No. 10 of 1961

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT
OF THE WEST INDIES

BETWEEN

JOHN DE FREITAS ... ... Appellant

- and -

THE QUEEN ... ... Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal, by special leave of the Privy Council dated 21st March 1961, from a judgment of the Federal Supreme Court of the West Indies (Hallinan, C.J., Rennie, and Marnan, JJ.) dated 12th September 1960, which dismissed an appeal from a judgment of the Supreme Court of British Guiana (Gordon, J. and a jury) dated 18th May 1960 whereby the Appellant was convicted of murder and sentenced to death. p. 85. p. 68. p. 64.

2. The principal questions raised in this appeal are whether the jury were correctly directed as to the law upon the defence of provocation, and as to the law upon the defence of self-defence.

3. The Appellant was indicted on the charge of murdering Flavius Da Silva on 21st August 1959. p. 1.

4. The evidence to support this indictment included the following :

(i) Vera Da Silva, widow of the deceased, said that she had known the Appellant for a long time. He had lived with her sister, and after her death in 1958 had come to live with the deceased's family in pp. 2-5.

1959. On 16th August 1959, the Appellant had told her and the deceased that he was in love with their daughter Gwendoline, aged 14, and that she loved him; no decision was reached that night, and the next morning the Appellant and the deceased left together. On 22nd August, at about 3.30 a.m., the witness was awakened by the Appellant and some other men; the Appellant said that the deceased had fallen overboard from his boat and drowned when it was struck by a wave; the next day she identified the body of the deceased at Charity Police Station.

pp. 5-8. (ii) Gwendoline Da Silva, the daughter of the deceased, said that about Easter 1959 and on several occasions later the Appellant had told her he loved her, but she told him she did not return it. On 20th August the Appellant and her father had arranged to go shooting the next morning; the next morning they had gone; she identified ropes found in the boat; she had heard the Appellant say that the deceased had fallen overboard.

pp. 9-10. (iii) Detective Sergeant William Smartt produced the firearms certificate issued to the deceased; the 16-bore gun to which it related had not been found. On 28th August 1959 he had been present when the accused made a statement under caution to Superintendant Sampson (Exhibit 'N'). In the statement the Appellant described how he and the deceased had left on a shooting expedition in the deceased's boat about 3 a.m.; while on the boat the deceased told him that he was going to dismiss the Appellant; the Appellant replied that the deceased might regret this because he would make Gwendoline follow him; the deceased then threatened to shoot the Appellant, picked up his gun and loaded it; the Appellant, who had been sitting in the stern, jumped up, caught hold of the gun in the deceased's hands and began to wrestle for it; the deceased fell down and the gun went off while the Appellant was standing over him trying to take away the gun; the Appellant got the gun away from him and then "got mad or something", and remembered hitting the deceased on his head with the gun; he then threw the gun overboard. The deceased said twice, "Gwendoline, my daughter, you is the cause of this", and looked as if he was dying, and then said to the Appellant "Sonny throw me overboard"; the Appellant then tied a piece of rope, which he had cut from the main sheet, around the deceased's neck, but could not remember why he did so; he then threw the deceased and his baboon-skin cartridge bag into the river,

took down the sail, stopped the engine and dropped anchor; later, when he came to himself, he found that the anchor was gone, and he hoisted the sail and went ashore.

(iv) Rudolph Da Silva, aged 13, the son of the deceased said that he had seen the accused and his father leave in the boat on 21st August at 3 a.m. The mast had come loose and it was repaired by the accused; the accused had returned alone saying that the deceased has fallen overboard. pp.10-12.

(v) Leonard Da Silva, the rural Constable and the brother of the deceased, said that the accused had came and told him that the deceased had been standing up in the boat when it was struck by a wave which knocked him overboard. The witness had searched for the body at Fox Horse early on 22nd August; the body was discovered on the shore with two wounds at the back of the head and a piece of rope round the neck; he had met the accused bathing at 6.30 p.m. and had arrested him for murder, and taken him to Charity Police Station. pp.13-14.

(vi) Police Constable Rudolph Da Costa said that at 4.15 a.m. on 22nd August the accused had come and reported the drowning of the deceased; he made a statement (Exhibit 'S') to the effect that the deceased had accidentally fallen overboard and that he had unsuccessfully searched for him. The witness said that the body was brought to Charity Police Station at 7 a.m. on 23rd August. pp.15-17. p. 87.

(vii) Police Constance Dornford Wilson produced two pieces of rope which had been on the deceased's boat when it returned and spoke to the dimensions of the boat, which was 26 feet 10 inches long and 5 feet 4 inches wide. pp.17.-19.

(viii) Police Corporal Thomas Chalmers said that on 23rd August the accused made a further statement (Exhibit 'Y') to the effect that the deceased had fallen overboard by accident; later, the statement continued, he discovered that the anchor, which had been tied on with rope, was missing; when the deceased had fallen overboard no rope was round his neck. On 25th August the accused was formally charged with the murder of the deceased, and later indicted on that charge; on 17th February the indictment was quashed, when the witness re-arrested the accused and the present proceedings were begun. pp.21-26. p. 88.

