

IN THE PRIVY COUNCIL

No. 34 of 1976

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O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- and -

FREDERICK DALEY and BURNETT McGHIE Respondents

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CASE FOR THE APPELLANT

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1. This is an appeal from a majority judgment dated 15th June, 1976 of the Court of Appeal of Jamaica (Graham-Perkins, J.A. Watkins, J.A. (Actg.) Zacca, J.A. dissenting) allowing the appeal and setting aside the convictions and sentences imposed by Melville J. and a jury on Frederick Daley and Burnett McGhie in the Clarendon Circuit Court on 8th December, 1975.

page 441

2. The Respondents were tried over a period of five days from 2nd to the 8th December, 1975 and on conviction of manslaughter a sentence of thirty months hard labour was imposed on both Respondents.

pages 3-438

3. The three principal issues of law to be determined on appeal to the Privy Council are -

(a) Whether on an indictment it is permissible to join a count of manslaughter to a count of murder in Jamaica?

pages 449-454

(b) Whether it is good law that on an indictment for murder a verdict for the alternative offence of manslaughter (regardless of the category) may be returned if the evidence so warrants?

pages 455-457

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pages 461-462

(c) Whether the issue of - manslaughter by flight - as defined by the trial judge arose on the evidence in the instant case and was fairly and correctly put to the jury by the trial judge?

4. With respect to 3(a) it is respectfully submitted that sections 31(1) and 44(1)(2) of the Jury Act governs what is permissible and those sections read as follows:-

31(1) - "On trials on indictment for murder and treason, twelve jurors shall form the array, and subject to the provisions of subsection (3) the trial shall proceed before such jurors." 10

44(1)(2) - "On trials on indictment for murder or treason, the unanimous verdict of the jury shall be necessary for the conviction or acquittal of any person for murder or treason."

"On a trial on indictment for murder, after the lapse of one hour from the retirement of the jury a verdict of a majority of not less than nine to three of conviction of manslaughter or of acquittal of manslaughter, may be received by the Court as the verdict of the jury." 20

It is submitted that by virtue of these provisions it is not permissible to join murder with a non-capital offence. See *Cottle v. The Queen* [1976] 3 W.L.R. page 209. 30

5. With respect to 3(b) it is respectfully submitted that sections 31(1) and 44(1)(2) of the Jury Act assume that there is only one offence of manslaughter although as Denman J. as he was then said in R. v. Towers 12 Cox's Criminal Cases at 533 -

"There was no offence known to our law so various in its circumstances and so various in its considerations applicable to it as that of manslaughter." 40

It is our submission that at common law there is a long line of authority which supports the proposition that the alternative verdict of manslaughter may be returned on an indictment for

murder, please refer to R. v. Weston [1879]  
14 Cox's C.C. 346 approved in Palmer v.  
Reginam [1971] A.C. 814 and the origin of this  
doctrine is adverted to in D.P.P. v. Nasralla  
[1967] 2 A.C. 238 at 244. There Lord Devlin  
states -

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"By a well established rule of the common  
law which industry of counsel has shown  
to have originated in R. v. Salisbury it  
is open to the jury if they are not  
satisfied with the prisoner's guilt on a  
charge of murder, to convict of  
manslaughter."

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6. With respect to 3(c) we contend that there  
was evidence capable of amounting to "manslaughter  
by flight" which emerged from the cross-  
examination of Dr. Samuel Morgan whose evidence  
was fairly summarised by the trial judge. The  
effect of the material part of the doctor's  
evidence was that there was a fracture of the  
skull and the sternum, and if the deceased  
was running away from the respondents who were  
throwing stones at him and he tripped and fell  
on the ramp, which was in the vicinity of where  
he fell, then it was possible that the fracture  
of the sternum and skull could be as a result  
of falling. In any event the fracture to the  
skull could be the result of stones thrown by  
the respondents.

pages 287-307

pages 401-404

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7. It is respectfully submitted that when  
the trial judge directed on "manslaughter by  
flight" - the trial judge said inter alia -

pages 418-421

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"Where one person, in this case two,  
one or two persons causes in the mind  
of another by violence or threat of  
violence a well founded sense of danger  
to life or limb as to cause that other to  
try to escape and in the endeavour to  
escape he is killed the person or persons  
creating that state of mind is guilty of  
at least manslaughter."

pages 419  
ll. 1-7

Further the learned trial judge said -

"What you have to decide is was it  
reasonable, was it the natural consequence  
of the behaviour of those two men on that  
day, well, if he fell on account of that,

page 420  
ll. 9-15

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members of the jury, probably if you think that, all the other ingredients that I told you about have been proved."

page 420  
ll. 16-23

"Then we come to the last one; the attempt to escape must be the natural consequence of the unlawful act by the accused men and the unlawful act that they did must be such as all sober and reasonable people would inevitably recognise must subject the deceased to at least the risk of some harm resulting therefrom albeit not serious harm."

