J A M A I C A

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 117 of 1975

B E F O R E : The Hon. Mr. Justice Graham-Perkins

The Hon. Mr. Justice Robinson

The Hon. Mr. Justice Zacca

R E G I N A v. D E S M O N D S M I T H

Mr. F.M. Phipps, Q.C. and Mr. O. Crosbie for the applicant

Mr. D.J. Pitter for the Crown.

M A R C H 8, 17, 1 9 7 6

GRAHAM-PERKINS, J.A.: The applicant was, on October 15, 1975, convicted by a jury in the Mandeville Circuit Court, before Henry, J. of the offence of manslaughter on an indictment which had charged that he, on June 16, 1975, murdered Headley Dwyer.

There were two possible bases on which a verdict of manslaughter was, on the direction of the learned trial judge, opento the jury, namely, provocation, and the absence of an intention to kill or to inflict grievous bodily harm. For the purpose of determining the severity of the custodial sentence he thought appropriate the trial judge enquired of the jury the basis of their verdict and, through their Foreman, they advised him that they had reached a verdict adverse to the applicant on the ground of provocation.

It is the fact that the evidence led by the Crown in support of the indictment was incapable of demonstrating any more than that Headley Dwyer came to his death as the result of a wound inflicted by the applicant by means of a knife. The wound was a one inch stab wound to the right side of the chest and involved the superior vena cava. From the point of view of the Crown the circumstances in which this wound was inflicted were, however, supremely vague and imprecise. There was no witness available to the Crown who could describe the circumstances immediately leading to Dwyer's death. Those circumstances were described only by the applicant and at the end of the day his version thereof remained substantially unchallenged. It is desirable, however, to relate, though not in

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much detail, an earlier incident described by the applicant.

At about 4.00 p.m. on October 15, 1975 the applicant was at his home when he heard "someone cursing outside". He recognised the voice of that person as that of Dwyer. He came on to the verandah after Dwyer had kicked down a door, and Dwyer and two other men, Trevor Campbell and Ferdinand Campbell - these latter gave evidence on behalf of the Crown - armed with machetes and pieces of stick "attacked him, thumped him, kicked him in his back and pushed him over the landing." He sustained a minor wound on his neck. Having escaped from his attackers the applicant went in search of, and later that evening found a constable to whom he made a report concerning the attack upon him by Dwyer and the Campbells.

A further incident, the one of more immediate concern in this appeal, occurred at about 9.30 p.m. on June 16, 1975, that is, some five and a half hours following the first incident. With regard thereto the applicant's evidence was to the following effect. Having reported the earlier incident to a constable he went to a shop to wait for that comstable. The proprietor of this shop began to close it up before the constable arrived and the applicant left for his home. On the way he saw Dwyer "come down from a sort of hill" and approach him. Dwyer "pushed" him in his face and asked him if he was coming from his mother's yard. Dwyer pushed him again and then "drew a machete from his windbreaker, lifted his hand and was on the pointof attacking" him when he wrestled with Dwyer. During this struggle he took a knife from his pocket and "cut at" Dwyer. Both Trevor and Ferdinand Campbell were with Dwyer when the latter attacked him with the machete. Because of the earlier incident he had very good reason to believe that his life was in danger and in using his knife to "cut at" Dwyer he was acting in self defence. The foregoing was, in substance, the version advanced by the applicant. If this version were accepted by the jury it is difficult to see how they could have avoided the conclusion that the applicant, in stabbing Dwyer had acted in self defence. In relation to this second incident Ferdinand Campbell gave evidence with which the learned trial judge dealt as follows:

> "Now, insofar as the evidence of the prosecution witnesses is concerned no attack whatever was made. Mr. Ferdinand Campbell has given evidence to the effect that on this night he...

" he along with the deceased - or rather, he left Miss Janie's shop and the deceased man followed apparently immediately after him. While going along, the deceased caught up with him and they walked in the direction of Carter from Craig Head. He said he had nothing with him and the deceased man had a cigar in his hand and nothing else; and the evidence is that after they had walked for a short distance the deceased stopped to urinate, and while waiting for the deceased this man who he later found out to be the accused went up to the deceased and had this talking; then he heard the deceased bawl out and when the deceased bawled out this man whom he discovered to be the accused ran off, passing him, followed by the deceased who fell to the ground. This is the nearest to an eye witness that the prosecution has brought and on that evidence it would appear that the deceased did not have any weapon, and then there was this talking between himself and the accused; there was no attack, certainly no attack with a deadly weapon on the accused and Mr. Campbell himself had nothing and did not attack the accused."

