

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
o - DEC 1971
25 RUSSELL SQUARE
LONDON W.C.1

34, 1970

1.

No. 14 of 1970

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE COURT OF APPEAL OF JAMAICA

B E T W E E N :-

DERRICK IRVING
Appellant

- and -

THE QUEEN Respondent

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CASE FOR THE APPELLANT

Record

1. This is an appeal by Special Leave in forma pauperis from the Judgment of the Court of Appeal of Jamaica, dated the 23rd day of July 1969, which dismissed the Appellant's application for leave to appeal against his conviction for murder before Mr. Justice Parnell and a jury in the Home Circuit Court at Kingston on the 31st day of January 1969 upon which he was sentenced to death.

pp.260-261
pp.248-259

pp.239-242

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2. The principal question to be determined in this appeal is whether the trial judge erred in not leaving to the jury the question of manslaughter on the basis

(a) of the evidence that the accused did not intend to kill or do grievous bodily harm; and

(b) that having left with them self-defence as a possible defence leading to an acquittal, he should have at the same time directed them that if they found that the accused, in defending himself, had used more force than was necessary in the circumstances, they should find him guilty of manslaughter and not of murder.

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p.1

3. The accused was charged with murder in that on the 8th day of July 1968, in the Parish of Kingston, he murdered Orville Fearon.

pp.3-66

4. The case for the Crown rested almost entirely on the evidence of Anthony Wilson, who said that at about 6.55 to 7.00 p.m. on the evening of the 8th July, 1968, he had ridden his bicycle to the home of the deceased at 8 Lad Lane, and from there he and the deceased rode, taking a route which lead them up Rosemary Lane. 10
Whilst riding on the lane, Wilson stopped for about three minutes, apparently to speak to someone, while the deceased continued riding northerly along Rosemary Lane. Wilson caught up with the deceased at the corner of Rosemary Lane and Laws Street, where he saw him speaking to two women in a manner amounting to a row. Wilson advised the deceased to stop the rowing and to ride on with him, and just at that moment he said he saw another girl by the name of 20
Sonia coming up and she started to curse the deceased. He said that Sonia ran off along Rosemary Lane, and the deceased parked his bicycle on the side-walk and ran after her but did not catch up with her as she ran into a yard on the lane. The deceased then rejoined Wilson and they both rode down Rosemary Lane, and then they turned back up Rosemary Lane. On the way up they met a group of four or five boys who blocked their way, and he then noticed that the 30
girl, Sonia, was talking to one of the boys in this group. In the group was the accused, and the accused asked the deceased why he had kicked his girl, and the deceased replied and asked him if that was what the girl had told him, and he, the accused, replied, yes. At that stage, Wilson said that he saw the accused feeling his pocket, and he then saw the deceased take out a knife. The accused then asked his 40
friends around for a knife but no one answered him. The accused and his friends then started to walk away fast down Rosemary Lane. Wilson then told the deceased to shut the knife, and both of them continued to ride down Rosemary Lane. They stopped at the corner of Barry Street and Rosemary Lane where he and the deceased had a talk and then they started to go back up Rosemary Lane. The deceased was riding about a yard in front of Wilson. On the way up,

Wilson said he again stopped for a short time to speak to someone and then he rode off after the deceased. As he was about to pass a shop in which there was a light, he said he saw someone come from the right and go up to the deceased, who dropped his bicycle, and the person who came up ran after the deceased. He said he saw a hand go up in the air and he saw a cutlass in the hand and it came down. He then heard
 10 a sound like a coconut was being cut and he saw the deceased drop, falling in the street. At that time he did not recognise who it was that had the cutlass in his hand. He went up to the deceased and saw that he was bleeding from the back of his head. The person with the cutlass then started to move away.