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We would point out that these directions were in accordance with R. v. Church [1965] 49 Cr. App. Reports 206 followed in Mackie 57 Cr. App. Reports 453 and approved in D.P.P. v. Newbury [1965] 2 W.L.R. 918.

8. In addition to the correct directions in law the following passages are adverted to in the trial judge's summing-up on the facts -

page 389  
ll. 23-47

"Well, the deceased remained in there for about five minutes, then he came outside. Then he came back out and he is running from the carpenter's shed now towards the mechanic shed. Now, at that stage he puts the witnesses - sorry, the accused men as being about eleven yards away. Remember he pointed out from the witness box here to the side of the dock there? The accused men had removed that distance away from the door of the carpenter's shed. Remember he pointed out from the witness box, here, to the side of the dock there the accused men had removed that distance away from the door of the carpenter's shed. Whilst the deceased was running across now he sees both accused men and he says that they had stones in their hands at that stage, when the deceased is running out and running across the yard to the ramp but he can't say if they threw any stones at him at that stage, whilst he is running. Now, remember, here again is the difference of Ceaphas now running after the deceased man, in other words Ceaphas gave you the impression that he came out first and the deceased behind whereas the witness is saying that the deceased came out first and Ceaphas came out behind him."

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"Well, the deceased is running towards the ramp and then he dropped and whilst he is on the ground both men started to throw stones at him then, whilst he is lying on the ramp. Now, remember he has put that distance whilst the deceased is lying on the ramp to where the men are throwing stones as being the same distance again from the dock, here, to the witness box; from the dock to the witness box about eleven yards, estimated; that was where they were then they were throwing stones but again, remember this witness can't say if any of the stones caught the deceased man."

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"Now, he did not see the deceased man throw any stones at all. It was put to him and he said it is not correct. Now, here you remember - well this man is sort of supporting what the accused man is saying; they are more or less saying what he is saying what he is saying. The only important difference is that the accused men are saying that the deceased man took up the stone he was sitting on and threw it at them. Mr. Burke is saying that never happened at all; he never threw it at all. Of course, he goes on to say that the accused men did throw stones at the deceased whilst he is lying on the ground by the ramp; but he can't say if any caught him. That is the important difference between what this witness is saying and what the accused men are saying. And again he confirms that the deceased man had nothing in his hands at all when he was running."

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"Then he said the fractures of the skull could be caused by a stone that was flung and he went on to say that a fairly large stone with a strong "degree of force would have to cause the fracture to the skull. Then he was asked, having regard to where he saw the injury on the skull there if the stone could have been thrown from behind by a person who was standing behind the deceased and he said it is possible and he said also it is possible that that blow could have been delivered whilst the deceased man was lying down. The head

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injury alone could have been responsible for the death and death could have happened instantaneously or a short time afterwards and a short time, according to him, members of the jury, could be up to two to three hours afterwards."

pages 403-404  
ll. 33-49

"Well, he went on to say that if the deceased man is running and trips and falls over the edge of the ramp, it is quite possible that he could have fractured the skull on the inside of the ramp here. - sorry, the chest - the sternum; but he wouldn't agree that in the same one fall he could hit his head and fracture the skull also. He said it is possible and it is hardly likely. He is there to give you his expert opinion. That is a great point in issue here - whether he could have hit his chest when he fell down, the force he fell down with, he also hit his head. Because, remember what Mr. Atkinson said - he hit his head on the smooth surface of the concrete there that is why you don't see no external marks, but it could fracture his skull. It is a question for you, members of the jury."

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page 404  
ll. 1-14

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page 415  
ll. 21-38

"It seems more likely to me what Mr. Burke is saying when he falls down he drops, boof; "him don't get up." You remember how Mr. Burke told you about it dramatically. He fell and "from he fell he didn't move. Is that when he fell and fractured his chest and skull? Whilst he is on the ground or whilst he is on the ground the stones are falling and hitting him and causing the chest injuries or the head injuries then because remember the doctor is saying that the brain injury was the substantial cause of death. Of any of the two injuries the chest injury could be a fifty-fifty chance; that he would die if he didn't get prompt treatment at all. The head injury he said from ten minutes to two hours so you may probably say it is not the chest injury that caused his death."

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We contend that these directions on the evidence of Mr. Burke an eye-witness and Dr. Samuel Morgan illustrate the fairness of the judge's directions on the facts of the cause pertaining to "manslaughter by flight." Furthermore it follows that once there was evidence to be put to the jury it was appropriate

that counsel for the Crown address the jury in his final speech on these facts.

