IN THE PRIVY COUNCIL No. 35 of 1972

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

- and -

LEARY WALKER — Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from a Judgment of the Court of Appeal of Jamaica (Henriques Edun and Graham-Perkins, JJ.A.), dated the 21st June, 1972, which allowed the Respondent's appeal against his conviction in the Kingston Circuit Court (Grannum J., and a Jury) of manslaughter upon which the Respondent was sentenced to imprisonment for life. The Court of Appeal quashed the said conviction, set aside the said sentence and ordered a retrial. pp.172-177

2. The Respondent was indicted on the charge that he, on the 17th day of March, 1970, in the Parish of Saint Andrew, murdered Ruby Walker. p.1

3. The trial took place in the Supreme Court for Jamaica sitting in the Kingston Circuit Court (Grannum J., and a Jury) between the 23rd and 31st days of March, 1971. The prosecution called material evidence to the following effect :-

(a) Vine Ricketts said that the deceased was her youngest daughter; the Respondent was the deceased's husband. The deceased was living with the witness at the time of her death. The Respondent was then living with his step-mother. On the 17th March, 1970, the deceased came home from work at about five to six o'clock; she received a telephone call and then pp.3-29 p.3 l.25 p.3 l.33 p.4 l.2 p.4 ll.18-19 p.5 ll. 30- end.

Record

left in her car at about seven o'clock
p. 6 11.4-23 taking her young son Karyl with her.
p. 7 11.6-8 About forty minutes later Karyl returned
p.7 home. He said something to the witness
11.10-25 who went to Sunrise Drive where she saw
the deceased lying in a pool of blood.
She said that the deceased had left that
p.7 11.26-28 evening in a Singer Vogue car. She said
p.8 11.5-6 that the Respondent used to beat the
deceased with the buckle of his belt; 10
she said that she saw scars on the
p.9 11.38 deceased's back. In cross-examination,
- end. she identified the deceased's hand-
Exhibit 1 writing on a letter dated the 24th June,
p.187 1969. She said that she saw the marks
of beatings on the deceased's body;
p.14 11. she agreed that she did not tell the
10-36 police about the beatings. She said
p.14 11.32-33 that she herself had never witnessed
p. 21 11.44 any beating. She did not know of her 20
- end daughter being involved in any unsavoury
p.25 1.36 relationship with a co-worker.
- p.26 1.2

pp.30-36 (b) Urcel Facey said that he lived in Sunrise
p.30 1.17 Drive. On the 17th March, 1970, he said
that he was on his verandah and saw a
p.30 1.4- car drive slowly up the drive at about
p.31 1.2 7.40 p.m. He heard a screeching sound
of brakes and screaming coming from the
p.31 11.4-5 car. He ran to his gate and saw a body
p.31 11.7-16 fall from the driver's seat. The body 30
was riddled with blood. It was the body
p.31 11.21 of a woman. He saw a man standing at the
-22 head of the woman's body. He identified
p.31 11.23 the Respondent as that man. A little
-26 boy in the car asked the Respondent why
p.31 11.27 he did that and the Respondent replied,
-34 'There was nothing left for me to do.'
p.32 11.1-5 The witness was then standing at the foot
p.32 11.6-8 of the dead woman. The Respondent then
made a step towards the witness: he 40
heard the click of a ratchet knife from
p.32 11.13 the direction of the Respondent and
-22 retreated into his gate. About two
p.32 11.23 minutes later when the witness returned
-32 the car had gone. He then telephoned
p.33 1.2 for the police from his home. He
identified the car as being the Singer
Vogue car BU-390 which was outside the
Court (Exhibit 2). In cross-examination,
p.34 11.12 the witness picked out a police officer 50
-14 when asked to identify the accused man.

Record

He then identified the Respondent as the man he saw by the Singer Vogue on the 17th March, 1970. On being recalled, the witness said that he did not see when the injuries on the deceased's body were inflicted.

p.35 11.5-end
p.36 11.18-26

(c) Franklin Ricketts said that the deceased had been his sister, she owned a Singer Vogue car BU-390 (Exhibit 2). He identified the deceased's body to the doctor at the Kingston Morgue.

pp.37-38
p.37 11 5-6
p.38 11.10-17
p.37 11.27 - end.

