

IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CICA (CRIMINAL) APPEAL # 12/93

BEFORE: The Rt. Hon. Mr. Justice Edward Zacca, President
The Hon. Mr. Justice Kenneth C. Henry, JA.
The Hon. Mr. Justice James Kerr, JA.

REYNALDO BARRINGTON WITTER V. REGINA

Mr. Keith Collins for the Appellant.
Mr. Samuel Bulgin for the Crown.

22ND NOVEMBER, 1994

ZACCA (P.)

The appellant was charged with the murder of Charles Marvick Moore on the 7th April, 1992. He elected to be tried by Judge alone. The appellant was found not guilty of murder but guilty of Manslaughter on the grounds of provocation. He was sentenced to (5) five years imprisonment. From this conviction he has appealed.

The appellant got married in October, 1991 to Maria after a friendship which began in 1988. They had two children. By March of 1992 Maria was having an affair with the deceased, Charles

Marvick Moore. There was evidence that on March 30th, the appellant went to the house of a friend of his wife. There he discovered his wife in the bathroom, semi-nude and the deceased in the passage way completely nude.

The appellant next saw his wife the following day. Things seemed to settle down for a week. However, on the evening of the 6th April, 1992, the appellant who is a trained mechanic was doing some work on a motor vehicle. Amongst his tools was a knife with a blade of five or six inches. Maria, his wife returned home at about 9:00 p.m. but changed her clothes and went out. The appellant enquired where she was going but she did not reply.

He changed his clothes intending to take his wife in the car to her destination. He placed the knife in his pocket although he stated that he had intended to return the knife to the tool box. His wife refused to go with him and eventually walked off towards Eastern Avenue.

The appellant went to two clubs frequented by his wife but did not find her. He later proceeded to the deceased's apartment on Theresa Drive in Windsor Park. The appellant parked his car on Hawkins Drive which runs parallel to Theresa Drive. He then went to the deceased's apartment. He discovered that his wife was in the apartment with the deceased. He knocked on the door and called out his wife's name. The deceased went towards the

appellant with a heavy pipe which was in fact a jack for a television satellite dish. The deceased was a television repair man.

The appellant took the knife out and the deceased retreated into the house and subsequently ran out of the house. He then confronted his wife and punched her in the face. She began to bleed. After an argument the appellant and his wife left the apartment and in leaving the appellant is alleged to have stated "If I catch him tonight I go fucking kill him". The appellant denied using these words.

The appellant tried to get his wife into the car which was parked on Hawkins Drive. She told him to pick her up on Williams Drive which also runs parallel to Hawkins Drive. He drove the car to Williams Drive but did not see her and returned to Hawkins Drive. He enquired from John Chisholm who was on the balcony of his apartment which is adjacent to Hawkins Drive, if he had seen Maria. Maria had apparently left the scene and took no further part in the events of that night. The appellant went towards his car when the deceased rode up on his bicycle.

Sandra Campbell testified that she heard screaming. She walked unto Williams Drive and looked in the direction of Mango Turn. Under a street light she saw the appellant standing over somebody. He had in his hand a shining object looking like a knife. His hand went up and down twice in a stabbing motion.

She also saw the appellant move his feet as if to kick the man on the ground. She returned to her apartment, telephoned the police and returned to the scene where she found a man lying on his back and bleeding.

John Chisholm in his evidence stated that he was on the balcony of his apartment when the deceased arrived on his bicycle. He got off his bicycle some 15 - 20 feet from the appellant's car. Words were exchanged between the two men and the deceased backed away as the appellant walked towards him. There was a scuffle between the two men and the deceased fell on the ground. He got up and ran. The appellant pursued the deceased into Mango Turn. Another scuffle took place and Chisholm stated that he lost sight of the deceased. He also saw the appellant kick Moore. Chisholm left his balcony and went to Williams Drive where he found the deceased lying on the ground. He was bleeding from his chest.

