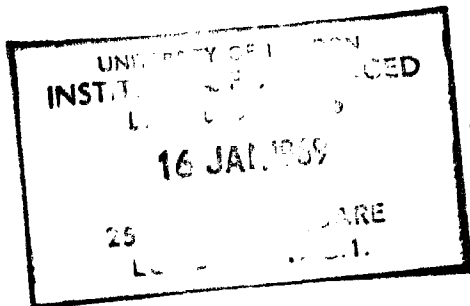


IN THE PRIVY COUNCIL

No.7 of 1968

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA



B E T W E E N :

GLASFORD PHILLIPS Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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p.147

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1. This is an Appeal by special leave in forma pauperis, granted on 22nd March 1968 in pursuance of a report from the Judicial Committee of the Privy Council, dated 19th March 1968, from the Judgment of the Court of Appeal of Jamaica (Henriques, Moody and Eccleston JJ.) dated 4th October 1967, whereby that court dismissed the Appellant's appeal against his conviction and sentence of death by the Saint Mary Circuit Court (Smith J, and a jury) dated 15th June 1967. The Appellant had been charged that, on 24th April 1967, in the parish of Saint Mary he murdered Joyce McNair.

p.135-6

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2. (a) "Section 3B of The Jamaica Offences Against the Persons (Amendment) Law No.43 of 1958 reads as follows:

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"(1) where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted

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of murder.

- (3) a person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

(b) "Section 30 of the Jamaica Offences Against the Person (Amendment) Law No.43 of 1958 reads as follows:-

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

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3. Section 16 of the Jamaica Judicature (Court of Appeal) Law Chap.178 reads as follows:

"(1) The Court of Appeal 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 whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

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Provided that the Court may, 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.

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(2) Subject to the special provisions of this law the Court of Appeal 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 interests of justice so require, order a new trial at such time and place as the Court of Appeal may think fit."

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4. At the trial, at which the Appellant did not give evidence on oath but made an unsworn statement from the dock, the defence did not dispute the killing by the Appellant of the victim; but medical evidence was called on the Appellant's behalf to establish the involuntariness of the act of killing as a result of automatism. The trial judge directed the jury not only on the issue of automatism but also on diminished responsibility and on provocation.

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5. The evidence for the prosecution was to the effect that the Appellant had been, for some time prior to the killing, living with the victim, Joyce McNair. Their relationship had deteriorated to the point where the victim, a week before the incident, packed her suitcase and went to live with her sister, Eunice McNair. The day following her departure, the victim returned to the Appellant's house and in his presence removed some furniture. Three days before the incident the victim and her sister visited the Appellant's home to take more furniture away. A quarrel took place in the course of which the Appellant seized a machete and struck both the victim and her sister with the flat side of the weapon, and further threatened them that if they reported the matter to the police it would be the worse for them. The matter was reported, and on 24th April 1967 the Appellant was served with two summonses for assault.

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6. At about 2 o'clock in the afternoon of 24th April 1967 the Appellant was seen talking

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on the roadside to the victim and her sister in a perfectly friendly manner. The group were joined by the Appellant's mother and a 16 year-old girl, called Mera Arthurs. An altercation took place between the victim and the Appellant's mother, whereupon the victim spat at the Appellant's mother. The Appellant thereupon took a machete out of a basket being carried by his mother and hacked the victim to death, which was instantaneous. Death was caused by shock resulting from severe injuries to the central nervous system, the brain, the spinal cord, and from haemorrhage.

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p.70,ls.
21-30

7. The Appellant in his unsworn statement from the dock said, inter alia, that he had been in a road accident in 1960 as a result of which he had been unconscious for twelve hours. From that day onwards he suffered periodically from giddiness and whenever he got a blow on the head he "got a black-out easily."

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p.72, 1.10

8. A consultant psychiatrist, Dr. Robert Mair, was called as the only witness for the defence. He confirmed that the Appellant had told him of the accident in 1960, and he found on clinical examination scars on the Appellant's head consistent with such an injury. He conducted an electro-encephelograph examination which recorded abnormal waves. The doctor concluded that the Appellant's injury together with the clinical examination could have induced a period of automatic behaviour in which the Appellant would be totally unaware of what he was doing. The doctor said that the Appellant was suffering from an abnormality of mind; but he was not asked, and did not state, in examination-in-chief whether that mental abnormality impaired, substantially or otherwise, the Appellant's mental responsibility. He confined his expert psychiatric evidence to the single issue of automatism, or possibly of amnesia.