Wilson then went into a yard opposite to where the deceased had fallen - a place which he had known before - he went into the kitchen,
 20 armed himself with a cutlass and came back out into the lane. He then saw the person who had the cutlass going up the street. That person started to run and he chased after him. The chase led up Rosemary Lane, along Laws Street, up Maiden Lane, along East Queen Street, and up Wildman Street. He said he recognised the accused when he was chasing him because the accused had looked behind him, and besides that, when he got to East Queen Street the
 30 accused had run into a club where there were a lot of lights around the premises and so he was able to recognise him. The accused, after he turned up Wildman Street, got away and Wilson was not able to catch up with him. Wilson said that he then returned to where the deceased had fallen. There was a crowd gathered at that time, and he got a taxi, in which he took the deceased to the Public Hospital.

40 5. Detective Cranman King testified that on the 9th July, he received a telephone message as a result of which he went to Allman Town Police Station where he saw the accused. He spoke to him, after having cautioned him, and told him that he was making investigations into the death of Orville Fearon which had occurred the night before, and the accused

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said, "A whole heap of them come to beat me and I take a cutlass and chop him." He asked the accused where the cutlass was, and the accused said, "Come mek me show you, Sir." The accused then took him to premises at 15 Sutton Street, Kingston, and from under a house there he took out a machete which he handed to Detective King.

p.78, 1.10-
p.82, 1.21

6. The medical evidence showed that the deceased suffered from a wound - a roughly circular lacerated wound - in the head, extending from just to the left midline of the top of the head, to the right, and taking in the right occipital area. The wound separated a circular piece of skull and a piece of brain in the parietal area, and the diameter of the wound was four and half inches. The cause of death was shock, following injury to the head, and the injury was consistent with infliction by a reasonably sharp and heavy instrument. 10

pp.108-156

7. At his trial the accused gave sworn evidence in which he said that on the 8th of July, 1968, at about 7.00 p.m. he was about to go down Rosemary Lane to Laws Street in the company of Ronald Linton and Bolton Simpson, and as he was near to the corner, he heard male and female voices. He recognised one of the voices to be that of his girl friend, Yvonne Rutherford. He continued down Rosemary Lane, and then he said he saw a fellow chasing a girl with a knife. He did not recognise the fellow at the time, but he later recognised him as Orville Fearon, the deceased, and the girl whom he was chasing with the knife was Sonia. He said that Sonia had on a 'ganzie' and it was cut in the back. He saw the cut after he had seen the deceased running her down. He said that he felt annoyed as a result of what he saw. He continued walking down Rosemary Lane, where he met two boys, one of whom was the deceased, Orville Fearon, and the other, Anthony Wilson. Wilson was holding a bicycle, and at that time the deceased had just returned from chasing the girl. He spoke to the deceased and told him that it was not right for him to ride a bicycle on a pedestrian's foot, and having been spoken to, get off the bicycle and kick and box that person. The accused said that the deceased 20 30 40

then pulled a ratchet knife from his pocket. He, the accused, did not have a knife on him, but he started to rub his hand over his pocket pretending that he had something there. He then asked if anyone had a knife, but no one answered him or offered him a knife. At that stage the deceased gave Anthony Wilson his bicycle to hold and was coming at him, the accused, with his knife. The accused said he then turned and walked away from the deceased. The deceased then turned back and took his bicycle from Wilson and rode away with the open knife still in his hand. The accused continued on to a yard, and he said he heard the deceased saying that he was going for a cutlass which was bigger than a knife, and the deceased then rode away with Wilson. The accused said he went into the kitchen of a friend of his by the name of Adrian Wilson, whose yard was also on Rosemary Lane, and he took up a machete and came back in the lane. He was walking towards the bar to the north, that is to say, up the lane, when he heard someone say, "See the bad men them deh." He said he spun around as he heard that and saw the deceased with a cutlass in his hand standing before him in a chopping motion. The accused was then about two feet away from him - about an arm's length - and at that time the machete was held in his right hand. He, the accused, swung his machete at the deceased's machete in the air, and he saw the deceased stagger backwards. He was then asked by his Counsel the following question:

Q. When you raised your machete, did you intend to do him grievous bodily harm or any injury?
The reply was: "No, Sir".

p.120, 1.18-25

A further question was asked:

40 Q. When you swung your machete, what did you mean to do with the machete?
A. I only meant to hit his own out of his hand, Sir, because he had it in a threatening position."

