judgment no 1, 1974

IN THE PRIVY COUNCIL No.35 of 1972

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

- and -

LEARY WALKER — Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from a Judgment of the Court of Appeal of Jamaica (The Honourable President, Edun, J.A. and Graham-Perkins, J.A.) dated the 21st day of June, 1972, whereby the said Court quashed the Respondent's conviction of manslaughter on the ground of diminished responsibility in the Supreme Court for Jamaica on the 30th day of March, 1971, set aside the sentence of life imprisonment imposed on him on the 31st day of March, 1971, and ordered a retrial. Leave to appeal to Her Majesty in Council was given to the Director of Public Prosecutions by a majority decision of the Court of Appeal of Jamaica (Fox, J.A. Smith, J.A. and Robinson, J.A.) the reasons for which were given on the 29th September, 1972.

pp.172-177

p.163
p.168

pp.178-184

2. The principal questions for determination in this appeal are whether the Court of Appeal were right in:-

(a) holding that the trial Judge wrongly withdrew the defence of self-defence from the jury;

(b) refusing to apply the proviso; and

(c) ordering a retrial.

The Respondent respectfully submits that whereas the Court of Appeal were right on issues (a) and (b), they wrongly ordered a retrial in this case.

3. The Respondent was tried on an indictment

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charging him with the murder of his wife, Ruby Walker, on the 17th March, 1970.

4. The case for the Crown was summarised by the Court of Appeal when giving the Appellant leave to appeal on 29th September, 1972, as follows:-

"The facts in the Crown's case

p.179,l.20-p.180

The respondent was tried on an indictment charging him with the murder of his wife on 17th March, 1970. The evidence in support of the Crown's case disclosed that from 1969 the respondent and his wife commenced living apart. There were matrimonial differences. These resulted in the wife and the two children of the marriage going to live with her mother at 6 Dorchester Avenue, St.Andrew. The respondent lived at Pembroke Hall, St.Andrew. On the 17th March, 1970, the wife returned home from work at some time between 5 p.m. and 6 p.m. She received a telephone call, which, as the respondent subsequently stated, was made by him. At about 7 p.m. she left home driving her motor car and accompanied by her son Karyl aged 5 years. At about 7.40 p.m. this car was seen by a witness being driven slowly up Sunrise Drive in Kingston 8. The witness heard the screeching sound of brakes and screams coming from the car. He ran to his gate and saw the body of a woman, subsequently identified as the deceased, fall out of the right side of the car from the driver's seat into the road. The body, he said, was riddled with blood. It struggled and expired. The witness saw the respondent standing at the head of the woman. He also saw a little boy come from the car. The boy asked, "Daddy why you do that?". He heard the respondent reply "There was nothing left for me to do". The witness said further that the respondent stepped towards him. He retreated when he heard the click of a ratchet knife coming from the direction of the respondent. When he returned to the scene about two minutes later, the car, the boy and the respondent had disappeared. The body of the deceased was lying in the street.

The respondent was accosted by the police on 20th March. He was sitting in the deceased's car which was parked on a road at Cooper's Hill. The police searched and found a blood stained knife in the pocket of the car. The respondent was

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taken to the Red Hills police station. Under caution he said "I would like to give a statement as to how it happened." He then wrote and signed a statement in which he said that at about 6 p.m. on 17th March, he had seen his wife driving her car through the square at Constant Spring. A man was with her. At about 7.30 p.m. he spoke with his wife by telephone from his home at Pembroke Hall asking her to lend him her car. "She offered to pick me up which she did, at about 20 minutes to 8. While driving along Sunrise Crescent an argument ensued as to her whereabouts that evening. She was driving. She stopped and raised an alarm and rushed out of the car. Then something happened. Then Karyl said to me, "Daddy why did you kill Mummy?". A man was in the vicinity; Karyl was crying. I took him into the car and drove to 6 Dorchester Avenue and left him at the gate. Then I drove into Havendale/ Meadowbrook area until I found myself on the Red Hills/Coopers Hill Road." The statement concluded, "I had no intention of hiding nor evading the police but the shock of the incident did not, and even now at writing has not, worn off. I began to think of going to the Constant Spring Police Station to surrender to the authorities there, as I was not aware that there is a Police Station at Red Hills."

Medical evidence adduced by the Crown established that the deceased received eleven stab wounds by a knife seven in the front and four in the back of the upper trunk. Most of these had penetrated vital organs and vessels. Death was due to shock and haemorrhage resulting from these wounds."

