JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 150/04

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

R v HERRON SPENCE

Ms. Janet Nosworthy for appellant

Anthony Armstrong and Miss Simone Wolfe for Crown

26, 27 September 2005 and July 28, 2006

HARRISON, P.

This appellant was convicted in the St. Elizabeth Circuit Court on 16th July 2004 on an indictment charging him with the offence of manslaughter and sentenced to serve a term of ten (10) years imprisonment at hard labour.

We heard the arguments in this application for leave to appeal, granted the application and treated it as the appeal. We dismissed the appeal and ordered that the sentence commence as from the 16th day of October 2004.

The facts on which the conviction is founded are that on the 3rd day of December 1999, at about 5.45 p.m. prosecution witness Rosemarie McFarquhar, was standing at her gate in Lacovia in the parish of St. Elizabeth, talking to one

Petal. One chain away at one Miss Evadney's gate, the appellant was standing with a group of women, including his mother Vivienne Morgan who complained that the deceased Trevor Salmon had hit her with a bottle. The deceased and Morgan were having a relationship. The appellant said, in response, "No fe worry, cause me a go chop off him neck." The witness left and returned 15 minutes later. The group had gone. The deceased then appeared staggering from the direction the witness had seen the appellant and the group. The deceased, holding his neck, sat at the light pole, bleeding from his neck. When asked, the deceased said in the presence of McFarquhar and one Royland Powell "Da Chop me, Vivienne son chop me. Call Essue for me." Gasping, he fell forward. The appellant is called "Da". The medical evidence disclosed that the deceased bled to death as a result of a large incised wound 7" to 8" wide and 4" deep to the left side of his neck, cutting through the main blood vessels of the neck. A sharp instrument could have caused the wound. Death would have resulted within 2 to 3 minutes after its infliction.

The defence was one of alibi.

In an unsworn statement from the dock, the appellant said that he went to a lady's home at about 8.00 p.m. to collect money for work that he had done for her. A crowd of people then accused him of killing Trevor. As a result he ran away to his grandfather's home. A defence witness Jenetta Jones testified that the appellant came to her home at 5.00 o'clock one evening and was there until 8:00 o'clock when she paid him and he left. Within a short time thereafter she

heard a commotion. She did not remember the year of the incident. The appellant's mother Vivienne Morgan testified of her relationship with the deceased and of his assault on her with a bottle. The deceased again attacked her with a fence post on 3rd December 1999 at the said Miss Evadney's gate. She ran into the house. Five minutes later she heard something, came out and saw the deceased lying at a light post "rubbing his neck". She denied that the appellant was there when she was speaking with the women, denied that she told him that the deceased had hit her with a bottle and denied that the appellant said that he was going to chop off the deceased's neck.

The jury rejected the defence of alibi and convicted the appellant, resulting in this appeal.

The appellant had been indicted and tried previously in June 2001, on an indictment for murder of the said Trevor Salmon. He was found not guilty on the charge of murder, but the jury was unable to agree on the charge of manslaughter which had been left to the jury by the learned trial judge. He was then ordered to be re-tried on the charge of manslaughter.

Miss Nosworthy for the appellant argued before us the following five supplementary grounds of appeal.

> "(1) The Learned Trial Judge failed to give the jury any or any adequate directions on the offence of Manslaughter and more particularly Involuntary Manslaughter with which the Applicant was charged under the indictment. Had the Learned Trial Judge given any adequate directions the Jury would have been compelled to return a verdict of not guilty on

the indictment there being no evidence on which to convict the Appellant of Involuntary Manslaughter or Manslaughter simpliciter.

(2) The Learned Trial Judge erred in law when he wrongly treated the offence with which the Applicant was charged as a Murder charge reduced to Manslaughter by reason of Provocation having regard to the following:

(a) There was no indictment before the Court for Murder.
(b) Manslaughter by reason of Provocation is not an autonomous offence and cannot arise independently of a charge for murder.

(3) The Applicant having previously been acquitted of the offence of Murder on his first trial arising out of the same facts he could not be retried for the offence of Murder.

(4) The substantive trial, conviction and sentence of the Applicant for the offence of Murder constitutes a breach of section 20(8) of the Constitution of Jamaica. Accordingly the said trial of the accused is a nullity and his conviction and sentence therein ought to be quashed.

(5) FURTHER AND OR ALTERNATIVELY that the sentence of the Court namely ten (10) years at hard labour was manifestly excessive in all circumstances of the case having regard to the following factors:

(a) The circumstances leading to the infliction of the fatal injury

(b) The antecedent history of Applicant

(c) His previous good conduct and absence of any criminal record

(d) His apparent employment and industry up to the date of arrest

(e) The sentence passed is higher than the range of sentence usually passed in similar circumstances.

