Privy Council Appeal No. 12 *of* 1957

Joseph Bullard - - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1957

Present at the Hearing:

EARL JOWITT
LORD TUCKER
MR. L. M. D. DE SILVA
[*Delivered by* LORD TUCKER]

The appellant was tried and convicted of the murder of one Eugene Layne in the Supreme Court of Trinidad and Tobago before Corbin, Ag. J., and a jury on 19th November, 1956.

His appeal to the Court of Criminal Appeal of Trinidad and Tobago was dismissed on 4th January, 1957. He appealed by special leave to Her Majesty in Council and his appeal was heard on 15th and 16th July, 1957.

The evidence for the prosecution was to the effect that the appellant was employed by Layne in the construction of a house at Corinth and at about 7 a.m. on 23rd July, 1956, he was following Layne about and complaining he had not been paid what was due to him. Layne said he had not the money and appellant would have to wait until he, Layne, returned from Usine in the afternoon. Appellant was carrying a hatchet. Layne and the appellant were walking together and when they reached the main Naparima-Mayaro road they were picked up by a car driven by a witness named Chapman who knew Layne well and had stopped his car on seeing him standing at the road side. The appellant got into the back seat and Layne into the front seat beside the driver Chapman. Before getting in the appellant said "This man owes me $60·00 and will not pay me my money." Layne replied "Do not worry with that man, he is a madman—I do not owe him any $60·00." The appellant on taking his seat placed the hatchet he was carrying on his lap.

After the car had started Layne said "I am going to the Usine and even if I owe you money now you are going to the Usine for it." The appellant said "He does not want to pay me my money." After travelling about 100 yards further the appellant called out "Oh God, I want my money. I want my money." At the same time he struck Layne at the back of

his head with the hatchet. Chapman pulled up the car, the appellant got out and Chapman drove straight to the police station and then took Layne to hospital. He was admitted at about 8 a.m. and died at 3.25 p.m. the same day. The post mortem examination some 18 hours later disclosed a stitched wound over the right temporal bone and stitched semi-circular wound at the top of the head, nearer back than front, right across the top of the head. Internally there was a depressed fracture involving the right temporal, the parietal and left temporal bone of the skull. This fracture was immediately below the wound at the top of the head. Death was due to shock and hæmorrhage from the fracture of the skull. In the opinion of the medical witness the first wound was caused by the back of the hatchet. As regards the second wound he said " I would think the cutting part of the hatchet would be used." In his opinion the blows were struck from behind. If the men were facing each other the first wound might have been caused by a backhanded blow. He did not think the injury at the top of the head could have been caused by a backhanded blow. He would not say it was utterly impossible, but highly unlikely. Both wounds were lacerated wounds and were caused by distinct blows. A second medical witness said the wounds in the right temporal region as well as in the parietal region could probably be caused by the head of the hatchet.

The evidence of the appellant was as follows:—On 23rd July, Layne owed him $160·00, and said he would give him $60·00 later. Appellant asked for $8·00 to fix his business at home. Layne said he would take him to the Usine for the $8·00. They walked peacefully to the main road, appellant carrying his hatchet and a paper bag. Chapman's car stopped and they got in. On the way appellant asked if Layne would give him the money he was wanting. Layne said " If not what will you do?" He replied " I will report you at the Usine." Layne said " You going to make me lose my work " and grabbed him by his neck and started to choke him with his left hand and cuff him with his right. Appellant picked up the hatchet and gave him two blows. He said " I suppose it must be the back of hatchet that struck him. I made the blows because he was strangling me. If Layne had not held my throat I would not have hit him with the hatchet."

In cross-examination he said : " Layne was choking me in the car, my head was going backwards all the time as I demonstrated. My head reached the back of the seat and could not go any further. One of Layne's feet was over the back of the front seat and the other was resting on the front seat. Layne gave me 12 or 14 cuffs on my ribs and face. One cuff caught me in my jaw. It was while he was cuffing me that I swung the two blows with hatchet."

On this evidence Counsel for the appellant relied on the defences of self-defence and provocation.

Dealing with the defence of provocation in his summing up the trial Judge after having told the jury " You must be satisfied that the deceased died as a result of a deliberate, cruel and brutal act committed by the accused, voluntarily, which was intentional and unprovoked," proceeded as follows:—

> " In some indictments it is open to the jury to return a verdict of not guilty of murder, but guilty of manslaughter on the ground of provocation. As a matter of law it is my duty to direct you that in the circumstances of this particular case that verdict is not open to you for reasons which I shall show you later. And since no defence of insanity has been put up, and therefore you cannot return a verdict of guilty but insane, the only two verdicts which will be open to you are either guilty of murder or not guilty at all on the ground of self-defence."

After outlining the evidence given by the appellant he said : " Well, that is the evidence given in chief by the accused Bullard. In that will

lie his defence. You must give due consideration to his defence and you must give it the weight and the attention which you think it deserves. But I have directed you that it will not be open to you to return a verdict of manslaughter on the ground of provocation, because it is from the evidence that you must get the provocation if there is any. And putting the most favourable construction on this evidence given here on oath by the accused he has not himself told you that what he did was a result of any provocation given him by Layne."

A few lines later he said: "I am directing you that nowhere in his statement, his evidence given on oath, will you find that he committed this act because he was provoked by Layne's refusal or failure to pay him the money. His evidence here is that if Layne had not held my throat I would not have hit him with the hatchet."

It was submitted at the hearing before the Board by Counsel for the appellant that the trial Judge was wrong in withdrawing the defence of provocation from the jury and that accordingly there had been a grave miscarriage of justice.