9. The issues of Law submitted for consideration to the Privy Council have arisen because of the Court of Appeal's criticism of the careful direction by Melville J. from whose summing-up can be elicited the facts of the case. pages 363-438

10. The facts are that in the carpenter's shed on the property of Jamaica Cordage Company Limited a dispute took place between the accused and the deceased in the presence of two of the eye-witnesses Messrs. Laidford and Smith. During the dispute the accused threatened to kill the deceased if he the deceased who happened to be the overseer of the property tried to prevent the accused taking some three hundred posts from the property.

11. Some five days after this initial dispute both accused returned to the carpenter's shed where the deceased was in the company of two of the eye-witnesses Messrs. Laidford and Smith. After demanding money from the deceased who referred them to the manager, both accused started to throw stones at the deceased inside the shed and he ran in an attempt to escape from the stones. At this point the accused were about six yards from the deceased.

12. Both the accused men and Crown witnesses are at one that the deceased fell on the concrete ramp while he was attempting to escape. The defence however, contends that it was the deceased who threw stones and suggested he was running for his gun while the Crown witnesses assert that the only stones thrown that day was by the accused.

13. The Crown witnesses Burke said that while the deceased was on the ramp, both accused continued to throw stones at him and at this point the distance of the deceased from the accused was about eleven yards.

14. The investigating officer found stones in the shed when he visited the scene of the crime on that day and although photographs

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were taken that day, he gave no instructions on this aspect of the matter.

15. It was against that background that Dr. Morgan gave the expert evidence. He gave it as his opinion that the head injury could have been caused by a fairly large stone flung with great force and that this injury alone could have caused death. He further stated that this injury could have occurred either while the deceased was running or when he was on the ramp. As for the fracture of the sternum, the doctor gave it as his view that this could have been caused by the deceased falling on the ramp.

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16. The defence was that no threats were issued; that it was the deceased who threw stones; and that the injuries he received were of his own making when he ran. It was further suggested he was running for his gun.

17. In his careful summing-up to the jury the judge on reviewing the evidence pointed out that the Crown's case was based on common design and that they would have to decide, in the light of the evidence and particularly that of the doctor, whether the injuries which caused death were from stones thrown by the accused which hit the deceased or whether the injuries were caused when he fell.

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18. At the end of the summing-up the trial judge left four issues to the jury, namely -

- (a) guilty of murder
- (b) guilty of manslaughter by reason of provocation
- (c) guilty of manslaughter by reason of flight; or
- (d) not guilty of any offence at all,

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and specifically charged them that if the verdict returned were manslaughter, that they should indicate on what basis and a verdict of "manslaughter by reason of flight" was returned in respect of both accused.

19. The accused appealed and in addition to their supplementary grounds of appeal the principal

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grounds of appeal concerned the judge's direction on "manslaughter by flight".

page 438

20. The Court of Appeal in an elaborate judgment stated that the original grounds of appeal, might be said to raise questions of fundamental importance concerning criminal trials.

page 441

page 442  
ll. 10-14

21. The majority judgment may be divided into three parts -

- 10 (i) An outline of the facts of the case, pages 441-446
- (ii) A discussion as to whether on an indictment for murder it is permissible to return a verdict of manslaughter save in the case of provocation or absence of intention to kill and whether the issue of manslaughter arose on the evidence, pages 449-454
- 20 (iii) A review of a number of authorities including Mackie's Case on manslaughter in an attempt to lay down a rule on causation in criminal trials, and to show that Mackie's Case was wrongly decided. pages 463-470

22. With respect to 9(i) we respectfully submit that the trial judge's summing-up he preferred to that of the Court of Appeal particularly as to the inferences he invited the jury to accept.

30 23. With respect to 9(ii) it is respectfully contended that in view of the statutory provisions of sections 31 and 44 of the Jury Act, the Court erred in assuming that a count of manslaughter can be joined in an indictment charging murder. It is further submitted that the Court of Appeal erred in law, in finding that the issue of - manslaughter by flight - did not arise on the evidence.

40 24. With respect to 9(iii) it is respectfully submitted that the trial judge's directions in law on the issue of - manslaughter by flight - in following the directions in Mackie's Case were correct and that the Court of Appeal's discussion of causation would tend to confuse the jury. We submit that the short minority

judgment was correct and that the appeal should have been dismissed.

25. In view of the foregoing it is respectfully prayed that the Order of the Court of Appeal setting aside the convictions and sentences in respect of the respondents be set aside and the Order imposed by Melville J. be restored together with any other relief as the Judicial Committee of the Privy Council may order for the following among other

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R E A S O N S

- (1) BECAUSE it was permissible in law to return a verdict of "manslaughter by flight" on an indictment charging murder.
- (2) BECAUSE there was evidence which was properly put to the jury on - "manslaughter by flight."
- (3) BECAUSE the trial judge's directions was fair and correct in law on the issue of - "manslaughter by flight."
- (4) BECAUSE the minority judgment was correct.

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Glen Andrade

No. 34 of 1976

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CASE FOR THE APPELLANT

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