19, 1965

APPELLANT'S CASE

IN THE PRIVY COUNCIL No. 8 of 1965

ON APPEAL FROM THE SUPREME COURT
OF THE BAHAMA ISLANDS

B E T W E E N :-

JAMES ROLLE Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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1. This is an Appeal in forma pauperis by special leave of Her Majesty in Council dated 29th January 1965 from the Judgment and Order of the Supreme Court of the Bahama Islands dated 22nd October 1964 after trial before the learned Chief Justice of the Bahama Islands and a jury. The Appellant was charged with murder contrary to Section 337 of the Penal Code (Cap. 69) of the Bahama Islands, namely that he on 6th July 1964 at New Providence did murder Isaac Emanuel Glinton (hereinafter called "the deceased"). The Appellant was found guilty unanimously by the jury and was sentenced to death.

2. According to the evidence adduced at the trial, the deceased was killed on 6th July 1964 at about 8.15 a.m. in a public street known as Strachan's Corner, New Providence by a stab wound in the anterior wall of the left ventricle of the heart, the wound being consistent with having been inflicted by an ice pick. Furthermore, the evidence of the prosecution witnesses, although differing in their various accounts as to the facts which immediately preceded the striking of the fatal blow, was to the effect that during a heated argument or quarrel between the Appellant and the deceased the Appellant stabbed the

deceased with an ice pick. Although not confirmed by all the prosecution witnesses, it was clear (it is submitted) taking the evidence as a whole, that the Appellant stabbed the deceased following and as a result of the Appellant being struck a blow with a piece of board wielded by the deceased.

p.13 3. For the reason hereinafter appearing the note in the record of the incident is not very clear according to the said note the Appellant stated in evidence that at about 8 a.m. on the said date he had called at the home of one James Pratt at Strachan's Corner in order to collect some bicycle tools belonging to him which were held by the said Pratt. As the said Pratt did not have the tools immediately available the Appellant told him where to leave the tools. The said Pratt then went back
p.5 & 6 into his house, whereupon (according to the evidence of William Neubold) the deceased who was a neighbour of the said Pratt and who had been sitting on a wall near by, commenced to abuse the Appellant so that a quarrel ensued. The Appellant stated in evidence
p.13 that he was then invited into Mickey's Bar (which is also at Strachan's Corner) by the proprietor who is known as "Mickey" and who said to the deceased, "Why don't you leave the man alone; he is with me". That the Appellant then went into Mickey's Bar where he was served with a bottle of beer for which he paid 2/- ; that the Appellant having drunk only half the contents of the said bottle, left the said bar and went into the street holding the half finished bottle of beer and intending to finish it in the street, but that he was attacked by the deceased with a piece of board and having been struck therewith by the deceased a severe blow on the left cheek; that the Appellant in fear of the deceased and in order to defend himself drew from his pocket an ice pick (not the same ice pick which was produced by the prosecution) and struck the deceased with the said instrument. That the Appellant did not intend to kill the deceased but acted as aforesaid without any premeditation.

4. Police Inspector Paul Thompson who was called as a witness by the prosecution stated in evidence

that when he saw the Appellant at 8.50 a.m. on the said date the Appellant had a swelling on his left cheek bone which he stated had been caused by his being hit by the deceased with a stick, and that the witness therefore sent the Appellant to the Out Patients' Department. It is submitted that this evidence is indicative of the severity of the injury received by the Appellant from the deceased with a board or stick as aforesaid. p.11 L.11

5. It is greatly regretted that for the reasons hereinafter appearing it has not been possible to agree with the prosecution the correctness of the record of the proceedings to be placed before the Privy Council, although there have been discussions to that end between Counsel who appeared for the Appellant at the trial and the Attorney General. It is understood that the prosecution accepts that the official record as transmitted is substantially correct and therefore the following submission is made on the basis of the official record being taken as correct, but leaving the correctness or otherwise of the record and the results which follow therefrom to be the subject of separate submissions as hereinafter appears.

6. Although Counsel for the Appellant at the trial relied on the defence of self-defence as giving a right to an absolute acquittal he also submitted to the jury that in the alternative it was open to them to find the Appellant guilty of manslaughter only. It is submitted that the learned Chief Justice in his summing up ought to have given to the jury a most careful direction as to the law of manslaughter and that if the jury rejected the defence of justifiable homicide then they should carefully consider the evidence so as to determine whether or not they should convict the Appellant only of manslaughter and not of murder. It is submitted that had the jury been directed as to the law of manslaughter and as to the evidence in relation thereto, that there is a strong probability that they would not have convicted the Appellant of murder

but only of manslaughter.

