27-04-06

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 5 OF 2004
(Ind. 30/03)

BETWEEN

STEPHEN EBANKS

APPELLANT

-AND -

HER MAJESTY THE QUEEN

RESPONDENT

BEFORE: **THE RT. HON. MR. JUSTICE E. ZACCA, PRESIDENT**
THE HON. MR. JUSTICE M. TAYLOR, J.A.
THE HON. MR. JUSTICE I. FORTE J.A.

Appearances: Michael Wood Q.C. instructed by James Austin Smith of Walkers for the Appellant and Adam Roberts for the Crown.

Heard: November 15, 2005 **Delivered: 27th April, 2006**

ZACCA P.

Reasons for Judgment

On November 15, 2005 we allowed the appeal, quashed the conviction for murder and vacated the sentence imposed. A conviction for Manslaughter was substituted and a sentence of 10 years imprisonment imposed. Time spent in custody to be taken into account.

The appellant was charged with the murder of George Hallmark Ebanks on March 29, 2003 at Eureka Drive, West Bay, Grand Cayman. At a trial before a Judge and Jury, he was unanimously

convicted by the jury of the charge. He now appeals against the conviction and sentence.

The case for the Crown rested on a written statement given to the police by the appellant on the 29th of March 2003 at 3.20 p.m.

This written statement was tendered in evidence by the Crown without objection from the defence. This statement was relied on by the Crown and the appellant in his defence.

The facts of the case are set out in full by reference to the written statement which follows:-

> "I Stephen Edwardo Ebanks wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say maybe given in evidence.
>
> x Stephen Ebanks
> x D. Groves DC 144
> x M. Bodden DS #35
>
> Today Saturday, the date I don't know
> I was cleaning a boat for Mr. Lee and them, after I got through cleaning the boat they paid me twenty dollars, then I wine up walking to the shop after they paid me, I bought two cigarettes, one box of matches, a soda and one of them lil cakes. After that I bought a eight dollar drugs, I went straight home I pushed the front door open because the front door cant lock. So I go straight into the house, something tell me to go in my brother L.B. room, I saw Halmark inside there with a

machete and a knife. Then I seen him like he got up from sitting on L.B. SEE bed, he had the knife in his hand, so I offered him a lil drugs, he was glad for it, but at first he had looked angry when I came in. So I went into the lil dining hall and he came, I gave him piece of rock cocaine and I had piece, he hit his first, so when he finish hitting, I used his pipe, while I was using my share I seen him made a funny move like he wanted to go for his knife, so he kinda like held back because my eye caught him, so he said if I got any more left in a kind of vexation way. "I said no I don't have anymore left see the paper on the ground". So I pulled out ten dollars he acted like he wanted the money I told him no I'll go and get it, I have a bicycle, so I jumped on the bicycle then I came back with the ten dollar drugs. I gave him piece then I had piece for myself, then he hit what I gave him, it was my turn him now, so while I was hitting the breeze was blowing through the window, so I turned my back towards him so the breeze did't bother what I was doing. So while I was using the drugs now something tell me to look behind, so when I look behind, I saw Halmark behind me with a knife in his hand as if he was getting ready to stab me, at this time I was stooping down using the drugs, so I spun around quick and put my right hand up SEE and blocked it that is how I got these cuts to my hand. He then took his foot pushed the back of my head causing the front of my head to hit the wall, some how I wine up getting on my feet, then when I got on my feet then he kind of swiped after me twice with the knife causing the two lil scores to get on my left hand and shoulder. Some how I kinda run up to him and he wine up punching me in my mouth, so some how I wine up grabbing my

> mothers kitchen knife then me and him ended up fighting and I slipped down, when I slipped he came towards me, and I hold my hand up with the knife, he was still coming towards me, to stab me, and I wine up stabbing him, then me and him was struggling for a while he ended up grabbing my hand then I ended up stabbing him again, he was running to get the machete now, then I kinda run up behind him and stab him, I think it caught him like in his back, I stab him because I was trying to stop him from getting the machete. Then we ended up fighting again, I think I might have stabbed him again I don't know, then I asked him what happen and he didn't answer me, I realize a lot of blood was on the floor and he looked like he SEE gave up, I then realize that he was hurt bad. I run outside and tell Brenda to call the police, but before that Halmark had picked up his knife and went outside. I just waited until the police came. The police came and handcuff me and told me that I was arrested for suspicious of murder they put me in the car. I defended myself, it is self defence.
>
> I have had the above statement read over to me and I have been told that I can correct alter or add anything I wish. This statement is true I have made it of my own free will. Stephen Ebanks."