(d) (sic) The Learned Trial Judge placed undue emphasis on the punitive aspect of sentencing and failed to give any adequate consideration to the issue of reform and rehabilitation of the Applicant."

Miss Nosworthy submitted that the learned trial judge treated the case as one of murder where provocation arose, but there should have been no directions in respect to murder nor provocation. Nor could the appellant have been charged with voluntary manslaughter nor treated as such, as the learned trial judge did. The latter is not an independent offence but a verdict of manslaughter resulting from an indictment for murder, reduced to manslaughter due to provocation or diminished responsibility. She relied on Blackstone's Criminal Practice – 2000 Section B1. Curiously, counsel argued that the essence of the charge was an unlawful killing without an intent to kill. Consequently, she argued, at the close of the prosecution's case the learned trial judge ought to have withdrawn the case from the jury.

Further, counsel argued, because the learned trial judge dealt with the case in his summing up as one of murder and not manslaughter, this was irregular, in that a plea of autrefois acquit would preclude this. This would also be in breach of section 20(8) of the Constitution of Jamaica. The trial was

therefore a nullity and was, in addition, a miscarriage of justice. Counsel also referred to the case of ***DPP v Nasralla*** [1967] 10 JLR 1, in which similar grounds were argued.

Counsel for the Crown argued that there was a clear distinction between voluntary and involuntary manslaughter. The conviction was in respect of voluntary manslaughter and there was no valid complaint in respect of the directions of the learned trial judge.

On the trial of an indictment for the offence of murder, the jury is entitled to return a verdict reduced to one of manslaughter, on the said indictment, on the ground of provocation, having found that the accused had not committed murder in the circumstances.

In such circumstances, if the jury is so divided as to be unable to return a verdict of manslaughter, the trial judge has the power to order a retrial for the offence of manslaughter only. This is in fact "voluntary" manslaughter, for the reason that the accused had the necessary mens rea, that is, the intent to kill or to inflict grievous bodily harm, albeit due to provocation.

The authors of Blackstone's Criminal Practice 2000, B1.25, at page 123, discussing voluntary manslaughter said:

> "Voluntary manslaughter is not an offence one can be indicted for, but rather is a verdict which can result from an initial indictment for murder. The actual verdict, however, will be simply 'manslaughter' without the label of 'voluntary'."

This general rule prohibiting the prosecution from initiating an indictment for "voluntary" manslaughter is inapplicable in some circumstances. The exception is, where the court orders a retrial for the offence of manslaughter because the jury failed to arrive at a verdict on that reduced offence, having found the accused to be not guilty of murder on the indictment so charged. The jury would be seen to have failed to complete its functions. It would be viewed as a partial verdict.

In ***DPP v Nasralla,*** (supra) the respondent was indicted for murder and the learned trial judge Small, J left for the consideration of the jury the verdict of murder and the alternative verdict of manslaughter. The jury found him not guilty of murder, but, divided 8 to 4, could not agree on manslaughter. The jury was discharged and it was ordered that the respondent be re-tried "on the issue of manslaughter." The respondent's application to the Supreme Court to set aside the order of re-trial and for a declaration that he could not be tried again being in breach of section 20(8) of the Constitution of Jamaica was refused. The Court of Appeal reversed that decision. Their Lordships in the Privy Council, on appeal by the Director of Public Prosecutions in allowing the appeal, held that by the modern practice, a jury could, and did return a partial verdict. Section 20(8) of the Constitution was declaratory of the common law, and at a second trial of the respondent on an indictment for manslaughter the plea of autrefois acquit failed because the jury had not in fact returned a verdict of acquittal of the offence of manslaughter.

The Board (per Lord Devlin) identified and dealt with the plea of autrefois acquit. At page 5 he said:

> "... the question to be determined by the Board and which was in effect determined by both courts below is whether at common law and at a second trial of the respondent on an indictment for manslaughter a plea *of autrefois* acquit would succeed.
> On the face of it it would appear that such a plea is bound to fail. Obviously, what is fundamental to a *utrefois acquit* is a verdict of acquittal of the offence charged. In the verdict returned by the jury in this case there is no acquittal of manslaughter."

and at page 6:

> "There are three categories of verdict in a criminal case. The first is the general verdict which is of conviction or acquittal upon the whole count. The second is the partial verdict. When at common law or by statute a jury is empowered to convict of a lesser or different crime to that charged in the count, they can be asked to return partial verdicts specifying the crime to which each verdict refers."

