JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 42 of 1974

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. v. DAVLYN MORRIS

Mr. H.G. Edwards Q.C., with Mr. W. Spauldings for applicant.

Miss Joyce Bennett with Mr. N.L.V. Sang for the Crown.

29th January, 1975
21st May, 1975

EDUN, J.A.:

On February 14, 1974 the applicant was convicted of the murder of Dorrel Rose and was sentenced to death. Against that conviction he has applied for leave to appeal.

The case for the prosecution was that at about 10 to 10.30 p.m., on June 30, 1973 Steadman Rose, also called Wesley, a son of the deceased, went to the shop of Puncey Thomas in Malta, in the Parish of Manchester, to purchase cigarettes. He took a $1.00 note out of his pocket and had it in his hand when the applicant, Davlyn Morris, grabbed the money. Steadman asked the applicant to return his money but the applicant refused and left the shop. Steadman looked for him but did not find him. In his search, Steadman met his father Dorrel Rose, the deceased, and his aunt Maritha Rose, and he reported the incident to his father. It would appear that the deceased had already heard of the incident. The deceased asked Steadman if he and the applicant had been gambling. Steadman said no. The deceased, Steadman and his aunt, Maritha, then proceeded to Thomas's shop.

By the piazza of that shop they found the applicant standing; Steadman said he was leaning on a lamp-post whereas Maritha said he stood slant-wise in the shop-yard. Steadman went and leaned against a window of the shop. Maritha said she went and leaned against a club-part of the shop, somewhere behind the applicant; the deceased went up and stood in front of the applicant who then shifted himself so that the deceased and

himself were facing each other with about 3-feet distance between them. The deceased asked: "Davlyn, Wesley owe you?" The applicant told him no, and used some bad words. The deceased turned to the applicant again and asked: "You and Wesley were gambling?" The applicant said no, and used another set of bad words. Then the deceased said: "Why unoo young boys in Malta wont work for unoo self, you know that Wesley is only eighteen years? Give him back his one dollar." Maritha in her evidence said that as soon as the deceased said that, the applicant's hand was down by his side clutched against him and she saw him use his right hand - lifted it up and made a stabbing motion at the deceased. The applicant then jumped back and she got her hand on the applicant but he staggered her around, came out of her hand and ran. The deceased held his throat and "blood was spilling from his throat like a burst water pipe." She bawled. People gathered. The deceased walked about 2 chains and fell and on the way to Spaldings Hospital, he died. She said that she did not see the deceased with anything in his hand; he had no weapon and no one attacked the applicant.

Steadman's version of the stabbing incident was that he heard no one using bad words but that the applicant and the deceased were talking. The applicant asked: "So a come you come to fight me?" The deceased said no, he was only asking him to give up the money. He went on to say that one Garfield Angel came up with a bottle lamp and he put it out; no one had told him to do so. The deceased was standing up, the applicant moved as if he was passing the deceased, then he saw the applicant make a stabbing motion. After that, the applicant ran and the deceased said: "You cut me and run but is all right." He saw that the deceased had a cut, he saw blood; the deceased ran off a little and fell to the ground. He said the deceased never attacked the applicant and he did not have a weapon at all.

Soon after the incident, Detective Corporal McGhie received a report. He went in search of the applicant. Five days later, the applicant went to Mandeville Police Station where McGhie told him of his report and cautioned him. The applicant said: "Me win the money sir, and him father come fi beat me and me cut him."

Dr. Grant gave evidence that on July 3, 1973 he performed a post-mortem examination on the body of the deceased. Externally, he found a 6" incised wound on the left side of the neck involving the skin, muscle and the left jugular vein. The wound commenced behind the left ear and ran forward and downward to the tip of the Adam's apple. The sterno-mastoid muscle was divided and there was a hole $\frac{3}{8}$" long in the internal jugular vein. At the deepest point the wound was $\frac{1}{2}$" and the wound could have been inflicted with a sharp instrument like a knife or razor. Moderate force could inflict such injury. He was of the opinion that the more likely way in which the wound was received was a slashing motion starting at the back of the ear down to the neck; death was due to haemorrhage caused by the incision of the left internal jugular vein.