The accused went on to say that after the

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deceased dropped he stood there for a moment, and Anthony Wilson, who was holding the deceased's bicycle, threw down the bicycle that he was holding and took up the cutlass which the deceased had in his hand. Wilson then rushed at him with the cutlass and he, the accused, turned and ran up the lane. He said he ran to Wildman Street, and eventually he went to Sutton Street, and then the following morning he went to the Allman Town Police Station and made a report. He said he saw Corporal King on the morning of the 9th of July, and he told him what had happened. He also said that he took Corporal King to 15 Sutton Street and handed him the machete.

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pp.157-177

8. Evidence was given on behalf of the defence by Adrian Wilson and Bolton Simpson. Adrian Wilson said that he lived at 32½ Rosemary Lane, and that whilst he was in his house he got a report involving his girl-friend, Pamela Evans, and after he got this report he heard something and went outside into the yard. Whilst there, he said he heard a metallic sound "like two metal lick together". He then heard a shout for "murder" coming from outside, that is, in Rosemary Lane, and he looked out and saw a man lying on the ground with a machete in his hand, and that man was the deceased. He saw Anthony Wilson come up and take the machete out of the deceased's hand and run with others up the lane - five others ran with Anthony Wilson up the lane. He didn't see the accused, but he saw other people, about ten of them, in the lane, mostly men, and at that time the deceased was lying on the ground. In re-examination, he said that the truth was that he did see a crowd chasing the accused up the road.

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pp.178-190

Bolton Simpson said that between 7.30 and 8.00 p.m. he was at the junction of Laws Street and Rosemary Lane with the accused and Arnold Linton. They remained there for about five minutes, and whilst there he heard Yvonne Rutherford's voice. Whilst they were walking down Rosemary Lane, he saw a bicycle lying across the middle of the road, and the accused went up and spoke to the deceased, Fearon, asking him what had happened between him and the accused's

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girl-friend. He said that the deceased did not reply, but, instead, drew a ratchet knife from his pocket and said to the accused, "If you want to fight. . . ." using some bad words, ". . . let us fight, but I am not going to argue with you." He said the accused then asked for a knife, but no one gave him a knife, and as the deceased heard the accused ask about a knife, he jumped on his bicycle and rode down Rosemary Lane, saying that he was going for something bigger than that. About five minutes later, he said, he was standing at the door of a bar at the corner of Rosemary Lane and Barry Street with Linton, and at that time the accused came up and spoke to them. He was about to walk off to go up Rosemary Lane, when, he said, he saw the deceased and Anthony Wilson riding their bicycles coming along Rosemary Lane in a northerly direction. They were riding side by side, and he heard one of them say to the other, "See him there." The deceased then came off his bicycle slowly, with a bill machete in his hand. The deceased gave Wilson his bicycle to hold and the deceased asked the accused if he was ready for a fight, but accused did not answer him. He said he then saw the deceased coming towards the accused with the machete in a chopping motion. He said he then saw the accused do something with his hand as if he was bowling in a fast manner, and he heard both machetes clash like two metals. He said the deceased stepped back and dropped in the road. Wilson then took the machete that the deceased had and chased the accused up the lane.

9. The learned trial judge, it is submitted correctly, left with the jury the issue of provocation. He directed them that if they found that the accused had acted under provocation they should return a verdict of manslaughter.