In sworn testimony, the appellant stated that when he reached his car, he saw a man riding towards him on his bicycle. He realized it was the deceased when he said "Come, finish what you started." The deceased sprang at him with a pipe, which was in fact another satellite dish jack, but smaller than the one which the deceased had at his apartment. The appellant thought it was a machete. He did not wish to turn his back to the deceased and therefore he backed away down Hawkins Drive. He then took out his knife to defend himself. The deceased swung the pipe towards

him and he managed to block the blows with his hand. The pipe finally fell from the hand of the deceased who then picked up a big stone and charged at the appellant. The deceased swung the stone at him and at the same time in self defence, he plunged at the deceased with both hands towards his chest. He then found himself sitting on the ground bleeding from his eyebrow. The deceased ran towards and into Mango Turn. The appellant pursued him and the deceased staggered and fell face down. The appellant then slashed at his back with the knife and kicked him twice. The appellant turned the deceased over and he saw blood on his shirt. He then realized that the deceased must have been injured when he charged at the appellant with the stone. The deceased was taken to the George Town Hospital where he was pronounced dead on the 7th April, 1992.

A post Mortem examination was conducted by Dr. Jay Barnhart. He stated that the cause of death was massive loss of blood due to a four inch deep stab wound going from front to back located 1 1/2 inches to the left of the midline passing through the left side of the breast bone, completely through the heart, trisecting the right coronary artery and puncturing the aorta. There was also a superficial cut along the right side of the face in front of the ear and a superficial cut on Moore's back. The doctor testified that a person could survive ten to twelve seconds in a conscious state after the infliction of the stab wound and he could flee for that period of time. He could not, however, ascribe a specific time limit to how long the deceased survived

after the injury. The ten to twelve seconds was based on the premise that the heart stopped immediately, but it is also possible that it did not. The injury was consistent with the assailant being over him as the wound was inflicted. It was also consistent with the appellant's version of the incident.

After the incident the appellant went to the George Town Police Station where he was seen by Sergeant Khan. He was then bleeding from a cut to his forehead. He told Sergeant Khan that a man hit him with a rock and that he hit the man with something. When asked as to what happened, he replied "You will soon know" and then "call the ambulance. A man is dying in Windsor Park. Let me help save the mother fucker."

On returning the car to Mrs. Roberts who is the owner of the car, he told her that he had got into a fight with a young man who he thinks is a friend of his wife. He also said to her "pray for me." In an interview with the police the appellant described the incident but denied having a knife or stabbing the deceased. In subsequent statement to the police, the appellant admitted using a knife.

Photographs were taken of the area. One of the photographs of Hawkins Drive shows a pipe on the ground and which was admitted in evidence. The learned trial judge in his reasons for his decision stated that this pipe must have been the second satellite dish jack wielded by the deceased and that it was found

at a spot which must have been out of sight of anyone standing on Mr. Chisholm's balcony.

Another photograph shows blood stains on mango Turn about 20 yards from where the deceased came to rest. The learned trial judge state that the blood stains were located at about the spot where Chisholm puts the second scuffle as starting.

Evidence was also led on behalf of the appellant of his good character and of the bad character of the deceased. In this regard a conviction sheet of the deceased was tendered in evidence. This showed the deceased having seventeen previous convictions between 1980 and 1990. These convictions include several for offences of violence - three for drug offences and one for damage to property.

The main ground of appeal argued on behalf of the appellant was that the learned trial judge erred in finding the appellant guilty of manslaughter as this verdict was inconsistent with his finding of facts.

Mr. Keith Collins, counsel for the appellant submitted that the learned trial judge ought to have found that the appellant inflicted the injury in self defence, having regard to his findings of facts.

It will be necessary to look at the Judgment of the learned

trial judge and to assess and analyse his findings of fact.

