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No. 14 of 1970

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

DERRICK IRVING — Appellant

AND

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

RECORD

10 1. This is an appeal from a judgment of the Court of Appeal of Jamaica (Waddington Ag.P., Luckhoo and Edun JJ.) dated the 23rd July, 1969, which had dismissed an application by the Appellant for leave to appeal from his conviction by the Home Circuit Court (Parnell J. and a jury) on 31st January 1969, on a charge of murder, for which he was sentenced to death. — pp.248-259; p.240

2. The Appellant had been indicted for the murder of Orville Fearon in the Parish of 20 Kingston on the 8th July, 1968. — p.1

3. At the Appellant's trial in the Home Circuit Court, held between the 27th and the 31st January, 1969, the evidence called by the prosecution included the following :

(a) Anthony Wilson said that at about 7 p.m. on the 8th July, 1968 he had ridden his bicycle to the home of Orville Fearson, the deceased, in Rosemary Lane, Kingston, as they had arranged to go together to a 30 cinema; after they met, the deceased had ridden his bicycle along Rosemary Lane — pp. 3-66

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ahead of the witness; the witness caught up with him and found him having a row with two women; another girl called Sonia came up and started abusing the deceased, who had parked his bicycle and had run after her, but did not catch her. Shortly afterwards, when they had continued their bicycle ride, they met a group of four or five boys, and saw Sonia among them talking to the Appellant. He came up to the deceased, and asked him why he had kicked his girl; the deceased pulled out a pocket knife; the Appellant felt his own pocket, asked the group for a knife, but no-one answered, and then the whole group walked quickly off down Rosemary Lane. The witness told the deceased to put away his knife and they rode off to the end of Rosemary Lane. They then turned and rode back again; the deceased got some distance ahead and was near a lighted shop window when a figure appeared from the right and went up to the deceased, who dropped his bicycle and ran off. The witness then saw an arm holding a cutlass go up in the air and come down; there was a sound like a coconut being cut, and the deceased fell in the street. The witness went to a nearby house which he knew, took a cutlass from the kitchen, and chased the assailant; he followed him some way and finally recognised him as the Appellant, but he escaped. When the deceased was struck, he had not had any weapon in his hand.

pp.82-89 (b) Detective King had seen the Appellant on 9th July, who had said "A whole heap of them come to beat me and I take a cutlass and chop him", and had then taken the witness to an address in Sutton Street, where he took a machet out from under the house and gave it to the witness.

pp.78-82 (c) Dr. March said that the deceased had had a circular wound 4 inches in diameter in the top of his head, which had been caused by a severe blow with a reasonably sharp and heavy weapon, either struck from behind, or

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from in front if the victim had been bending forward at the time.

(d) Hyacinth Callimore said that she lived in Rosemary Lane and that on the evening in question she had seen the Appellant walk down the street and into a yard; soon afterwards she had heard a loud sound like the breaking of a coconut, after which a crowd gathered. — pp.94-102

10 4. The Appellant gave evidence on his own behalf. He said that he had been in Rosemary Lane at the time in question when he heard an argument; when he approached, he saw the deceased running down Sonia with a knife; the back of her dress was cut. He spoke to the deceased, who pulled a knife out of his pocket; the Appellant pretended that he had a knife and asked the bystanders to give him a knife, without success, so he walked away from the 20 deceased into a yard; he had heard the deceased say that he was going for a cutlass which was bigger than a knife; the Appellant went into the kitchen of Adrian Wilson, who lived in Rosemary Lane, and picked up a machete and went back into the lane; as he walked along the lane he heard a shout behind and saw the deceased about two feet away with a cutlass held up before him; the Appellant swung his machete at that of the deceased, who staggered backwards; 30 he had had no intention of injuring the deceased; Wilson then picked up the cutlass held by the deceased and chased him up the road. — pp.108-156