(d) Wilbert Watson, a Detective Acting Corporal, said that on the 20th March, 1970 at about 10.30 a.m. he was on mobile patrol in Coopers Hill driving a Land Rover. He saw on Coopers Hill Heights a Singer Vogue car Bu-390 parked under a tree at the end of a cul-de-sac. He saw a man sitting around the steering wheel. The witness identified himself to the man whom he identified as the Respondent. He searched the car, having noticed that the registration number was that of a car wanted by the police; in the left pocket of the car he found a knife which was open and had what looked like blood-stains on it. He then took the Respondent with the car and knife (Exhibit 3) to Red Hills Police Station and handed over the knife to Detective Acting Corporal Lumley. Lumley identified himself to the Respondent; the Respondent said, 'I would eventually give myself up.' After caution by Lumley, the Respondent said, 'I want to tell you something because forty years have been wasted.' The Respondent elected to make a written statement after caution, which he wrote out himself (Exhibit 4).

pp.39-45
p.39 11.14-16
p.39 11.23-28
p.44 140 -
p.45 1.1
p.39 11.31-32
p.40 11.1-4
p.40 11.12-22
p.40 11.24-25
p.41 11.24-34
p.41 1.36 -
p.43 1.8
Exhibit 4
pp.188-189
p.43 1.20 -
p.44 1.36

(e) Zamora Lumley, Detective Corporal, said that on the 17th March, 1970, at about 7.40 p.m. he went to Sunrise Drive and there saw the body of the deceased. He attended a post mortem examination on the following day. On the 20th March, 1970, he attended at Red Hills Police

pp.45-54
p.45 11.19-25
p.46 11.1-3
p.46 11.18-19

Record

p.47 11.18 -19 Station and there saw the Respondent who said, 'Officer, I would freely give up myself because forty years have been wasted.' After caution, the Respondent
p.47 11.20 -26 said, 'I would like to give a statement as to how it happened.' The Respondent then made the written statement (Exhibit
p.47 1.30 - p.48 1.23 4). In cross-examination, the witness agreed that he had made a mistake as to the words spoken by the Respondent at Red
p.52 11.33 -34 Hills Police Station. He said that the Respondent said, after caution, 'I want
p.52 11.31 -34 to tell you something because forty years have wasted.' In re-examination, the witness said that the Respondent also
p.53 11.1-3 said, 'I would like to give a statement as to what happened.' In further cross-examination, the witness said that he
p.53 1.13 - p.54 120 had not made a note of these latter words and that he did not give evidence of such latter words at the Preliminary
p.54 11.26 -32 Examination. He said that the witness Watson was present throughout the interview.

(f) Karyl Walker gave unsworn evidence that
p.57 1.10 & p.58 1.21 -22 he was the five-year old son of the Respondent. He said that he remembered
p.58 11.27 -29 his mother. One day in 1970 in the night she was driving her car with his father sitting in the front passenger
p.58 1.33- p.59 1.11 seat and the witness in the back. His father pushed his mother out of the car.
p.59 1.12- 18 After further examination of the witness as to his understanding of the nature of
p.59 1.19 -p.61 1.40 an oath, the learned trial judge ruled that he should give no further evidence.

p.63-69 (g) Louis Dawson, registered medical practitioner, said that on the 18th March, 1970, he performed a post mortem
p.63 11.31 -end examination of the deceased. He said that he found eleven injuries which he
p.64 1.14- p.65 1.16 traced in the process of dissection. Death was due to shock from the
p.65 11.19 -end haemorrhage resulting from the stab wounds of the chest. A knife such as
p.66 11.3-5 Exhibit 3 could have caused the
p.66 11.9-11 injuries. For each of the eleven wounds
p.66 11.25-27 a separate thrust was required. In cross-examination, the witness said that it was quite possible that the assailant

Record

could have been seated when the injuries were inflicted.with the deceased stretched across his lap face down. It was most likely that the deceaed having received injuries to the back shifted position exposing the front to attack. Injury number one could have been fatal by itself as could injuries numbers ten and eleven. There were no signs of ill treatment on the body of the deceased apart from the eleven recent injuries.