Dr. John Morgan performed a post mortem examination on the body of the deceased on March 30, 2003. He found some 24 injuries but stated that apart from two penetrating wounds on the thorax and one on the back all the other wounds were superficial. Death was

due to massive haemorrhage with several litres of blood in the thoracic cavity as a result of a puncture wound to the left ventricle of the heart.

At the trial the appellant was represented by Mr. Z. Harrison Q.C. The defence of the appellant was that he was acting in self defence. He did not rely on the issue of provocation and no direction was given by the trial judge on the issue of provocation.

Prior to the summing-up the learned trial judge had a discussion with Counsel for the appellant and the Crown in the absence of the jury. Counsel was being asked to assist the Court on certain directions to the jury. The following ensued:-

> **"Mr. Harrison**: I don't usually argue much for provocation in these matters, but it seems to me My Lord that manslaughter may arise in two situation, one, the unlawful and dangerous act – the inherently unlawful and dangerous act committed resulting in death but without the specific intent to kill. My learned friend has spoken to that ..... It may be, My Lord, that provocation may arise in this particular case in the very circumstances which led allegedly to self defence: The acts of demanding drugs, demanding more drugs, making a funny move and so on.
>
> **The Court:** Well provocation only arises in law when the accused acts on the sudden, before he has had time for his passions to cool and in circumstances where a reasonable

> man would have ..... not been able to control his reaction. We don't have evidence of those things, do we.
>
> How could I infer from the state of the evidence that the accused, having been provoked by something, acted on the sudden? In other words, immediately after the something occurred before there was time for his passion to cool. You need to know what the triggering act was and then you need to know when he acted or reacted to it. You need to know the time factor.
>
> **Mr. Harrison**: My Lord that would require and I wish to say, My Lord, that I preface by saying that I don't usually in this kind of case lean on manslaughter arising from provocation, but its just that there have been situations where the acts or act to which the accused responds to defend himself or herself may give rise to an act of provocation. I am diffident, My Lord, as to whether that is the situation here.
>
> **The Court**: Unless you have anything more to say, its my view that there is no air of reality to a provocation theory; in other words, there is an absence of evidence from which any reasonable trierof fact could infer all of the various elements of provocation. They would be in the realm of speculation."

Mr. Harrison indicated that he thought that provocation may arise but he was diffident in putting it forward as a defence because it would detract from the appellant's defence of self defence

The learned trial judge gave no direction on the issue of provocation which could lead to a verdict of manslaughter. He however, left with the jury a verdict of Manslaughter based on the lack of intent.

Mr. Michael Wood Q.C. who did not appear at the trial relied on the following amended grounds of appeal.

Ground 1

> The learned trial judge should have reminded the jury, in summing-up, to disregard the inappropriate remarks made by prosecuting counsel in opening the Crown's case to the jury.

Ground 2

> The learned trial judge failed to direct the jury as to the limited use it should make of the evidence of the defendant drug consumption.

Ground 3

> The learned trial judge erred in failing to leave the defence of provocation to the jury.

Ground 4

The conviction for murder was, in all the circumstances, wrong.

Before us Mr. Wood was content to rely on his submissions with respect to ground 3.

He submitted that the factual evidence of what occurred prior to the deceased's death that could amount to provoking conduct came from the defendant's written statement, namely:

(i) the hostile behaviour coupled with the violent reputation of the deceased;

(ii) the deceased's attack on the appellant;

(iii) the deceased being armed.