10. On the issue of self-defence the learned trial judge directed the jury that if they found that the accused intended only to act in defence of himself they should acquit him. It is respectfully submitted that the learned trial judge erred in not telling the jury that

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in addition to their considering the possibility of a verdict of manslaughter on the ground of provocation, it was also for them to consider returning a verdict of manslaughter on the basis

- (a) of the evidence that the accused did not intend to kill or cause grievous bodily harm; and
- (b) that the accused, in defending himself, had used a degree of force greater than was necessary in the circumstances. 10

11. With regard to the trial judge's failure to direct the jury on manslaughter in relation to the issue of self-defence, the Appellant respectfully makes the following submissions:-

- (a) that since self-defence consists of two elements, namely an intent to defend one-self, and the use of no more force than is reasonable in the circumstances, it must follow that the jury have to consider whether the accused had an intent to kill or cause grievous bodily harm, hence necessitating a consideration of a verdict of manslaughter. 20
- (b) that, in the alternative, the trial judge should have directed the jury that if they found that the accused, in defending himself, had used a greater degree of force than was necessary in the circumstances, they should find him guilty of manslaughter and not of murder. (Johnson v. R. (1966) 10 W.I.R. 402, and R. v. Hamilton (1967) 11 W.I.R. 309 following the decision of the High Court of Australia in The Queen v. Howe (1958) 100 C.L.R. 448). 30
- (c) that the effect of the decision in the Howe case, as adopted in the West Indies, is that in every case where the trial judge leaves the issue of self-defence to the jury, he must in addition to directing them on the possibility of acquittal also tell them 40

that a verdict of manslaughter is open to them.

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12. On the 31st day of January 1969, the jury returned a unanimous verdict of guilty and the accused was sentenced to death.

pp.239-242

13. The accused applied for leave to appeal to the Court of Appeal of Jamaica on several grounds including the ground relied upon in this case; but in a Judgment dated the 23rd day of July 1969 the said Court dismissed the application.

pp.242-248
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p.243,1.10-
p.259

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14. With regard to the grounds of appeal relied on in this Case the Court of Appeal held that in the face of the full directions on self-defence it was not necessary to give any further directions on the issue of killing without intention to cause serious injury. The Court of Appeal took the view that in rejecting self-defence the Jury must have rejected the factual case for the Defence and accepted that of the Crown. It is respectfully submitted that the Court of Appeal fell into error since the rejection by the Jury of the Defence of self-defence need not have been on a complete rejection of the factual case for the Defence. The jury might well have thought that although the deceased had the intention to defend himself, he had, in so doing, used more force than was reasonably necessary in the circumstances.

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15. It is submitted further that the Court of Appeal were wrong in saying that the directions on self-defence were "extremely favourable to the applicant", since the failure of the judge to direct the jury on manslaughter in relation to self-defence, deprived the accused of a third choice (apart from murder or acquittal) namely, a verdict of manslaughter.

16. On the 23rd day of February 1970, an Order in Council was made pursuant to the advice of the Judicial Committee (Lords Hodson, Guest and Wilberforce) dated 23rd February 1970, granting the Appellant Special Leave to Appeal in forma pauperis to Her Majesty in Council.

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pp.260-261

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17. The Appellant respectfully submits that this appeal should be allowed and his conviction and sentence quashed for the following amongst other

R E A S O N S

1. BECAUSE the learned trial judge erred in not leaving to the jury the question of manslaughter on the basis of the evidence that the accused did not intend to kill or do grievous bodily harm. 10
2. BECAUSE the learned trial judge, having correctly left self-defence to the jury, failed to direct them that if they found that the accused intended to defend himself and not to kill or cause grievous bodily harm, then they should return a verdict of manslaughter.
3. BECAUSE the learned trial Judge, having correctly left self-defence to the jury, failed to direct them that if the accused had used more force than was necessary in the circumstances, they should return a verdict of manslaughter and not murder. 20
4. BECAUSE the judgment of the Court of Appeal is wrong and should be reversed.

L.J. BLOM-COOPER

EUGENE COTRAN.

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- and -

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CASE FOR THE APPELLANT

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