RECORD

pp.26-28. (ix) Joseph Ephrain Ho-Yew, a government analyst, said that the rope found round the neck of the deceased was the same as the length which had been taken from the boat.

pp.28-33. (x) Dr. Cyril Leslie Mootoo, a pathologist, gave his post mortem result; death had been due to perforation of the right lung from gunshot wounds and strangulation; the gunshot wounds were the first injuries inflicted, and to inflict them an assailant would have had to be behind the victim pointing the gun downwards. The gunshot wounds would eventually have been fatal but the rope was put round the deceased's neck while he was still alive; after the gunshot wounds the deceased would not have been able to fight with anyone.

p. 35. 5. The Appellant made a statement from the dock in his defence in which he affirmed the last statement
p. 93. made to the police (Exhibit 'N'); he had had no intention of doing anything and was really sorry for what had happened. He called no witnesses.

p.37, l.7. 6. Gordon, J. began his summing-up by reminding the jury that they were to judge the case on the evidence alone; the presumption of innocence was in favour of the accused man and they, the sole judges of the facts should draw any inference from the evidence favourably towards the accused man; murder was the unlawful and intentional killing of another with malice; the prosecution had to prove that the accused killed the deceased having the intention to inflict grievous bodily harm to him or to kill him and that in so doing he was not provoked by the dead man. The defence was contained in the accused's statement to the police which was affirmed from the dock and which contained four defences intertwined, insanity coupled with automatism, self-defence, accident and provocation. As to insanity, there was some evidence in the statement that the accused's mind went blank; if there was no intent, the jury should acquit; the learned judge then dealt with the defence of insanity.

As to the defence of self-defence, after relating the relevant facts, the learned judge told the jury that of the three requisites for such a defence, they might think there would have been no chance of retreat; but they would have to consider whether the injury inflicted was excessive in relation to the attack on the accused, and in particular whether the blows on the head and the strangulation were excessive; the third

prerequisite for the defence was that the injury was not by way of revenge after the danger had passed; having regard to the medical evidence, the jury would consider whether the blow on the head and the strangulation were necessary; if there was any doubt whether the accused had acted in self-defence, that doubt should be resolved in his favour. If the jury considered that death was accidental or had any doubt about that question, they should acquit.

Dealing with the defence of provocation, which had not been raised by either counsel, the learned judge said that it was of some importance in this case and went on :

> 'Although the accused is indicted for murder, it is always open to a jury on a charge of murder to convict of the alternative offence of manslaughter. Manslaughter is the unlawful and felonious killing of another without malice expressed or implied. p.45, 1.10.
>
> Now, you will remember I told you that murder is the unlawful and intentional killing of another with malice. Manslaughter is the unlawful and felonious killing of another without malice expressed or implied. You will have observed that in both the offences - murder and manslaughter - the killing must be unlawful. The difference between the two offences being that in the case of murder you must be satisfied from the surrounding circumstances that there was in the mind of the accused immediately before dealing the fatal blow or blows an intention to kill or to do grievous bodily harm. In the case of manslaughter that intention to kill or do grievous bodily harm is not present. ....
>
> In order to be satisfied on the issue of provocation, you must find that in the particular circumstances not only would an ordinary person have lost his self-control but that the accused as a fact did lose his self-control and that it was in consequence of that loss of self-control that he formed the intention to do the injury to the deceased from which death resulted.' p.46, 1.16.

If there had been sufficient time for the accused's passion to cool, there was no provocation, but if the jury found the accused was acting under the stress of provocation when he dealt the fatal blow, that would p.46, 1.45.

be sufficient to reduce the verdict to manslaughter; the weapon used must also be considered, and anxious thought should be given to the rope which caused strangulation. After discussing the proper approach to be made to circumstantial evidence, the learned judge went on to discuss the evidence called in detail, including the statement referred to by the Appellant. He concluded by reminding the jury of the onus of proof in relation to the possible defences and in relation to provocation said :

p.63, l.11.

'If you are satisfied beyond reasonable doubt that the accused unlawfully caused the death of Flavio Da Silva but that at the time of doing so he was under the stress of provocation, and that when doing the act and/or acts which caused the death that he did not intend to kill him or to cause grievous bodily harm, your verdict should be one of manslaughter.

If you are in doubt whether the act was done under such an impulse, you will resolve that doubt in favour of the accused as you will do if you are in any doubt with respect to any of the other propositions which I have put to you.

p.63, l.24.

Finally, if you are satisfied beyond reasonable doubt that the death of the deceased was caused by the deliberate act or acts of the accused and that at the time of committing those acts or immediately before he intended to kill the deceased or to do him grievous bodily harm and that in doing so he was not acting in self-defence or under the impulse of provocation or suffering from some disease of the mind your verdict should be one of guilty of murder.'