In his defence, the applicant elected to give an unsworn statement. He said:-

> "My name is Davlyn Morris, I am from Robins Hall, Malta District. On Saturday night 30th June, I was at Malta, me and Wesley and some other man was gambling when I set a dollar and Wesley win 50¢ out of it and he say is $1.00 he want and I tell him no, is 50¢ him have to get. I change the dollar and give him 50¢ and him say to me him don't want it. I put it down on the table and he did not take it up. I take it up and put back into my pocket and went outside and he leave and went away, Wesley leave and went away, and he run out and about half hour I see him and him father and auntie was coming and I leaning on the light-post. Him father come up to me and also Wesley and Pigeon, as I know her and Busta say to me: Give Wesley him money and if I don't give him him money a dead down here to-night. I say to him I did not have any money for Wesley and he started to rush me and I walk away from him and tell him he must leave me out and he still rushing me. I say to him, leave me man, I don't have any money for Wesley and I walk to the piazza of the shop and he rush me with an open knife and he back me up in the club door and him say to me if I don't give Wesley the money tonight is dead down here and a two a we go dead and him rush me and I did have a knife in my pocket, I did not intend to cut him, I only scaring him from me and when he rush me I ease up my hand and come down and the knife catch him like that.

His Lordship: And when he rushed you ..... what happened?
Accused: When he rush me I ease up my hand so and when I coming back down with the knife him rush right down in a the knife.
His Lordship: He rushed me and what?
Accused: And him come right in a the knife and the knife cut him here (points) and I walk away from him and I was standing at a shoeblack tree. I was considering over what happen and I burst out a cry. And I finish."

Cecil Coley gave evidence on his behalf. He said that on the night in question, the applicant and plenty others were gambling. Wesley too was gambling and he saw when the applicant take up $1.00 and said he lost 80¢ out of it and not 90¢ and he went out of the shop with it. Soon after Wesley's father, also called "Busta", came and asked if they were gambling and he said yes. The deceased went out of the shop and returned in half an hour and said: "The dirty rass Davlyn don't come back here as yet." The applicant was leaning against a lamp post. The deceased turned to him and said: "A going dig out your rass eye to-night." The applicant more than once told him to keep off and he turned to Garfield Angel who had come up with a bottle lamp and the deceased said to him: "Out the light we don't want any light tonight, is death." He blew on the bottle and it went out. The applicant stepped up on the piazza between a gate and a wall and turned his back to the wall. The deceased stepped up right before him and he took out a knife and pull it and the applicant was walking backwards and telling the deceased to keep off. He saw when the deceased open his knife and the applicant take out his knife and hook him and the deceased said: "The rass boy cut me in me neck and run gone but he has to live at Malta, he can't come to Robins Hall." Under cross-examination, he said it was only the deceased who attacked the applicant and that the deceased did not make any attempt to cut at the accused man. He claimed it was true that he was there and he saw what happened.

In his summing-up, the learned trial judge left the defence of self-defence to the jury. He stated to them that no questions of provocation or accident arose and that the possible verdicts in the case was that the applicant was either guilty of murder as charged or not guilty.

At the hearing of the appeal, learned attorney for the applicant submitted that the evidence in the case as a whole raised the issue of provocation as conduct which cannot justify might well excuse, and the learned trial judge erred in law in withdrawing that issue from the jury. He said also that the same facts disclosed accident as a defence and there, too, the learned trial judge erred. In reply, learned attorney for the Crown submitted that the issues of provocation did not arise, nor did accident arise as a defence. However, when asked about her views concerning the verdict of manslaughter on the ground of the question of unintentional killing not having been left to the jury, she urged that the Court could apply the proviso as the facts of the case established a strong case of murder. On this aspect, learned attorney for the applicant replied that unintentional killing was a cardinal defence and the Court ought not to apply the proviso as there was a failure to put such a defence to the jury.

Provocation

We repeat what has so very often been cited as good authority on this subject, Lord Devlin's dictum in the Privy Council in Lee Chun-Chuen v. R (1963) 1 AER p.73 at p.79:-

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellants' submission is that if there is an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from Holmes v. D.P.P. [1946] A.C. at p.597. In Mancini v. D.P.P. [1942] A.C.1, the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with a fist - but held that it was right not

> to leave the issue to the jury because the use of a dagger in reply was disproportionate."

