds 1 and 2 are lacking in merit for the following reasons:

Ground 1

This is focused on a complaint regarding the learned trial judge's treatment of the medical evidence and resolved itself into academic discourse as to the manner in which the fatal blow was struck to the head of the deceased. This can be seen from the absence of any challenge being made by the defence as to the object used to inflict the injury to the deceased resulting in his death, or as to the fact that the deceased was unarmed. The manner in which the blow was delivered was of no moment and therefore pales into insignificance.

In any event, the demonstration given by the doctor in Court by moving his hand from the left side to the back of his head was consistent with the position in which the witnesses saw the deceased when he was struck by the appellant with the shovel. This was the account accepted by the jury in arriving at their verdict.

Ground 2

This ground sought to complain about the failure of the learned trial judge to deal with the evidence of the appellant as to his good character. An examination of the sworn testimony, of the appellant and of the witness called on his behalf, does not reveal any material which would raise the issue of the appellant's good character in a manner which would have placed a duty on the learned judge to give a direction to the jury on this aspect of the law. There is no merit in this ground.

Ground 3

This ground of complaint which sought to focus on the learned trial judge's directions on provocation, we found to be of particular concern and was the matter to which we gave the most anxious consideration. It is without question that there was material on the Crown's case which was capable of being regarded as a provocative act done by the deceased to the appellant within the terms of Section 6 of the Offences against the Person Act, (the "Act"). In the circumstances, it was incumbent on the learned trial judge to properly direct the jury on the law relating to provocation in the clearest possible manner to enable them to come to a correct verdict on the evidence.

Learned counsel for the appellant in advancing his arguments on this ground submitted that while there was no complaint directed at the general directions on the law in this area of the case, when it came to the particular directions as to the circumstances in which provocation in law fell to be

applied, the direction was deficient. With this submission, we are in agreement.

To properly grasp the essence of counsel's argument it will be convenient to cite some examples of the summation to indicate the limit to which the directions went; and in so doing it will be seen exactly in what manner these directions fell short.

Having dealt extensively with the defence of self defence the learned trial judge continued in this vein (page 104 line 25 of the notes of proceedings):

> "Now Mr. Foreman and your members, if you reject self defence, you say that I do not find that the accused was acting in self defence then you have to consider another limb and that limb is what is known as provocation."

The learned trial judge then went on at this point to define provocation in law and to identify the evidence which in law was capable of amounting to provocative conduct. He then went on to refer to the standards fixed by law, by which the jury would determine whether there was evidence fit for them to arrive at a verdict of manslaughter based on provocation.

In conclusion however, the learned trial judge said this:

> "So, Mr. Foreman and your members, if you reject self defence, you go on to consider provocation. If you reject provocation, then the accused man would be guilty of Murder. If you find that the accused was provoked, then with that provocation it would reduce the charge from Murder to Manslaughter."

On more than one occasion the learned judge directed the jury that if the accused was provoked they should find him guilty of Manslaughter. Those

directions did not go far enough. An examination of the summation revealed that the learned judge did not tell the jury that if they were in doubt as to whether the accused was provoked or not they should find that provocation in law was made out and return a verdict of Manslaughter. His failure to so direct the jury was a fatal omission and amounted to a non-direction of a material nature rendering the conviction bad.

For guidance **R v McPherson** [1957] 41 Cr. App R 213 cited by learned counsel for the appellant following **Woolmington v D.P.P.** [1935] 25 Cr. App. R. 72 and applying **Lobell** [1957] 41 Cr. App. R. 100 is sufficient authority for this contention. The headnote is sufficient for the purposes of this judgment. It reads:

> "Where on a charge of Murder provocation is relied on by the defence, the jury should be directed that the onus of proving absence of provocation remains throughout on the prosecution and that if the jury are left in doubt whether the facts show sufficient provocation to reduce the killing to Manslaughter, that issue must be determined in favour of the prisoner." (Emphasis supplied)

It was for the above reasons that we came to the conclusion that we did and made the orders which appear at the commencement of this judgment.

On 20th July 2001, the Court in accordance with its request, received a report from the Probation Officer for the parish of Saint Elizabeth. Acting on the recommendation contained therein, the following order was made:

> By and with the consent of the appellant a Probation Order made for three years subject to the terms and conditions as set out therein.