7. The law of the Bahama Islands in relation to manslaughter is contained in Sections 345, 346 and 347 of the Penal Code, the relevant parts of which read as follows:-

> "345. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter,and not of murder, if any of the following matters of extenuation are proved on his behalf, namely :-
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> (1) that he was deprived of the power of self control by such extreme provocation given by the other person as is mentioned in section 346; or
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> (2) that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self control;
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> 346. The following matters may amount to extreme provocation to one person to cause the death of another person, namely:-
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> (1) An unlawful assault and battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of accompanying words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was of the power of self control;
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> (2) The assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of

instantly attacking the accused person with deadly or dangerous means or in a deadly manner;

347. (1) Notwithstanding proof on behalf of the accused person of such matter of extreme provocation as in section 346 is mentioned, his crime shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf or from evidence given on the part of the prosecution:-

(a) that he was not in fact deprived of the power of self-control by the provocation;

(b) that he acted wholly or partly from a previous purpose to cause death or harm or to engage in an unlawful fight, whether or not he would have acted on that purpose at the time or in the manner in which he did act but for the provocation;

(c) that, after the provocation was given, and before he did the act which caused the harm, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control; or

(d) that his act was, in respect either of the instrument or means used or of the cruel or other manner in which it was used, greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstances to be deprived of his self-control by the provocation.

(2) Where a person in the course of a fight, uses any deadly or dangerous means against an adversary who has not used or commenced to use any deadly or dangerous means against him, if it appears that the accused person prepared or prepared to use such means before he had received any such blow or hurt in the fight as might be a sufficient provocation to use means of that kind, he shall be

presumed to have used the means from a previous purpose to cause death, notwithstanding that, before the actual use of the means, he may have received any such blow or hurt in the fight as might amount to extreme provocation."

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8. In fact no direction of any kind was contained in the summing up as to any of the relevant matters contained in the said provisions of the Penal Code and in fact there was no direction or reference of any kind in the summing up on the question of manslaughter save and except for the sentences reading, "If it was not intentional in the sense that I have told you then the verdict against the accused cannot amount to more than manslaughter. But it may not amount to manslaughter." Furthermore after one more sentence the learned Chief Justice continued, "If you find that he had a right of lawful defence and exceeded it, that is no defence at all. If you find that the killing was intentional and unlawful, then your duty is to convict the accused." The words "convict the accused" were presumably intended by the learned Chief Justice and would be taken to mean, "convict the accused of murder", and it is submitted that there was a positive misdirection in that it ignored the question of (i) provocation in accordance with Section 345 (1) and (ii) possible justifiable but excessive harm thereby reducing the crime to manslaughter in accordance with Section 345 (2) of the Penal Code, both of which aspects ought to have been considered by the jury after being properly directed thereon.

9. The matters hereinafter set out relate to what is submitted are irregularities in the conduct of the trial and other misdirections in the summing up and it is submitted that by reason thereof the conviction ought not to stand.

10. The only official record of the evidence adduced at the trial is that contained in the hand written notes of the learned Chief Justice, notwithstanding the provisions of Section 57 of

the Supreme Court Act 1897 (Cap. 4 of the Laws of the Bahama Islands) the material part of which reads as follows:-

"There shall wherever possible be provided adequate equipment for recording mechanically the evidence and proceedings in every cause or matter, whether civil or criminal, heard before the Supreme Court in its various jurisdictions and on its several sides; Provided that in any of the following cases, that is to say (a) where the presiding judge and the parties or their Counsel or Attorney consider that a recording is unnecessary ..... the presiding Judge may order ..... the particular cause or matter be heard or shall proceed as the case may be, without mechanically recording the evidence therein."

To the best of the Appellant's knowledge there was no reason why adequate mechanical recording equipment should not have been available and nothing to the contrary was agreed or was ordered by the learned Chief Justice in accordance with the said Section.

11. The only notes taken by the learned Chief Justice at the trial were of a perfunctory character, he merely jotting down a few notes occasionally and being content for the most part to follow the witnesses' evidence from the depositions, which he also had before him for the purpose of his summing up. The absence of an adequate note may well have been responsible for the following errors made by the learned Chief Justice in his summing up, viz :-

(i) He said to the jury, "You will be able to take into the jury room with you when you go to deliberate, the statement by the accused after he had been warned and cautioned." In fact the only such statement tendered by the prosecution had been withdrawn after objection by the defence. Although, so far as is known, the jury did not in fact have the statement with them in

p.17 L.35

the jury room, it is submitted that the said direction was prejudicial to the Appellant.