What are the elements of provocation in this case? In our view, there is no credible narrative of events suggesting the three elements of provocation. There is none arising in the case for the prosecution. In his defence the applicant claimed that the deceased demanded from him money which was not due; threatened to kill him if the money was not given to Steadman; rushed upon him with an open knife; and backed him up against the club door with repeated threats.

The witness Coley, on behalf of the defence, said he saw when the deceased opened his knife, and that he heard him use threats, but that the deceased did not make any attempt to cut at the applicant. The wound was large and deep, and the moderate degree of force used to cause that wound establishes that if the weapon was a knife, it must have been as sharp and deadly as a razor. It is our view that the use of threats and advancing with an open knife /self-defence apart/ amount to no more than a provocative incident and, in those circumstances, to slash the deceased's throat and make blood flow "like a burst water pipe" in reply was disproportionate. The learned trial judge in our view did not err in withdrawing the issue of provocation from the jury.

Accident and lack of intent to kill or cause grievous bodily harm

In Sigismund Palmer v The Queen (1971) 16 W.I.R. 499, in the judgment of the Privy Council, Lord Morris of Borth-y-Gest said this:-

> ".... In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible verdict may remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury."

The applicant said in his unsworn statement ".... and I did have a knife in my pocket, I did not intend to cut him, I only scaring him from me and when he rush me I ease up my hand and come down and the knife catch him like that." We wish to adopt the views of Lord Diplock as to the subjective test of intention and as to the consequences of a voluntary act, which he expressed in Hyam v D.P.P. (1974) 2 AER 41 at p.69, thus:-

> "..... Intention can only be subjective. It was the actual intention of the offender himself that the objective test was designed to ascertain. So long as the offender was not permitted to give evidence of what his actual intention was, the objective test provided the only way, imperfect though it might be, of ascertaining this. The Criminal Evidence Act 1898 changed all this. A defendant to a charge of felony became entitled to give evidence in his own defence. The objective test no longer provided the only means available in a criminal trial of ascertaining the actual intention of the offender: but it had been so for so long, that this House overlooked the historical fact that the objective test did not define the relevant intention as to the consequences of a voluntary act. It was no more than one means of ascertaining the relevant intention, to which the Criminal Evidence Act 1898 added another - the defendant's own evidence of what his actual intention was."

We have, in the instant case, an unsworn statement by the applicant as to his intention. He did not give the jury an opportunity of hearing him, under cross-examination, say more about his intention. But, be that as inadequate as it may be, so far as the applicant's intention as to the consequences of a voluntary act is concerned, the jury had only his <u>ipse dixit</u> and nothing more by which to judge of his intention. The learned trial judge said this to the jury at p.109 of the summing-up:

> "The accused man elected to give an unsworn statement from the dock and because he gave his statement from the dock he could not be asked any questions. Subject then to the fact that his account was not given on oath and he was not cross-examined you must take into consideration what he said and you must give what weight you think it deserves."

He said at pp. 114-115 concerning the intent with which the crime of murder must be committed:-

> "The prosecution must go on to prove that the accused dealt the blow or inflicted the injury voluntarily and deliberately, that is to say, consciously and under no duress or compulsion on the part of anyone. The prosecution must go on to prove that the accused did so with the intention of killing or of causing serious bodily harm from which death was likely to result and did in fact result. The prosecution must prove that the killing was unprovoked and the prosecution must prove that the killing was not in self-defence and that the killing was not as a result of an accident.

> Now, in relation to intention, the prosecution must prove intention as it would any other fact or circumstance in the case. There is no other way to prove intention than to ask the jury to infer it from what you find was done by the accused or what you find was said by him or both together. Every person in the absence of any evidence to the contrary is presumed to intend the natural consequences of his acts. If you should find that the accused man took a knife and so cut Mr. Rose at the side of his neck then you have to ask yourselves, what must have been his intention? Was it either to kill Mr. Rose or to cause him really serious harm? He says that he did not mean to cut him, he just meant to scare him." (underlining mine).

The learned trial judge went on to deal with self-defence and there have been no complaints regarding his directions in that respect. Nevertheless, the question still arose whether any further directions on accident and on manslaughter on the basis of applicant's statement that he did not intend to injure the deceased were necessary.