In his judgment at page 9, the learned trial judge in concluding as to where the stab wound was inflicted states:

"Where was the fatal stab wound inflicted? On Hawkins Drive, in Mango Turn where the blood stains are located, or at the corner of Mango Turn and Williams Drive, where Moore came to rest? If I accept what Sandra Campbell has to say it is more likely that the stab wounds were inflicted in the last of the tree places. However, it is possible, given the heat of the circumstances that she mistook a slashing motion for a stabbing motion. After all there were two slashing cuts to Moore and only one stab wound. It is unlikely, given Dr. Barnhart's evidence, that the stab wound was inflicted in Hawkins Drive, but it is not impossible given that the ten to twelve seconds flight is predicted on an immediate cessation of the heart beat which may not have occurred simultaneously with the infliction of the injury. It seems more likely that the stab wound was inflicted where the second scuffle started but we have no evidence from any source which can lead us inevitably to that conclusion and Dr. Barnhart says there need not be blood stains at the point of injury.

In truth, I am unable to reach a definite conclusion on where the fatal stab wound was inflicted and so I must make my findings on the basis that it occurred where the accused said it did, in Hawkins Drive."

Sandra Campbell's evidence was that she saw an incident take place at the corner of Williams Drive and Mango Turn. She described a stabbing motion twice. Also she saw a kicking motion.

If the stabbing incident took place on Hawkins Drive, she was

there not an eye witness to that stabbing.

The evidence of John Chisholm was the he saw two scuffles, one of which was in Mango Turn. He neither describes a stabbing nor a slashing.

The court was therefore left with the evidence of the appellant as to where and how the stabbing took place, the learned trial judge having accepted that the stabbing took place on Hawkins Drive.

Again at page 9 of his judgment, the learned trial judge stated:

"Photographs were taken of the area. Two matters are worthy of note here. One photograph shows a pipe on the ground which has been admitted as an exhibit and which must be the second satellite dish jack wielded by Moore. It was found at a spot which must be out of sight of anyone standing on Mr. Chisholm's balcony."

By this finding the learned trial judge accepted that the deceased wielded a satellite dish jack at the appellant as he stated in his evidence. This incident occurred immediately prior to the stabbing.

The learned trial judge also stated at page 10:

"John Chisholm was, to my mind an honest witness, but he did not see everything that went on. He did not see either man with a weapon, whereas both protagonists were armed, and he was unsuspected completely for at least part of the time.

But if one takes stock of the action of

the accused before and after the actual stabbing one is led irresistible to the conclusion that he was not acting in defence of himself when he engaged Moore in combat in Hawkins Drive. True it is that Moore cannot have been in Hawkins Drive on an innocent errand. He was not on his pathway home. He came armed with a weapon. He used the weapon at some stage."

At page 11 is stated:

"In any violent engagement there may well be actions of defence and offence by both combatants, and it may well be that the actual fatal move was a defensive one. But I am satisfied beyond doubt that the accused was engaged in combat with Moore in Hawkins Drive and it was not a situation where he was defending himself against violence. He was out to commit violence himself when confronted by Moore."

If the stabbing was inflicted in self defence then it would not matter that the appellant was out to commit violence himself when confronted by Moore.

The learned trial judge failed to make any finding of fact as to whether or not the deceased was armed with a stone and whether or not he attacked the appellant with the stone. It was the appellant's case that he inflicted the injury when the deceased swung the stone at him. It will be remembered that the appellant was seen with an injury by his eyebrow and which the appellant stated was caused by the stone.

The learned trial judge apparently did not consider the evidence of the good character of the appellant and the bad

character of the deceased. There is no doubt that the deceased was a violent person having regard to his attack on the appellant at his apartment on 6th April, 1992 and the fact of his many convictions for offences of violence. It is uncertain as to what significance this evidence would have had on the trial judge in considering the credibility of the appellant.

There is no duty on the appellant to establish self defence. The duty is on the Crown to negative self defence. The learned trial judge's finding that - "It may well be that the actual fatal move was a defensive one" would indicate that the Crown had not established a case of murder beyond a reasonable doubt and therefore had not negative self defence.

In any event on a review of the evidence and the relevant finding of facts of the learned trial judge, we were of the view that the crown had failed to negative self defence and that the learned trial judge was in error in not holding that the appellant had acted in self defence.

For these reasons the court allowed the appeal against the conviction of manslaughter and ordered that the conviction be quashed and sentence set aside.