Mr. Wood also submitted that there was evidence of loss of self control by the appellant namely:-

(i) the appellant's inability to remember how many times he had stabbed the deceased;

(ii) the appellant's later statement that he was in a rage;

(iii) the appellant's inability to remember the degree of force he used.

The law in the Cayman Islands with respect to leaving the issue of provocation to the jury is set out in s.185 of the Penal Code which is the same as s.3 of the Homicide Act 1957 in England.

s.185 states:

> "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 the reasonable man."

Where there is evidence that can amount to provocation, whether or not the defence raises it is the duty of the trial judge to leave it to the jury for their consideration.

In the case of ***Bullard v R [1957] 42 Cr. App. R. 1, [1957] A.C.635*** Lord Tucker at p. 6 42 stated:

> "It has long been settled law that if on the evidence, whether of the prosecution or the defence, there is any evidence of provocation fit to be left to the 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 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 reasonable doubt that the killing was provoked."
>
> at page 644:
>
> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

R v Rossiter [1992] 95 Cr. App. R 326 R v Dhillon [1997] 2 Cr. App. R 104 .

In ***R v Anthony Gerrard Van Dongen and Mitchell Van Dongen E.W.C.A. Crim. 1728,*** May L.J. at pgh. 4 of his judgment said:

> "A defence of provocation was not advanced in evidence or forensically for either defendant. Whether or not to rely on a defence of provocation is a dilemma which often faces those representing defendants in murder trials whose main defence is self-defence or lack of intent. A defence of provocation may be uncritically inconsistent with, or may otherwise weaken, other defences. But it is well established that the judge should direct the jury to consider a

> defence of provocation, even if it is not the defendant's overt case, if there is some evidence from whatever source from which the jury could find that there was provoking conduct which resulted in the defendant losing his self control."

See also ***R v Acott [1997] 2 Cr. App. R. 94. R v David John Cambridge [1994] 99 Cr. App. R 142.***

Where a judge is obliged to leave provocation to the jury, he should indicate to them, unless it is obvious, what evidence might support the conclusion that the defendant had lost his self control; this is particularly important where the defence has not raised the issue.

In our view there was evidence of provocation in the appellant's statements which formed both the Crown's and the appellant's case at trial, and the trial judge was in error in not leaving the issue of provocation for the consideration of the jury.

The ground on which the Judge specifically declined to put the issue of provocation to the jury was the absence, in his view, of evidence from which it could be inferred that the accused acted, "on the sudden, before there was time for passion to cool." There was no evidence, the Judge said, of the time that elapsed between the

alleged provocative act and the infliction of the fatal wound that penetrated the deceased's heart.

But the story that the jury might find to emerge from the accused's statements if they accepted it, was of a continuing ferocious struggle involving two men armed with knives which started with the alleged provocative act of the deceased and involved the infliction of two dozen wounds. It would have been open to the jury to conclude that the fatal wound, whenever inflicted, was delivered in sufficient proximity to the threatening act described by the accused as having initiated the struggle that it could be said to have been inflicted, "before there was time for passion to cool."

Counsel for the Crown submitted that if the Court was of the opinion that there was a misdirection or non direction on the issue of provocation, then this Court should apply the proviso (s.9 Court of Appeal Law).

It is accepted that there will be cases where the proviso may properly be applied even where the issue of provocation should have been but was not left to the jury.

This however is not such a case. The verdict of the jury makes it clear that they rejected his evidence that he acted in self defence.

But it does not follow that they would have rejected a defence of provocation. There was clear evidence that the deceased was of a violent character, and that he had acted in a violent and aggressive conduct towards the appellant. According to the only evidence before the jury on the point, it was the deceased who had attacked the appellant. The evidence of the appellant inflicting a substantial number of injuries to the deceased was evidence suggesting a loss of self control.

This is therefore not a case in which it would be proper to apply the proviso. It is for these reasons the Court quashed the conviction for murder and substituted a conviction for manslaughter.

In imposing a sentence of 10 years the Court considered the previous convictions of the appellant and a number of cases brought to the attention of the Court.

Zacca, P.

Taylor, J.A.

Forte, J.A.