In the instant case, the complaint in ground one, was that the learned trial judge having failed to give any adequate directions on the offence of involuntary manslaughter charged in the indictment deprived the appellant of an acquittal, there being no evidence to convict the appellant of manslaughter.

The learned trial judge's directions to the jury on the offence of manslaughter, on page 22 of the record reads:

> "... the prosecution has to prove that the death was caused by an act of the accused man, and that that act was an unlawful act. That it was a deliberate act and that it was done with the intention to kill or caused grievous bodily harm to the deceased. But, in this particular case, although all those ingredients

> that I have mentioned before would amount to a definition of murder, in this particular case, this accused man was so provoked that he was not in control of himself. He did something on the spur of the moment and so, the result is not murder, but manslaughter.
> So, the prosecution is saying that the accused man carried out an unlawful, deliberate act with the intention to kill or caused grievous bodily harm and that act caused the death of Trevor Salmon. But, at the time he was so provoked by what he had been told by his mother, concerning what Trevor Salmon has done that he was not in control of himself."

The learned trial judge here properly pointed out to the jury that the alleged killing by the appellant was a deliberate act, with the requisite intention to amount to murder, but because of the legal provocation that arose, the offence to be considered was reduced to manslaughter. The prosecution had to accept that legal provocation existed.

It is incorrect to argue that the offence charged was "involuntary manslaughter." The offence charged was "voluntary manslaughter." No directions on involuntary manslaughter could have been given by the learned trial judge in the circumstances. The directions given were proper and adequate and there was ample evidence before the jury from which they could properly consider the offence of manslaughter as charged. There was no merit in this ground.

Ground two is a complaint that the learned trial judge wrongly treated the offence charged as murder reduced to manslaughter by reason of provocation because, there was no indictment for murder before the court, nor can

manslaughter, in that circumstance be treated as an autonomous offence in that it "cannot arise independently of a charge of murder." This ground is misconceived. The appellant could not have been tried on an indictment for murder, for the reason that he had specifically been acquitted of the offence of murder, at his former trial in June 2001. A plea of autrefois acquit would have been a successful response to such an indictment for murder. The learned trial judge was correctly explaining to the jury the manner in which the charge of manslaughter arose, in that the issue of manslaughter was still to be decided due to the partial verdict at the previous trial. This ground also failed.

Ground three also failed for the reasons advanced above in respect of ground two. The prosecution was not purporting to re-try the appellant on an indictment for murder.

Ground 4 complains that the appellant was tried, convicted and sentenced substantively, for the offence of murder, in breach of section 20(8) of the Constitution of Jamaica. The trial therefore is a nullity and his conviction and sentence should accordingly be quashed.

It is a confusion of thought to argue that the appellant was undergoing a "... substantive trial ... for murder..." He had been acquitted, at the previous trial, of the offence of murder, and was not being retried for the said offence, whether substantively or otherwise. That would have amounted to a breach of the said section 20(8). Nor had the appellant been acquitted of the offence of manslaughter; that issue had been left outstanding. The indictment for

manslaughter was properly preferred due to the previous partial verdict (**Nasralla v DPP,** supra). No breach of section 20(8) of the Constitution was committed. This ground was also without merit.

Ground five complains that the sentence of 10 years imprisonment at hard labour was manifestly excessive.

The facts put forward by the prosecution related to the incident portray the appellant as reacting with a cold and deliberate statement to the complaint that the deceased had hit his mother with a bottle. He said "No fe worry, cause me a go chop off him neck." This was without hesitation, a clear response of intention by the appellant, to resort to extreme action. The learned trial judge in sentencing the appellant took into consideration the appellant's conduct in relation to his mother. He said, inter alia, at page 62 – 63 of the record:

> "... I cannot pretend that I don't understand the nature of the provocation, which could have led to what the jury has found that you did; ... young men are attached to their mothers. You said something about somebody's mother in Jamaica, it breaks a very strong reaction. ...
> I believe it would be wrong, even though you are a young person, even though it is the first offence, it could be wrong to spend (sic) you home, after a man had died in that way. ...
> The Court has to show to our society that people can't take out their feelings on others in that way. ...
> I will, in fact, make the sentence less than if it was a different sort of situation."

By this statement the learned trial judge was mindful of the principles of deterrence for the protection of the society in imposing punishment on the appellant. A balance was maintained taking into consideration the appellant's

youthfulness and the seriousness of his act, in the circumstances of the case. We did not find that a sentence of ten years could in any way be seen as manifestly excessive on the facts of the case. We could find no basis to disturb the sentence.

For the above reasons we made the orders stated above.