[2010] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APEAL NO. 74/2008

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A. (Ag.)

DWIGHT WRIGHT v. REGINA

Hugh Wilson, for the appellant.

Miss Dahlia Findlay for the Crown.

25, 26 February and 23 April 2010.

MCINTOSH, J.A. (Ag.)

[1] On the 2nd June, 2008, the appellant Dwight Wright was convicted for the murder of Marvin Thorpe, in the Circuit Court for the parish of Hanover, after a trial which lasted four days. He was sentenced on that same day to life imprisonment with the stipulation that he would be eligible for parole after he had served seven years.

[2] Mr. Wright applied for leave to appeal against his conviction and sentence and the single judge who considered and granted his application expressed the view that he "should be afforded the

opportunity to canvas the issue as to whether provocation was properly withdrawn from the jury". The learned judge added that although his defence was that of self defence, "it is not inconceivable that in the presentation of that defence provocation did not (sic) arise as a subsidiary issue".

[3] Accordingly, the single ground of appeal argued by Mr. Hugh Wilson, counsel for the appellant, was that:

> "**the learned trial judge erred by withdrawing the issue of provocation from the jury and thereby deprived the appellant of the right to have the issue of manslaughter left to the jury."**

[4] We heard this appeal on the 25th February 2010 and gave our decision *sans* reasons on the 26th February 2010, when we allowed the appeal, set aside the conviction for murder and substituted therefor a conviction for manslaughter. We now give our reasons for that decision.

The Prosecution's Case.

[5] The evidence of the circumstances which led to the death of Mr. Marvin Thorpe came from the prosecution's sole eye witness, Dwayne Haughton who testified that at about 9:00 pm, on the 7th August, 2006, the date which was earmarked for the celebration of the anniversary of Jamaica's independence, he was in Lethe Square, in the parish of Hanover, playing music on a turntable. It appeared that he was

providing the music for the night's festivities. He was the person in the role popularly referred to as 'the Selector'.

[6] While he was so engaged, he saw the appellant, Dwight Wright, walk over to Marvin and they started to argue. They were arguing for about 5 minutes. Then he saw that the appellant had his hand in his right pocket "and then he stab Marvin and run off." The area was lit by street lights, light from the stall where he was and lights from a Petcom Service Station across from the stall. He had an unobstructed view of the two men and he was able to see that it was a ratchet knife that the appellant had used to stab Marvin. He was also able to say that the appellant stabbed Marvin because he saw that he "pushed the knife".

[7] Marvin did nothing before the appellant stabbed him but after the stabbing, he picked up a piece of iron that was leaning against the stall/shop to the side of which they were arguing and ran after the appellant, trying to fling the iron at him but he was unable to do so and fell to the ground. In cross examination he said the piece of iron was beside Marvin for the duration of the argument/dispute but he denied the suggestion that Marvin had used the iron pipe to hit the appellant and that the appellant had stabbed Marvin as he moved to hit him again.

[8] Another prosecution witness David Hemmings testified that he was at Lethe Square that night and had seen the appellant run pass him. Then he

had seen Marvin with a knife stuck in his chest, heading in the appellant's direction. Marvin had pulled out the knife, made three steps and then collapsed. He did not recall seeing Marvin with a piece of iron in his hand neither when he was running after the appellant nor when he collapsed.

The Defence.

[9] The appellant gave an unsworn statement in which he told the jury that he was in Lethe Square that night of the 7th of August 2006 and had seen Dwayne Thorpe (clearly, referring to the deceased). They had a dispute and the deceased attacked him with a piece of iron. "When he attacked me with the piece of iron" the appellant said, "he hit me on my hand and when he was going to hit me again with the piece of pipe iron I pushed the knife forward and stab him in the left side and I ran off".

The Trial Judge's Directions on Provocation.

[10] In summing up the case to the jury, the learned trial judge gave adequate directions on the law relating to self defence and directed the jury in the following terms as it relates to provocation:

> **"The prosecution must also prove that the killing was unprovoked. The prosecution must disprove provocation, legal provocation, that is, at the time the accused killed the deceased there was not anything said or done to the accused that caused him to lose his self control so that he was not master of his mind when he committed the act. The prosecution must prove that because if**

> **the prosecution does not disprove provocation it means then that the killing was done under provocation, if there was evidence of that …And there would be a killing but the killing would be…manslaughter. The provocation reduces the murder to manslaughter."**

[11] Then the learned trial judge went on to tell the jury that the prosecution had led evidence that there was not anything said or done to the accused at the time of the killing. There was an argument but on the prosecution's case there was nothing from the witness (Haughton) that amounted to provocation. He continued that on the case for the defence, the accused said there was a dispute but he gave no evidence of any words said by the deceased or anybody with him that caused him to lose his self control.

> **"So there is no evidence on this trial of provocation. So there is no consideration for you of the defence of manslaughter… But the prosecution must still disprove provocation."**

This direction formed the basis of the appellant's complaint.

Submissions.

[12] Mr. Wilson submitted that the fundamental issue which arose was whether there was evidence from which a jury properly directed, could reasonably find that the appellant had been provoked to lose his self control. If there was any such evidence, the learned trial judge should

have pointed this out to the jury and invited them to assess and determine whether provocation did arise.

[13] That was the clear duty of the trial judge in accordance with the provisions of section 6 of the Offences Against the Person Act which reads:

> **"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."**

[14] This section requires that two conditions be left to the jury:

1. The subjective condition of whether anything said or done caused the appellant to lose his self control; and

2. The objective condition of whether those things said or done might have caused a reasonable man to have reacted as the appellant did.