p.67 ll.14-31

p.68 ll.19 - end

p.69 ll.26-34

4. The Respondent made an unsworn statement from the dock. He said that he married the deceased in 1960. The deceased went to university in 1960 after the marriage and subsequently graduated. They later had two children. He went to New York to further his studies. The deceased followed with the children. They lived happily until the middle of 1969. One day they had a quarrel over a letter the deceased had written to a man in Jamaica and the deceased admitted that she had been having improper relations with a man. They wrote to Colonel Morris of the Salvation Army and asked his advice on the matter. This did not help them very much. The deceased returned to Jamaica in July 1969 and the Respondent followed. The deceased went to live with her mother and he followed there. They became reconciled and it was decided that the Respondent should go back to New York, tidy up their business, abandon his studies and return home. He returned at the end of 1969 and lived with the deceased at her mother's house. In January, 1970, on the deceased's birthday the Respondent was waiting on the deceased at home with a present and card. She did not arrive home until 9.00 p.m. being brought home by a man. The Respondent protested and they quarrelled. On the following day, he was asked to leave and he did so. He said that the statement he gave to the police concerning the marriage was true. While they were travelling in the car (on the 17th March, 1970), they quarrelled about the man whom the Respondent had seen bring her home on the 19th January. The deceased flew into a temper and said, 'Well, is me damn man and if you don't like it you can go and kill your blasted self.' The Respondent said that he was surprised because strong

p.74-76

p.74 ll.29-end

p.75 ll.1-18

p.75 ll.19-27

Record

language was never used in his family. After using those words the deceased stopped the car and rushed out. He went to her, held her and pulled her back into the car. He was then over into the driver's seat. The deceased fell across his lap and in the course of the struggle to get her inside the car she grabbed and held on to the Respondent's testicles and squeezed him. The Respondent felt a cramping pain. He felt that he was going to faint. He remembered seeing a knife in the centre tray of the car along with a cigarette lighter. He reached for the knife. Beyond that he did not recall anything until he heard Karyl say, 'Dada, why you kill mummy?' He then knew that something had happened. The Respondent said that he had explained the rest to the police.

p.75 11-28
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p.75 1.43-
p.76 1.8

pp.76-113

5. Vincent Williams, a doctor of medicine with a diploma in psychological medicine, gave evidence on behalf of the Respondent. He had experience of psychiatry since 1949 and had been a consultant for twenty-two years. He examined the Respondent on the 23rd September, 1970. In his opinion, the Respondent was not mentally ill at the time of his examination but he was of a neurotic personality type, that is, emotionally unstable with mal-adjustment possibility. He had a functional derangement due to a disorder of the nervous system. The witness said that the Respondent was not insane at the time of the incident but his judgement may have been substantially impaired. He said that neurosis was an inherent condition of the individual. Assuming that there was marital stress with the patient having to abandon his studies, in the context of the Respondent's personality he could go to pieces. If the Respondent had seen his wife with another man and had questioned her about it and she had admitted it was her man and had abused the Respondent and had further squeezed his testicles then all those factors with the symbolism of the injury to his testicles would increase the likelihood of his judgement being further impaired. It would be possible for such a person to behave in a reflex and involuntary way. Such involuntary action

p.77 11.1-9

p.79 11.15-
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p.79 11.28-
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p.80 11.12-
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p.80 11.17-
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p.80 1.24
- p.81 1.22

p.82 11.1-12

p.83 11.1-12

Record

would be called automatism. Under such a state of automatism a person could have mental illness: he could perform well-integrated acts. There could be a sudden return of awareness: a sudden break in awareness and a sudden return. The witness said that the Respondent's son speaking to him could have brought the Respondent back to awareness. In cross-examination, the witness said that assuming that the facts of the incident put to him were correct then it was likely that the Respondent's behaviour could be explained by his judgement being impaired. The reason was that the Respondent was of a neurotic type who, when faced with stress, would behave in an unusual way. He was not saying that the Respondent was in a state of automatism; he was saying that given the Respondent's personality with the related facts and stresses at the time then it was likely that the Respondent may have been acting in an automatic state. The witness said that because the Respondent remembered seeing, and reaching for, the knife it made the conclusion that he was in a state of automatism less likely. He said that if he was in a state of automatism he would recollect no detail. He said that it was more consistent that he became aware when his son spoke to him, that he had a new awareness of his deed and went into a panic. It was likely that his judgement was substantially impaired. The fact that a man said something would indicate a certain amount of awareness.