The Appellant called two witnesses, Adrian Wilson, who said that he had heard a sound like two pieces of metal coming together before the deceased fell, and Bolton Simpson, who said that he had seen the deceased advancing towards the Appellant with a machete and strike a blow at him; there had been a clash of metal and the 40 deceased had stepped back and dropped the machete. — pp.157-177; pp.178-190

5. Parnell J., in his summing up to the jury, gave the jury general directions upon their duties and the onus of proof and the elements of murder. It was accepted by the defence that the — pp.191-238

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appellant had been present at the death of the deceased and had used a machete; the real issue to be considered was the circumstances under which the Appellant had got hold of a machete and what in fact caused him to inflict the wound described in the evidence; a second issue to be considered was provocation. The learned judge then went in detail through the evidence given during the trial. Finally the trial judge held that an issue of self defence arose upon the whole of the evidence in the case, and directed the jury upon the law of self-defence; the prosecution had to disprove the defence when it was raised; if the jury accepted what the Appellant had said had happened, or were in doubt about it, their duty was to acquit. The learned judge then turned to provocation, and directed the jury upon the effect of the Appellant's evidence upon that issue; he would leave the issue to the jury. The judge repeated that if the jury accepted what the Appellant said, then it was open to them to acquit him, and if they were left in a state of doubt whether the Appellant was acting in self defence, they should acquit him.

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p.239

6. The jury convicted the Appellant of murder, and he was sentenced to death.

7. The Appellant applied for leave to appeal to the Court of Appeal, but his application was dismissed by the Court of Appeal (Waddington Ag.P., Luckhoo and Edun JJ.) by a judgment dated 23rd July 1969

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pp.248-259

The judgment was delivered by Waddington J. He set out in detail the effect of the evidence given for the prosecution and for the defence, pointing out that the case for the Crown rested almost entirely on the evidence of Anthony Wilson; he said that the issues of provocation and of self-defence had been left to the jury; there was no complaint about the direction on provocation; there was no merit in the grounds of appeal argued except the ground raised that there had been no proper direction to the jury that if there had been no intention to cause grievous bodily harm, the verdict should have

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been manslaughter and not murder. It was not disputed that no direction to that effect was given in specific terms, but the question arose whether such a direction was necessary in view of the directions on self defence which had been given; the learned judge then cited in full the passages from the summing up which dealt with self defence; on four occasions the jury had been told to acquit the Appellant, if they accepted his evidence; that was tantamount to telling the jury that if they believed the Appellant had merely wanted to knock the cutlass from the hand of the deceased and not to kill, they should acquit; in the face of those directions which were extremely favourable to the Appellant, no further directions on the question of killing without intent to cause serious injury were necessary; it seemed clear that the jury must have completely rejected the factual case for the defence, otherwise on the directions of the judge, they would have been obliged to acquit the Appellant, whatever his intention may have been in striking the blow which killed the deceased. The application would be dismissed.

8. The Respondent respectfully submits that the judgment of the Court of Appeal was correct. The jury were given full and accurate directions upon the issues of self-defence and provocation, and the facts of the case, as raised in any of the evidence, did not admit of the further verdict of manslaughter arising from the causing of death without any intent to kill or do grievous bodily harm. There was a clear conflict between the case for the prosecution and that of the defence, and if the defence had raised any doubt in the minds of the jury as to the correctness of the prosecution case, their verdict should have been one of acquittal, as they were correctly directed. It is submitted that there was no evidence to support the defence of provocation, and, in any event, the jury were correctly directed in law upon that issue.

9. The Respondent respectfully submits that this Appeal should be dismissed and the judgment

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of the Court of Appeal should be affirmed, for the following, among other

R E A S O N S

1. BECAUSE there was no misdirection to the jury upon a verdict of manslaughter.

2. BECAUSE the evidence did not admit of a verdict of manslaughter

3. BECAUSE the jury were correctly directed upon the issue of self defence

4. BECAUSE of the other reasons in the judgment of the Court of Appeal. 10

MERVYN HEALD

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