5. The case for the defence was also summarised by the Court of Appeal as follows:- p.181, lls.1-34

"The facts in the defence

Sworn evidence of the manner in which the deceased came by her death was not given by the defence. In an unsworn statement the respondent said that as a result of quarrels over a man he had left his wife, and continued; "while we were travelling in the car we quarreled about the same man who I saw driving her that evening. She flew into a temper and said: 'Is my damn man, if you don't like it you can go and kill your blasted self.' I was surprised because strong language was

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never used in our family. After saying that she stopped the car and rushed out. I went to her, hold her and pulled her back. I was over into the driving seat. She fell across my lap and in struggling to get her inside the car she grabbed and hold on to my testicles and squeezed me. I felt I was going to faint. I remember seeing a knife in the centre tray along with a cigarette lighter. I remember reaching for the knife. Beyond that I don't remember anything. I heard Karyl saying "Daddy why you kill Mommy?" Then I knew something had happened. The rest is as I stated to the Police."

A doctor who examined the respondent on 23rd September, 1970 was called by the defence. He gave an opinion based upon intelligence gathered from that examination, and from reading the depositions in the case, that the respondent was not insane at the time of the killing, but that he was a neurotic personality whose judgment may have been impaired and that this impairment may have been increased if his wife had admitted being with another man, had abused him, and had squeezed his testicles."

6. In his summing-up the learned trial Judge left to the jury the following possible verdicts:-

(1) guilty of murder;

(2) guilty of manslaughter -

(a) on the basis of provocation,

(b) on the basis of diminished responsibility.

(3) not guilty, on the ground that the respondent was in a state uf automatism when he struck the fatal blows.

7. The learned trial judge specifically withdrew the defence of self-defence from the jury. He said:-

p.132, ll.1-25 "One of the things that the prosecution have the onus of negativing in this case is the question of self-defence, that is that the accused man - the prosecution has the burden

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of making you feel sure that the accused man was not acting in any self-defence. Now, as far as that issue is concerned, I am saying that it does not arise in this case at all in any way and 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, 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."

"I think I told you yesterday that this was not, in my view, a case in which an issue of self-defence had any relevance at all. You must remember that this is still an element that the Prosecution had the burden of negativing. The Prosecution must make you feel sure that this man was not acting in necessary self-defence." p.151, ll.11-18

8. On the 30th March, 1971, the jury returned a unanimous verdict of not guilty of murder, but guilty of manslaughter on the basis of diminished responsibility. p.163

9. On the 31st March, 1971, the Respondent was sentenced to imprisonment for life. p.168

10. The Respondent appealed to the Court of Appeal upon the following grounds:- pp.169-171

"1. "Misdirection

(a) The learned trial Judge wrongly withdrew the issue of self-defence from the jury's consideration thereby depriving the applicant of a real chance of a complete acquittal.

(b) The trial Judge wrongly directed the jury that

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there was an onus on the applicant to prove that he acted involuntarily at the time of the killing. It is submitted that a later correct statement of the law on this point could only serve to confuse the jury unless they were clearly told that the original statement that the onus was on the applicant was wrong.

(c) The accused defence was not adequately put to the jury and the jury were invited to draw inferences adverse to the applicant without proper foundation therefor e.g.

(i) inference that the applicant had armed himself with a knife before the killing.

(ii) inference of cruel conduct by the applicant towards the deceased.

(iii) a direction that evidence of marriage relationship in 1969 had nothing to do with incidents in 1970.

(iv) the applicant's unsworn statement was mutilated in the summing up.

(v) the evidence of Dr. V.O. Williams on automatism was not adequately put to the jury.

(vi) the learned trial Judge failed to direct the jury as to the law if it was found that the accused was provoked and was also suffering from diminished responsibility.

2. Inadmissible Evidence

The evidence of Karyl Walker ought not to have been heard by the jury. The trial Judge was neglectful in his duty when he permitted this little boy to start his testimony before it was decided whether or not he was competent to give evidence. The effect was to leave with the jury prejudicial evidence which could not be challenged. This evidence affected the consideration of the case by the Judge himself and must have affected the jury.

3. The Sentence was Manifestly Excessive

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GROUNDS OF APPEAL OR APPLICATION

(1) Mis-direction

(2) Inadmissible evidence

(3) Sentence excessive"

11. In their Judgment delivered by Edun, J.A. on 21st June, 1972, the Court of Appeal only dealt with the ground of appeal relating to the withdrawal of the defence of self-defence from the jury. The Court held, it is submitted correctly, that

pp.172-177

(a) there was evidence to go to the jury on the issue of self-defence and the learned trial Judge wrongly withdrew it; and

(b) it was not possible to apply the proviso in this case.

The Court concluded its judgment as follows:-

"In the instant case, except for an inference, there was no evidence in the Crown's case which would go to negative self-defence and the learned trial Judge definitely withdrew that defence from the jury. The defence was of a kind which, however weak or tenuous, might, if believed by the jury or if it caused them to entertain a reasonable doubt, have resulted in a complete acquittal. In other words, the withdrawal of that defence, of itself, in the light of the evidence amounts to a denial of justice to the appellant and it is tantamount to condemning him without his being heard; a substantial miscarriage of justice.

p.176, l.38-p.177, l.10

For the reasons given, we allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice ordered a retrial at the present sitting of the Home Circuit Court. In the meantime, the appellant is to remain in custody."