It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by Counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the Judge after a proper direction to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. See such cases as *The King* v. *Hopper* [1915] 2 K.B. 431 at p. 435, and *Kwaku Mensah* v. *The King* [1946] A.C. 83 at p. 93.

In the present case it is not the non-payment of money by Layne that is relied upon as affording provocation but the assault, as described in the appellant's evidence, upon a man who on the prosecution evidence was already incensed by the non-payment and whose claim had been brushed aside by Layne with the statement that he was a madman. The non-payment alone could not, of course, have afforded any sufficient provocation. Their Lordships do not know exactly upon what Counsel for the defence at the trial based his case of provocation. If it was based solely on the non-payment this may account for the language used by the Judge. However this may be, the real ground as disclosed by the evidence is as indicated above, and it should have been left to the jury, whose duty it would have been to determine with what part of the hatchet the blow or blows were struck and whether the weapon used was or was not wholly disproportionate to the provocation received and whether the story of the appellant, even if unacceptable in its entirety or somewhat exaggerated, might not have afforded sufficient provocation to excuse—though not to justify—the blows struck by the appellant. The jury might for instance have rejected the view that the appellant's life was ever in real peril from strangulation, yet accepted the story that he had been seized by the throat and received numerous violent blows. All these matters were for the jury and it is not in their Lordships' opinion possible, taking the view of the evidence most favourable to the appellant, to say that the issue of manslaughter could properly be withdrawn from the jury.

The Court of Criminal Appeal took the view that as the appellant's story had been rejected by the jury on the issue of self-defence there was no evidence on which the issue of provocation could be based, and in so deciding relied upon the language used by Viscount Simon in his speech in *Mancini* v. *Director of Public Prosecutions* [1942] A.C.1 at page 9 as follows:—

> "Before, therefore, MacNaghten J.'s summing up can be criticised on the ground that it did not deal adequately with the topic of provocation, we have to see what was the extent of the provocation as disclosed by the evidence which the jury had to consider, and

> for this purpose we have to exclude altogether the allegation made by the appellant that he heard the voice of Fletcher threatening him with 'knifing', and that Distleman came at him with an open pen-knife in his hand. The Judge had already instructed the jury fully on these matters and had directed the jury to acquit the appellant altogether if they felt they could accept the appellant's story. The alternative case, therefore, as to which it is suggested that a defence of provocation was open, must be regarded on the basis that the appellant's story was rejected."

This langauge must be considered in the context of the facts of that particular case, when it would seem true to say that once the story of the presence of a knife in Distleman's hands was rejected there was nothing left upon which to base the defence of provocation, but their Lordships have no doubt that Viscount Simon was not intending to lay down as a proposition of universal application that the same evidence which has been adduced in support of an unsuccessful defence of self defence can never be relied upon in whole or in part as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which cannot justify may well excuse.

In the present case the fact that the jury rejected the defence of self defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. As was said by Humphreys, J. in *Rex* v. *Roberts* (1942) 28 C.A.R. 102 at p. 110 " As for the question whether it was open to them on the facts, Counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The Court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them." Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.

Their Lordships are accordingly of opinion that the verdict of guilty of murder cannot stand in this case.

A further objection was taken by Counsel for the appellant, which was not raised in the Court of Criminal Appeal. It was said that the trial Judge had misdirected the jury with regard to the onus of proof in connection with the defence of self defence.

Early in his summing up the Judge said : " The most important direction in law which I have to give you is that the onus of proof is always on the prosecution. It is for the Crown to establish the guilt of the accused and never for an accused person to establish his own innocence. You must be satisfied by the evidence led by the prosecution that you can feel certain of the guilt of the accused. And if you do not feel that certainty on the evidence led by the prosecution then it is your duty to acquit the accused."

A little later he used the words already quoted, " You must be satisfied that the deceased died as a result of a deliberate cruel and brutal act committed by the accused voluntarily, which was intentional and unprovoked."

It is said that the effect of this general direction was vitiated by the fact that later in his summing up the Judge, in dealing with the respective versions of the incident in the car used the words " so that you now have to decide whether you believe Chapman that Layne was sitting quietly in front of the car looking ahead of him when the accused dealt

him those two severe blows, or whether you believe Bullard that Layne had leaned over and was strangling him in such a manner that it was necessary for him to use extreme methods to defend himself."

It is important to observe that in the very next sentence the Judge said: "Bear in mind the general directions in law which I have given you." Later on he again used a similar expression: "If you believe the evidence given by the witnesses for the prosecution and you do not believe that evidence given by Joseph Bullard."

Having regard to the fact that there was no dispute that the blows were struck by Bullard and that the only issue left to the jury was self defence their Lordships do not consider that the jury can have been left in any doubt as to the onus being throughout upon the prosecution. It would no doubt have been better if the Judge had used language similar to that suggested by Lord Goddard in the recent case of *Reg.* v. *Lobell* [1957], 1Q.B. 547 at p. 551: "A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution." But there is no magic formula and provided on a reading of the summing up as a whole the jury are left in no doubt where the onus lies no complaint can properly be made.

In the result their Lordships have humbly advised Her Majesty that the appeal be allowed and the verdict of guilty of murder set aside and the case remitted to the Court of Criminal Appeal of Trinidad and Tobago with a direction to record a verdict of guilty of manslaughter and to pass sentence accordingly.

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In the Privy Council

JOSEPH BULLARD

v.

THE QUEEN

DELIVERED BY LORD TUCKER

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