p.89 11.1-4
p.86 11.31 -37
p.86 1.38 - p.87 1.2
p.87 11.10-20
p.88 11.20-22
p.88 11.28-34
p.89 11.7-38
p.92 11.6-31
p.95 11.22-41
p.94 11.18-34
p.109 1.34 - p.110 1.43
p.98 11.11-24

6. The learned trial judge began his summing-up by directing the jury upon the nature of their duty and the respective functions of judge and jury in a criminal trial and that the burden of proof was on the prosecution. He then considered the meaning and effect of circumstantial evidence and the necessary elements which the prosecution had to establish to justify a verdict of murder. He dealt fully with the defences of provocation, diminished responsibility and automatism. He directed the jury that the prosecution had the onus of negativing any question of self-defence. He continued in the following terms :-

pp.114-162
p.119 1.19 - p.122 1.14
p.123 1.31 - p.127 1.19
p.127 1.20 - p.130 1.10
p.132 11.8-25

> '..... I am not going to bother to leave the issue of self-defence to you at all. Out of an abundance of caution I will tell you this so that you will understand why

I am not leaving the issue of self-defence to you. In order to raise the issue of self-defence in a murder trial there must be some evidence that the accused man had some reason to fear death or bodily harm from some action or word of the deceased; that he had no opportunity to retreat or retreated as far as he could and that he struck whatever blows he did strike with the intention of defending himself from death or serious bodily injury. You may know that there was no evidence in this case that can support any of those propositions and therefore I withdraw from you the issue of self-defence.'

The learned trial judge then summarised the evidence given on behalf of the prosecution and the Respondent, including the Respondent's unsworn statement from the dock. The learned trial judge directed the jury that they should disregard any evidence given by the child, Karyl Walker. He then reminded the jury of the defences put forward by the Respondent. He said that the Respondent was saying that he acted involuntarily and that it was for the prosecution to satisfy the jury that whatever caused the deceased's death was a voluntary act on the part of the Respondent. The learned trial judge, after asking leading Counsel for the Respondent if he wished anything further to be put more fully or in greater detail, reminded the jury of the possible verdicts open to them.

p.146 11.11-42
p.159 1.21 - p.160 1.15
p.158 1.40 - p.159 1.4
p.160 11.46 - end

7. The jury returned verdicts of not guilty of murder but guilty of manslaughter on the basis of diminished responsibility and the Respondent was sentenced to imprisonment for life.

p.163
p.167-168

8. The Respondent applied for leave to appeal against his conviction and sentence to the Court of Appeal of Jamaica (Henriques Edun and Graham-Parkins, JJ.A.), sitting as a Court of Criminal Appeal. The appeal was allowed on the 21st June, 1972, and the conviction was quashed, the sentence set aside and a retrial ordered in the interests of justice.

p.169-171
p.172-177

Record

9. The Judgment of the Court was delivered by Edun, J.A., who summarized the material facts after expressing the Court's view that the main ground of appeal which warranted consideration was whether or not the trial judge was correct in not leaving to the jury the defence of self-defence. The Court was unanimously of the view that the learned trial judge was wrong and that this was not a case for applying the proviso. The Court referred to the case of Lashley v. R. (1958-59) 1 W.I.R. 100 and to the three ingredients of self-defence in relation to which there had to be some evidence before the defence was raised. The Court said that the facts disclosed four points, First, there was no evidence on the case for the Crown proving in what circumstances the deceased came to be stabbed apart from the Respondent's unsworn statement at the trial. Secondly, the Respondent's reply to his son's question, 'There was nothing left for me to do', was not inconsistent with a reasonable inference that he was conscious and that he killed his wife because he was acting in self-defence. Thirdly, Urcel Facey's evidence that he saw the body of the woman fall out off the driver's side of the car supported the Respondent's statement at the trial that he was over into the driving seat when he held his wife and pulled her back. Fourthly, the doctor said that it was possible that the deceased was stretched across the lap of the assailant face downward, thus supporting the Respondent's statement at the trial of the relative positions of himself and the deceased.

p.172 l.21 - p.174 l.19
p.172 ll.17 - 20
p.174 ll.24-27
p.174 ll.28-42
p.174 l.43 - p.175 l.33
p.175 ll.1-6
p.175 ll.7-18
p.175 ll.19-24
p.175 ll.25-33

