Privy Council Appeal No. 14 of 1970

Derrick Irving – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER 1970

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD AVONSIDE

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The appellant was indicted on a charge of having murdered a man named Orville Fearon on 8th July 1968. After a trial in the Home Circuit Court he was (on 31st January 1969) found Guilty by the jury and was sentenced to death. He applied to the Jamaica Court of Appeal on a number of grounds for leave to appeal against his conviction. His application was heard by Waddington Ag.P, Luckhoo and Edun JJ. and on 23rd July 1969 it was dismissed. By special leave appeal is now brought.

The case for the Prosecution rested almost entirely on the evidence of a man named Anthony Wilson. He had gone to the home of the deceased who was a friend of his aged seventeen and together they had ridden their bicycles up Rosemary Lane in the Parish of Kingston. Wilson fell behind to speak to someone and when he caught up with the deceased he saw that there was an altercation between the deceased and two women. Wilson advised the deceased to end the altercation. A girl named Sonia came up and began to curse the deceased. She then ran away. The deceased parked his bicycle on the side walk and ran after her. He did not catch her. The deceased then rejoined Wilson. Together they rode down Rosemary Lane and afterwards they turned back up that lane. As they proceeded they met a group of four or five young men who blocked their way. Sonia was talking to one in the group which included the appellant. The appellant whose age was twenty asked the deceased why

he had assaulted his girl. The appellant, according to Wilson, felt his own pocket and the deceased took out a knife. The appellant asked his friends around for a knife—but no one answered him. The appellant and his friends then started to walk away fast. Wilson told the deceased to close his knife. Together they rode down the lane: they stopped and had a talk. Later they started to go back up Rosemary Lane: the deceased was riding in front. Wilson said that he again stopped for a short time to speak to someone and then rode after the deceased. Wilson said that as he was about to pass a shop in which there was a light he saw someone come from the right and go up to the deceased. The deceased dropped his bicycle and the person who had come up ran after the deceased. Wilson said that he saw a hand go up in the air: he saw a cutlass in the hand and it came down. There was a sound like a coconut being cut and the deceased fell. Wilson went to the deceased who was bleeding from the back of his head. The person with the cutlass (whom Wilson did not at that time recognise) moved away. Having gone to nearby premises from which he secured a cutlass for himself Wilson saw the person who had the cutlass: he was going up the street and then started to run. Wilson chased after him and recognised him as the appellant though he did not catch him.

A police officer gave evidence that he saw the appellant on the following day and that the appellant had said " A whole heap of them came to beat me and I take a cutlass and chop him ". Medical evidence showed that the deceased had a circular lacerated wound in his head some 4½ inches in diameter.

The appellant gave evidence at the trial. In regard to the events in Rosemary Lane he said that he heard male and female voices (one of the latter being that of a girl friend of his) and that he then saw someone whom he later recognised as the deceased: the deceased was chasing the girl Sonia and he had a knife: the back of her dress was cut. Then he saw the deceased and Anthony Wilson: he remonstrated with the deceased who pulled out a knife. The appellant had not got a knife though he pretended to have one: without avail he asked those around for one. The deceased and Wilson rode away. The appellant walked away but said that he had heard the deceased say that he was going for a cutlass. So he the appellant went to the kitchen of a friend of his whose yard was nearby and there secured a cutlass (or machete) for himself. Later, he said, as he was walking up the lane he heard a shout which made him turn round: he saw the deceased with a cutlass in his right hand standing before him " in a chopping motion ". The appellant said that he swung his cutlass at the deceased's cutlass and then saw the deceased stagger backwards: he had only intended to hit the deceased's cutlass out of his hand: he had had no intention of injuring the deceased. Wilson, he said, picked up the cutlass which the deceased had had: he was chased by Wilson and he ran away.

The appellant called two witnesses whose evidence supported that given by the appellant.

It will be seen that in important respects there was a conflict between the evidence given for the prosecution and that given for the defence. Did the appellant make an attack upon the deceased and strike him down or did the appellant take action to resist an attack made upon him by the deceased?

In a full and careful summing up the learned Judge directed the jury as to the crime of murder and reviewed all the evidence. The issues of self-defence and of provocation were left to the jury. The law in regard to those matters was amply explained. It was made clear that it was for

the prosecution to rebut the defence of self-defence. Thus in the course of his summing-up the learned Judge said:

> "Now I repeat: where a defence of self-defence is raised, and not only raised but, like in this case, evidence is brought by the accused to support it, with his witnesses, he is not assuming any burden of proof on that point; he has not got to prove anything, he is only explaining to you the circumstances under which the man got the cut. The prosecution will have to disprove it and if on a consideration of the whole of the evidence you are either convinced of the innocence of the prisoner that he was defending himself as he said, or you are left in doubt as to whether he was acting in necessary self-defence, your duty would be to acquit him—he is not guilty. In other words, then, if you accept what the accused man told you as to what happened, your duty is to acquit. If you are left in doubt as to whether he was acting in the necessary self-defence, again your duty will be to acquit him."

Having made it clear to the jury that they must acquit the appellant if they accepted his evidence as to his having acted in self-defence or if they were left in doubt the learned Judge directed them that if on the other hand they rejected self-defence they should consider the question of provocation. He explained the law in regard to that matter and told the jury that if they thought that the appellant was provoked or if they were in doubt as to whether the facts and circumstances showed sufficient provocation they should return a verdict of manslaughter. No complaint has been made as to the adequacy of the direction relating to provocation.

It was one of the contentions in the Court of Appeal that the learned Judge should have directed the jury that they might convict the appellant not of murder but of manslaughter on the basis of his statement that he had not intended to injure the deceased. In rejecting this contention Waddington J. pointed out that on four occasions in his summing-up the learned Judge had directed the jury that if they accepted what the appellant had told them then they would have to acquit him. (They had also been told to acquit him if they were in doubt as regard to self-defence.) "If the jury believed what the applicant had said, then, if they followed the directions of the learned trial judge, they would have been obliged to acquit the applicant, whatever his intention may have been in striking the blow which killed the deceased. It seems clear that the jury in rejecting self-defence must have completely rejected the factual case for the defence and accepted that of the Crown." The Court concluded that no further direction to the jury had been necessary.

Before their Lordships the contention advanced on behalf of the appellant was that the learned judge at the trial should have directed the jury that if they found that the appellant in defending himself had used a greater degree of force than was necessary in the circumstances they should find him guilty of manslaughter and not of murder. It was argued that in every case where on a charge of murder an issue of self-defence is left to the jury it is obligatory so to direct the jury.

Their Lordships heard this appeal at the same time as they heard the appeal of Sigismund Palmer where exactly the same contention was raised. Learned Counsel appearing for both appellants developed his argument in relation to both appeals. Their Lordships have set out their conclusions in their judgment in Palmer's case and need not here repeat them. For the reasons given their Lordships have humbly advised Her Majesty that this appeal should be dismissed.

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In the Privy Council

DERRICK IRVING

v.

THE QUEEN

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

Printed by HER MAJESTY'S STATIONERY OFFICE
1971