[15] The section therefore takes away the power previously exercisable by a trial judge to withdraw the issue of provocation from the jury where there was evidence potentially capable of satisfying the subjective condition if the judge considered that there was no evidence which

could lead a reasonable jury to conclude that the provocation was enough to make a reasonable man do as the accused did. It is now for the jury to decide whether the objective condition was satisfied.

[16] The in-depth nature of counsel's research into this area of the law was evident from the wealth of authorities cited in the course of his submissions. We duly commended him for his industry and the fact that only some of the authorities are referred to herein, is by no means meant to detract from that. There is one central theme running through the authorities and that is that it is the duty of the trial judge to leave the issue of provocation to the jury wherever there is evidence on which they would have found as a reasonable possibility that the appellant was in fact provoked to lose his or her self control - (see **Franco v. The Queen (Antigua and Barbuda)** [2001] UKPC 38; **Robert Smalling v The Queen (Jamaica)** [2001] UKPC 12; **David John Cambridge** [1994] 99 Cr. App. R. 142; **Ethel Amelia Rossiter** [1992] 95 Cr. App. R. 326)

[17] However, an issue of provocation could only arise if the trial judge considered that there was some evidence of a specific act or words of provocation resulting in a loss of self control (see **Regina v. Acott** [1997] 2 Cr. App. R 94).

[18] Mr. Wilson further submitted that although the appellant's case was based on self defence, provocation was a live issue for the consideration

of the jury. There was evidence from which a reasonable jury properly directed might have concluded that the appellant was provoked to lose his self control. Once the jury rejected self defence, they were obliged to consider the evidence that was capable of constituting provocation. It was for the jury to draw the appropriate inferences and in withdrawing the issue from the jury, a miscarriage of justice had resulted. He therefore sought an order of this court quashing the conviction for murder and substituting in its stead a conviction for manslaughter.

[19] He relied on the words of Lord Justice Stuart-Smith in **Benjamin James Stewart** [1996] 1 Cr. App. R. 229 at page 236C, as follows:

> **"It is now well established that even if the defence do not raise the issue of provocation and even if they would prefer not to because it is inconsistent with and will detract from the primary defence, the judge must leave the issue to the jury to decide if there is evidence which suggests that the accused may have been provoked and this is so even if the evidence of provocation is slight or tenuous in the sense that the measure of the provocative acts or words is slight."**

[20] This was in line with the earlier decision in **Joseph Bullard v The Queen** [1957] AC, 635 where, at page 642, Lord Tucker 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 the issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has 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 a reasonable doubt that the killing was unprovoked."**

[21] It was also held in **Bullard** that there was no proposition of universal application that the same evidence that had been adduced to support an unsuccessful defence of self-defence could never be relied on, in whole or in part, as affording provocation sufficient to reduce the crime from murder to manslaughter. "Conduct which could not justify might well excuse".

[22] In this case, as in **Bullard**, the fact that the jury rejected the defence of self defence did not necessarily mean that the evidence for the defence was not of such a kind that even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged its burden of proving that the killing was unprovoked – it could not be said that such a result was impossible.

[23] Mr. Wilson submitted that following **Acott**, if there is a reasonable possibility of provocative conduct, it must be left to the jury. In the instant case the provocative conduct would arise firstly, on the dispute between the appellant and the deceased. This arose on the case for both the prosecution and the defence.

[24] Secondly, on the defence's case the deceased used a piece of iron pipe to hit him on his hand. The iron pipe was also mentioned in the prosecution's case, albeit at a different stage in the incident from that described by the appellant. A third feature for consideration was the age of the appellant at the time of the killing. He was then sixteen years old.

[25] The accused had given an unsworn statement so that any attempt at assessing his state of mind would involve the forbidden realm of speculation. There was no opportunity of exploring what could have caused him to react as he did but in this case there was a reasonable possibility, as opposed to a speculative possibility, that there was provocative conduct on the part of the deceased that caused the appellant to lose his self control. The trial judge was obliged to look at that in a situation of life threatening conduct even if it did not amount to self defence. The life threatening conduct could be inferred from the circumstances.

[26] Miss Findlay for the Crown could not but concede that the learned trial judge ought, in the circumstances of this case, to have left provocation for the consideration of the jury and fell into error when he withdrew the issue from the jury.

Conclusion

[27] The submissions by counsel for the appellant, so vigorously advanced, were indeed well-founded. A trial judge's duty is clear, as it relates to the issue of provocation, in circumstances such as those in the instant case. We adopt the words of Lord Tucker, in **Bullard**, as being entirely applicable to this case:

> **"Every man on trial for murder had the right to have the issue of manslaughter left to the jury if there was any evidence on which such a verdict could be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice and it was idle to speculate what verdict the jury would have reached."**

[28] We accordingly agreed that the verdict of guilty of murder could not stand and had to be set aside. A verdict of guilty of manslaughter was substituted therefor as there was no question that the jury found that the appellant had unlawfully killed the deceased Marvin Thorpe.

[29] The sentence of life imprisonment with eligibility for parole after seven (7) years was also set aside and we determined that a sentence of seven (7) years imprisonment was appropriate in all the circumstances.

ORDER

The order of the court was therefore as follows:

Appeal allowed. Conviction and sentence for murder set aside and a conviction for manslaughter is substituted with a sentence of seven years imprisonment to commence on the 2nd September, 2008.