10. In the Court's view, if what the Respondent said in his statement at the trial was true it was utterly unreasonable to expect him to retreat when he was within the confines of a car and under the weight of his wife. Further, the distribution of the injuries together with the doctor's opinion was not inconsistent with those injuries being inflicted in self-defence. As the evidence disclosed a credible narrative constituting the Respondent's cardinal line of defence the Court could not understand why the learned trial judge took it upon himself to decide a question of fact. The Court declined to apply the proviso expressing the view that the defence was of a kind which, however weak or

p.175 ll.34-37
p.175 ll.38-41
p.175 ll.41-45
p.176 l.16 - p.177 l.5

p.175 ll.42 - end

tenuous, might, if believed by the jury or if it caused them to entertain a reasonable doubt, have resulted in complete acquittal.

p.186

11. The Appellant was given final leave to appeal to the Privy Council by the Court of Appeal of Jamaica on the 18th January, 1973,

pp.178 - 184

pursuant to section 7 of the Judicature (Appellate Jurisdiction) (Amendment) Act, 1970 (Act 12 of 1970).

12. The Appellant respectfully submits that this appeal should be allowed. It is respectfully submitted that there was no evidence sufficient to raise the issue of self-defence and that the learned trial judge was justified in withdrawing that issue from the jury's consideration. There was no evidence from which the inference could be drawn that the Respondent acted under any reasonable apprehension of death or serious injury necessitating the use of such a lethal weapon. The force used was so manifestly excessive and the injuries inflicted were so grave as to be inconsistent with self-defence. The Respondent on his own statement was the aggressor up to the time of the alleged black-out. Before using a knife it would be reasonable to expect the Respondent to have made some attempt to remove the deceased's hand or hands from his testicles or release her and allow her to go; there was no evidence that he made any attempt to do so or that he was in any way unable to do so. There was no evidence that the Respondent used the knife with the intention of defending himself from death or injury; the only evidence was that he could not remember anything after reaching for the knife until his son spoke to him.

13. It is respectfully submitted that the Appellant's statement after the killing, 'There was nothing left for me to do', did not raise the issue of self-defence; without more, it is submitted that it could not reasonably be inferred from that statement that the Respondent may have been acting in self-defence. Further, it is respectfully submitted that the issue of self-defence was in no way raised even if

the Respondent's account of being in the driver's seat at the time of the killing and of the relative positions of himself and of the deceased may have been true. Further, even if the Respondent could not have retreated further and the injuries were not inconsistent with their being inflicted in self-defence, it is respectfully submitted that the issue of self-defence was not thereby raised. In the absence of direct evidence from the Respondent (or clear evidence from any other source) as to why he stabbed the deceased, it is respectfully submitted that any inference sought to be made that he did so in self-defence was a matter of conjecture.

14. It is respectfully submitted that having regard to the nature and conduct of the Respondent's defence at the trial, the issue of self-defence was incompatible with the defences put forward, particularly that of automatism. The act of squeezing the testicles was introduced, first, as the factual basis for the defence of automatism that is, as the final act which broke the Respondent's consciousness and brought on the involuntary state, secondly, as part of the provocative conduct of the deceased and, thirdly, for its effect upon a person suffering from diminished responsibility. In those circumstances it is respectfully submitted that the learned trial judge in directing the jury upon self-defence would have been compelled to present a theoretical view of the evidence not argued on behalf of either the prosecution or the Respondent. This theoretical view would have had the effect of eroding the pleaded defence of automatism.

15. It is respectfully submitted that the Court of Appeal was in error in permitting Counsel for the Respondent to present a case based on self-defence having regard to the fact that self-defence had not been argued or suggested at the trial and/or that there was no direct or positive evidence to make self-defence an issue at the trial.

16. The Appellant respectfully submits that this appeal should be allowed and that the Respondent's conviction and sentence be restored for the following, among other

Record

REASONS

1. BECAUSE the jury were correctly directed both on the facts and the law of the case.

2. BECAUSE the learned trial judge correctly withdrew any question of self-defence from the jury.

3. BECAUSE there was no evidence to raise the defence of self-defence.

4. BECAUSE the Respondent has suffered no miscarriage of justice. 10

STUART N. McKINNON

No. 35 of 1972

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

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- and -

LEARY WALKER — Respondent

CASE FOR THE APPELLANT

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