12. The provisions regarding the application of the proviso and the ordering of a new trial are contained in S.13 of the Judicature (Appellate)

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Jurisdiction Law, 1962, as follows:-

"S.13 (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, not-notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the provisions of this Law the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interest of justice so require, order a new trial at such time and place as the Court may think fit.

(3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

13. The Respondent respectfully submits that having refused to apply the proviso, the Court was wrong in proceeding to order a new trial for the following reasons:-

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(a) the interests of justice do not require the ordering of a new trial;

(b) a new trial opens the possibility for a verdict of murder against the Respondent when he has already been acquitted of the murder charge.

14. The Appellant applied for leave to appeal to Her Majesty in Council under the provisions of Section 7 of the Judicature (Appellate Jurisdiction) (Amendment) Act, 1970, (Act 12 of 1970) which introduces a new Section 31A to the principal law cited in paragraph 12 above as follows:- p.177

> "The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V, or VI where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

15. The Court of Appeal, by a majority decision, gave leave to appeal. In their reasons therefor given on the 29th September, 1972, the Court said that "in a murder case, the sufficiency or otherwise of evidence to raise up the issue of self-defence is obviously a matter of public importance... It is this obvious difficulty in applying the test relevant to determine the sufficiency or otherwise of evidence, which emphasises the public importance of this point of law in this case. It is the potential significance of the decision as a guide in future cases where the evidence is of a like quality which makes that public importance exceptional." pp.178-184 p.182, ll.26-28 p.183, ll.39-46

The Respondent respectfully submits that it is not possible, and indeed undesirable, that any standard test should be laid down to determine the sufficiency of evidence to raise the issue to self-defence. It is submitted that the Court of Appeal when delivering judgment on the Respondent's appeal on the 21st June, 1972, were right in holding that "each case must depend and be decided upon its own facts", and were further right in holding that, on the facts in this case, the evidence, however weak, was sufficient to raise the issue and should not p.176, ll.7-8

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have been withdrawn from the jury. The Respondent also submits that it makes no difference whether the evidence relating to the issue of self-defence comes from sworn evidence or an unsworn statement from the dock, since the latter, as the trial
p.152,11.5-11 Judge correctly reminded the jury in this case, that "although it is not sworn evidence which could be subject to cross-examination, nevertheless you can attach such weight to it as you think fit and you must take it into account in deciding whether or not the prosecution have established their case before you here .....
p.152,11.27-31 What he has told you you must test and be sure by the same standard and scale, in the same scale as any other statement in this case. Not because his statement comes from the dock should you employ any different standard or test."

16. On the question of the application of the proviso and the ordering of a new trial, the Court
p.183,11.21-30 of Appeal when giving leave said:-

> "The second point requires an answer to the question whether even if self-defence did arise on the evidence it was correct for this Court to have declined to apply the proviso. In determining this question the Privy Council will be able to give further consideration to the implications in the order of this Court for a re-trial, and to make such finally authoritative ruling on a difficult point as the justice of the case requires. For these reasons, we grant the application."

17. The Respondent respectfully submits that this appeal should be dismissed with costs, that the Order of the Court of Appeal quashing the conviction and setting aside the sentence should be affirmed, and that the Order of retrial made by the Court of Appeal should be quashed for the following amongst other

R E A S O N S

1. BECAUSE the Court of Appeal correctly held that there was evidence to go to the jury on the issue of self-defence and the trial Judge wrongly withdrew that defence from the jury.

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2. BECAUSE the Court of Appeal correctly held that there was a substantial miscarriage of justice and the proviso could not be applied.

3. BECAUSE the Court of Appeal wrongly held that it was in the interests of justice to order a retrial in this case.

4. BECAUSE when giving leave to the Appellant the Court of Appeal wrongly considered that a test could be laid down as to the sufficiency of the evidence to raise the issue of self-defence and this rendered this case of exceptional public importance.

5. BECAUSE it makes no difference whether the evidence sufficient to raise the issue of self-defence comes from sworn evidence or from a statement from the dock.

6. BECAUSE, save for the order for a new trial which it is submitted cannot stand, there is nothing in this appeal which tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in the future, and therefore nothing which would justify intervention or disturbance of the decision of the Court of Appeal.

18. If contrary to the above submissions and reasons, this appeal is allowed, the Respondent submits that the case should be remitted to the Court of Appeal for argument on the other grounds of appeal referred to in paragraph 10 above.

T.O. KELLOCK

EUGENE COTRAN

No.35 of 1972

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

- and -

LEARY WALKER — Respondent

C A S E FOR THE RESPONDENT

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