7. The jury found the Appellant guilty of murder and he was sentenced to death. He appealed to the Federal Supreme Court of the West Indies (Hallinan, C.J., Rennie and Marnan, JJ.), when on 12th September 1960 the appeal was dismissed.

pp.69-84.

8. The judgment of the Federal Supreme Court was delivered by Marnan, J. on 21st November 1960. He first dealt with a question that an application for an adjournment of the trial had been wrongly refused, which is not raised in the present appeal. He then related the relevant facts and said that two complaints had been made of the summing up relating to the defences

of provocation and self-defence. As to the alleged misdirections upon the defence of provocation, consideration of all the references in the summing up to this defence did not support the criticism that the jury had been led to think that if they thought the Appellant had intended to kill the deceased the defence of provocation was not available to him; this direction would be wrong in the light of Holmes v. D.P.P. (1946) A.C. 588, Kwaku Mensah v. R. (1946) A.C. 83 and A.-G. for Ceylon v. Perera (1953) A.C. 200.

Alternatively, it was suggested that the jury should have been directed that if they found or were left in doubt by the evidence in relation to the defence of self-defence, that all the necessary constituents were present except that the Appellant had used excessive force, they should return a verdict of manslaughter. R. v. Howe (1958-9) C.L.R. 448, an Australian case, was relied on for this proposition. In that case the accused was charged with murder, the jury were directed upon the law of provocation but given no other direction in relation to manslaughter. The High Court had held that the jury should be directed that if they were able to return a verdict of not guilty by reason of self-defence, save that they thought that the accused had in fact used more force than was reasonably necessary in self-defence, although believing that he had only used reasonable force, a verdict of manslaughter should be returned. This decision was said to be based upon English cases dealing with killings in the course of wrongful arrest. This category of killings was discussed in Russell on Crime (11th Edition) at p. 504 et seq. which treated this class of case as an early development of the law of provocation, which became settled by 1833. This was supported by the answer of the judges in R. v. Allen (1867) L.T. (N.S.) 222. Marnan, J. considered that if the full defence of self-defence was not available, the prisoner could only rely on the defence of provocation; the statement of law approved by the High Court of Australia was not correct and would be likely to mislead a jury. The ruling in Howe's case was inconsistent with the judgments in R. v. Semini (1949) 1 K.B. 405 and R. v. Mancini (1942) A.C. 1; if not, the doctrine would certainly have been referred to in those judgments; the ruling in Howe's case was not the law of England or of the West Indies and accordingly the appeal should be dismissed.

9. The Respondent respectfully submits that the conviction of the Appellant and the rejection of his appeal by the Federal Supreme Court were correct. No complaint can be made of the proceedings at the trial or the full summing up of the learned judge beyond the two questions of misdirection raised on the appeal to the Federal Supreme Court. On a proper reading of the summing up, it is submitted that the jury were not directed that if they thought the killing was intentional, the defence of provocation was not open to the Appellant. Even if it could be suggested, which is not accepted by the Respondent, that any part of the summing up, taken alone, would have conveyed such an impression, the effect of the summing up, taken as a whole, was that the defence of provocation was available if the jury thought that the Appellant, under provocation, had intended to kill the deceased.

10. The Respondent respectfully submits that the jury were correctly directed upon the defence of self-defence. There was no evidence before the jury that the Appellant had considered that he was using no more than reasonable force in repelling an attack upon him when he killed the deceased, particularly having regard to his own statement and the medical evidence. There was no finding by the Federal Supreme Court that any such evidence had been before the jury upon which a defence such as that referred to in Howe's case could be based. It is submitted that Howe's case does not correctly state the English common law upon the defence of self-defence which is the same as the law in the West Indies. The law is correctly stated in R. v. Mancini and in R. v. Semini (supra). If the prisoner does not raise a case that he has used no more than reasonable force in repelling an attack, (R. v. Cobell (1957) 1 Q.B. 547), the only defence resulting in a verdict of manslaughter open to him is one of provocation. The law relating to resistance to unlawful arrest is correctly stated in R. v. Allen.

11. The Respondent respectfully submits that this appeal should be dismissed and the Appellant's conviction should be confirmed for the following, amongst other

R E A S O N S

(1) BECAUSE the jury were correctly directed upon the defence of provocation.

(2) BECAUSE the jury were correctly directed upon the defence of self-defence.

(3) BECAUSE there was no evidence that the Appellant had used excessive force in the belief that he had used no more than reasonable force in resisting an attack.

(4) BECAUSE of the other reasons in the judgment of the Federal Supreme Court.

MERVYN HEALD.

No. 10 of 1961

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT
OF THE WEST INDIES

BETWEEN

JOHN DE FREITAS ... Appellant

- and -

THE QUEEN ... ... Responden

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, W.C.2.

Solicitors for the Respondent.