(ii) He said to the jury, "You will be able to take to the jury room with you the ice pick which was used. You must consider how lethal
p.13.L.31 a weapon it was"; when it appeared from the
p.3.L.6 evidence of the Appellant and the evidence of the witness Maynard that the ice pick produced in Court was not the instrument used by the Appellant.

p.17 (iii) He said to the jury, "The facts of the
L.28 case are very simple and it is noteworthy that they are scarcely challenged by the accused", when the fact was that there was a considerable variance in the evidence given by the witnesses
p.4-7 for the prosecution as to the facts immediately preceding the striking of the fatal blow, in particular as regards the assault on the Appellant by the deceased. Furthermore the learned Chief Justice towards the end of his summing up said, "You will remember that the accused gave evidence on oath and he is entitled to be believed just
p.17 as much as anyone else. He has been cross-examined
L.40 like any other witness. What he said to us is substantially what the prosecution witnesses have said". It is submitted that this was confusing to the jury when the prosecution witnesses had varied substantially in their evidence.

12. Before notice had been given of intention to apply for special leave to appeal but after the date of the conclusion of the trial, the Appellant's Counsel and Attorney in the Bahama Islands who had appeared for him at the trial, had an interview with the senior typist attached to the Supreme Court in order to bespeak a copy of the transcript of the evidence and was then informed by her that no transcript was available but that a copy of the Judge's notes would be available as soon as the learned Chief Justice had prepared them for her to type. The Appellant submits that the notes of the evidence as finally supplied for the record are in fact not a contemporary record but are a constructed note prepared by the learned

Chief Justice partly from the notes which he did take at the trial, partly from the depositions and partly from his memory. As examples of the inaccuracy of the said note (i) the evidence of the witness Maynard that there were no blood stains on the ice pick produced in Court was adduced only during cross examination and it is not correct that there was no cross-examination of the said witness as stated in the said note and (ii) the note does not record the statement made by the Appellant in his evidence that the ice pick in fact used by him had a duller point than the ice pick produced in Court. p.3 L.6

13. The Appellant furthermore states (though it has been intimated by the prosecution that this is disputed) that the transcript of the summing up is incorrect in so far as it purports to record the proceedings when the jury returned for the first time. The Appellant says that the facts were that the jury returned after an absence of about half an hour and were asked if they had arrived at a verdict, to which the foreman replied to the effect that they were eleven to one for a verdict of "guilty", but that one of the jurymen did not believe in capital punishment. The learned Chief Justice then directed them that it was immaterial whether a juror agreed with capital punishment or not and that is was their duty to return a verdict according to the evidence, but he also directed them that the eleven jurors who were in favour of a verdict of "guilty" were not entitled to change their verdict at that stage. He also directed them that it would be wrong to bring in a compromise verdict and he directed them in such a manner so as to convey to them that the only purpose of their returning to the jury room was for the twelfth man to make up his mind.

14. The Appellant respectfully submits that the said verdict and judgment should be reversed and that he should be unconditionally discharged or in the alternative that a judgment of manslaughter be substituted for the said verdict

and judgment of murder and that such sentence be awarded as to Her Majesty in Council may seem just, for the following among other

REASONS

(1) That having regard to the absence of a mechanical recording apparatus the trial was irregular and contrary to the provisions of Section 57 of the Supreme Court Act 1897.

(2) That the learned Chief Justice misdirected the jury in directing them that the eleven of them in favour of a verdict of "guilty" were not entitled to change their minds.

(3) That the learned Chief Justice disdirected the jury in that he failed to direct them as to the law of manslaughter or that manslaughter was an important issue to which they should direct their minds when considering the evidence and in particular as to the question of provocation or justifiable but excessive harm which would reduce the offence to manslaughter.

(4) That had the jury been directed as aforesaid and in accordance with the law as laid down in Sections 345, 346 and 347 of the Penal Code there was a strong possibility that they would have returned a verdict of manslaughter.

(5) That in the premises there has been a substantial miscarriage of justice.

PHILIP GOODENDAY

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JAMES ROLLE

v.

THE QUEEN

CASE FOR THE APPELLANT

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