If indeed Dwyer had a machete concealed under his windbreaker at 9.30 at night it is unlikely that Ferdinand Campbell would have seen it. When, therefore, Campbell said that Dwyer "had a cigar in his hand and nothing else" up to the moment the latter stopped to urinate, that assertion could not be taken to exclude the presence on Dwyer's person of a machete which, in the circumstances, would have been concealed from Campbell's view by Dwyer's windbreaker. Further, it is clear that the conclusion that "on that evidence it would appear that the deceased did not have any weapon ... there was no attack, certainly no attack with a deadly weapon on the accused ..." was one that did not necessarily follow from Ferdinand Campbell's evidence. Neither it is supported by the unchallenged evidence by the applicant and by Constable Hall, who arrived on the scene shortly after Dwyer was stabbed, that the applicant handed over a knife and machete to Hall. Certainly there was no evidence that the applicant had a machete with him prior to the fatal incident. Nor is the conclusion supported by the evidence of the applicant, that

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during the struggle with Dwyer he received two cuts on his right hand, and a wound to his head. The applicant's evidence in this respect was supported by the evidence of Dr. Grant. There was also the evidence of Mr. Garriques of the Forensic Laboratory that he found "blood from two different persons "on the shirt shown to have been worn by the applicant at the material time. It is fair to say here that Trevor Campbell who denied having participated in any attack upon the applicant or being present at the scene with Dwyer when he was stabbed testified to the effect that he arrived at the scene sometime after Dwyer received this stab wound and saw the applicant "sawing his hand with a machete" thereby causing the wounds to the applicant's right hand. He did not, however, seek to say that the injury to the applicant's head was also self inflicted. On the background of the foregoing it was clear that the issues of provocation and self defence arose.. Indeed the learned trial judge dealt more than adequately with the law relating to those issues and no complaint has been, or indeed, could have been, made with respect thereto. It is of crucial importance to bear in mind, however, that both issues depended on the same evidence and it is in connection with the trial judge's directions as to the manner in which the jury should approach the resolution of those issues that the applicant complains and, in our view, quite properly so.

The trial judge dealt <u>in extenso</u> with the elements requisite to constitute the offence of murder and then proceeded to deal with the issue of provocation. He concluded his directions on this issue thus:

> "If you believe that the accused did lose his self control and lost it as a result of provocative acts by the deceased and persons acting with him, and if you believe it would cause any responsible man capable of reasoning to act as he did, then the accused may be said to have acted under provocation and it would be open to you to convict him not of murder but of manslaughter."

Then he continued:

> "And then I finally tell you as to provocation - as to self defence: if you feel sure that the accused was not acting

"under provocation then you have to go on and consider the question of self defence."

Thereafter he dealt very fully and fairly with the law as to self defence. At the end of the summing-up however the jury were left with a clear direction that they were to consider self defence, the cardinal defence relied on by the applicant, if, but only if, they felt sure that the applicant was not acting under provocation. In our view this was a most unfortunate and serious misdirection. To have arrived at a verdict of manslaughter on the ground of provocation it is perfectly clear that the jury must have accepted the applicant's version of the circumstances immediately surrounding Dwyer's death. That version spoke all too eloquently in favour of the applicant's assertion that he had acted in self defence. And yet the jury were, in effect, precluded from considering the applciant's real and only defence by a direction which required them not to consider self defence unless they felt sure that the applicant had not acted under provocation. It is clear that in a case where the issues of provocation and self defence depended on precisely the same evidence, evidence given by the applicant alone and quite clearly accepted by the jury, the jury ought to have been asked to consider the issue of self defence first and then to go on to consider provocation if theyconcluded the issue of self defence adverse to the applicant. At the very least they ought to have been told to consider both and say what view they took as to the manner in which each was to be resolved having regard to the evidence. Clearly they ought not to have been told in effect, in this case, not to consider self defence without first getting provocation out of the way. It appears to us to be beyond debate that the applicant lost a very real chance of complete acquittal that was very clearly open to him on the evidence.

We treat the application for leave to appeal as the hearing of the appeal and, for the reasons we have given we allow the appeal and set aside the conviction for manslaughter.

By a majority (Graham-Perkins, J.A., dissenting) the Court orders that there be a retrial on the issue of manslaughter.