In R. v. Derrick Irving S.C. Cr. A. No.12 of 1969, the case for the prosecution was that a Mr. Wilson saw when the deceased dropped his cycle and the person who had come up ran up after the deceased. Then Wilson saw a hand go up in the air: he saw a cutlass in the hand and it came down. There was a sound like a coconut being cut and the deceased fell. Wilson went to the deceased who was bleeding from the back of his head. The person with the cutlass moved away. Soon after Wilson gave chase and recognised that man as the appellant though he did not catch him. A police officer gave evidence that he saw the appellant on the following day and that the appellant had said: "A whole heap of them came to beat me and I take a cutlass and chop him."

The appellant gave evidence at the trial and, among other things, he said, as he was walking up the lane he heard a shout which made him turn around; he saw the deceased with a cutlass in his right hand standing before him "in a chopping motion". The appellant said he swung his cutlass at the deceased's cutlass and then saw the deceased stagger backwards; he had only intended to hit the deceased's cutlass out of his hand; he had no intention of injuring the deceased. The trial judge left self-defence and provocation to the jury. On appeal, the contentions by counsel for the appellant were that the trial judge should have

directed the jury on the defence of accident and of manslaughter on the basis of his statement that he had not intended to injure the deceased.

In giving the reasons for the Court's decision, Waddington, J.A., pointed out that on four occasions in his summing-up the learned trial judge directed the jury that if they accepted what the appellant had told them then they would have to acquit him. They had also been told to acquit him if they were in doubt with regard to self-defence. "If the jury believed what the appellant had said, then, if they followed the directions of the learned trial judge, they would have been obliged to acquit the applicant, whatever his intention may have been in striking the blow which killed the deceased. It seems clear that the jury in rejecting self-defence must have rejected the factual case for the defence and accepted that of the Crown." The Court of Appeal concluded that no further direction to the jury had been necessary.

The appellant, Derrick Irving applied for special leave to the Privy Council and in an unreported decision (Privy Council No. 14 of 1970) delivered on November 23, 1970, the same day on which the decision of Sigismund Palmer v. The Queen (supra) was delivered, the application, which was then considered as an appeal, was dismissed. The defence of accident was not pursued in the Privy Council.

Conclusions

In the summing-up of the instant case, the trial judge told the jury that if they accepted what the applicant told them they would have to acquit him. Also, if they were in doubt in regard to self-defence, they were to acquit him; and that the defence did not have to prove self-defence. He made it clear to the jury: "I had told you earlier on that in a case of this nature, the prosecution has to prove everything, every ingredient of the charge, and I tell you specifically when you come to deal with self-defence that it is the prosecution who must satisfy you so that you feel sure that the accused man was not acting in self-defence."

In our view, neither self-defence, nor accident, nor lack of intention to kill or to cause really serious bodily harm arose from the case for the prosecution. Towards the end of the summing-up on p.117, the trial judge in dealing with the defence said:-

"Mr. Foreman and members of the jury, it is common sense that if a man is going down on another one and is using threatening words and has in his hand an open knife and is threatening to kill, if that man who is attacked in this way draws out his knife and slashes to get away, he would not be guilty of any offence, he would be exercising his right to protect his own life. So it all turns on the view which you take of the evidence. If you believe Mr. Morris /the applicant/ that he is speaking the truth as to how he was attacked by the deceased with a knife, it is not something which Mr. Morris has to prove but if you believe him then, of course, he is not guilty of any offence. If you believe his witness, Mr. Coley, who supports him as to his being attacked, that would be stronger ground still for saying that Mr. Morris is not guilty of any offence. If you are not sure whether Mr. Morris and his witness are the ones who are speaking the truth or it is Maritha Rose and Steadman Rose who are speaking the truth, then the Crown would not have proved the case because you would be left in that state of reasonable doubt which you must resolve in his favour." (underlining mine).

It seems clear to us that the jury in rejecting self-defence must have completely rejected the factual case for the defence and accepted that of the prosecution. No further direction to the jury on accident or on the lack of intention to kill or to cause really serious bodily harm was necessary. We, therefore, see no necessity to consider application of the proviso.

For the reasons given, the application for leave to appeal is refused.