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p.74,1.30

p.75, 1.2

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p.80, ls.19-
25 and p.80
1.37 p.81,
1.2, p.80,
ls.34-36

9. In cross-examination, Crown Counsel put questions to the doctor tending to demonstrate that the impairment of the Appellant's mental responsibility was not substantial. The doctor indicated that he could only say that

10 in a state of automatism or in an amnesic state the mental responsibility was impaired for the period of such state. After re-examination, the trial judge at the request of the foreman of the jury, asked the doctor whether the state of automatism or amnesia was the cause of the killing or a result of the act of killing. The doctor replied that some change came over the Appellant "which rendered him not fully in control of what he was doing, and it also rendered him unable to register what he was doing".

p.87, ls.33-
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20 10. At the conclusion of Dr. Mair's evidence, defence counsel said that he was proposing to call another medical witness, Dr. Martin, "but in view of certain things he will not be here until 2 o'clock, so I will close my case now". To which the learned judge replied: "As you like. It is a matter for your decision."

p.86, ls.22-
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30 11. The trial judge dealt fully in his summing up with the issue of the Appellant's state of mind. He prefaced his remarks about the medical evidence by telling the jury that it was "not bound to accept the evidence of an expert....and his evidence or his opinion may be rejected if you, the jury, are satisfied that...if for any reason you do not agree with the opinion he has expressed". In so directing the jury, the trial judge, it is submitted, failed to distinguish between opinion evidence and unchallenged and uncontradicted clinical evidence, such as the recording of the electro-encephalograph, which the jury was bound in the circumstances to accept.

p.113, ls.34-
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40 12. The trial judge in his direction about the involuntariness of the Appellant's actions failed to refer to the evidence of the electro-encephalograph recording. More seriously, the trial judge totally misinterpreted the medical evidence. He summarised the evidence on this issue in the following way: "The doctor said that from his examination the accused had an abnormality of mind which could cause amnesia that is to say

p.114, ls.34-
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automatic behaviour". It is respectfully submitted that this passage confuses two quite disparate states of mind. The doctor was endeavouring to state that the Appellant could be suffering either from automatism, a state of mind in which the propositus is unaware of his actions at the time they are performed, or from amnesia itself an abnormality of mind, which erases from the consciousness an earlier experience which may have been a wholly voluntary act.

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13. If the expert medical evidence was inconclusive, as it is submitted the trial judge thought it was, it was the duty of the trial judge, it is respectfully submitted, to ensure that the jury had every available medical evidence to assist it in determining the issue of automatism raised by the defence; in particular, the trial judge was wrong in leaving the decision not to call Dr. Martin as a witness to defence counsel. It is submitted that a criminal trial is not a game played by opposing parties according to rigidly applied rules but an inquiry into the issues raised by the defence so as to give the jury as much assistance as possible to arrive at a just verdict.

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pp.127-132

14. On the issue of diminished responsibility, the trial judge directed the jury correctly, save in one respect. The trial judge told the jury that "in examination-in-chief he Dr. Mair said nothing at all about the mental responsibility of the accused being impaired at all; he said nothing". This, with respect, was both inaccurate and prejudicial. Dr. Mair was not asked by defence counsel to consider whether the abnormality of mind impaired the Appellant's mental responsibility because (a) the evidence was directed to the issue of automatism and (b) the defence was not seeking to establish the defence of diminished responsibility under Section 3B of the Jamaica Offences Against the Person (Amendment) Law No.43. The trial judge further directed the jury that the purport of

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p.131,ls.18-20

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Recordp.132, 1s.19-
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10 the medical evidence was that "if there was no black-out there would be no impairment of responsibility. That is what it appears to me that the doctor's evidence amounts to". It is respectfully submitted that the doctor gave evidence that the clinical examination, together with the electro-encephalograph recording, established an abnormality of mind and impaired the Appellant's mental

20 responsibility whether or not that abnormality of mind was manifested by a state of automatism or of amnesia. If, as it was submitted it was right to do so, the trial judge properly left the issue of diminished responsibility to the jury (in spite of the fact that the Appellant did not himself raise the defence) it was wrong, it is respectfully submitted, for the trial judge to negative the effect of any such defence by such a misdirection on the expert testimony.

P.122, 1.13
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30 15. The trial judge, in accordance with the decision in Bullard v. The Queen [1957] A.C.635, rightly (it is submitted) left the issue of provocation to the jury although no reliance was placed on it by the defence. The trial judge directed the jury that to constitute the defence of provocation the acts done or said by the victim "must be such as would cause a reasonable person, that is an ordinary responsible person, to lose his self-control; it must be such as would cause a sudden and temporary loss of self-control in a reasonable person; and it must actually have caused in the accused this sudden and temporary loss of self-control.

40 To put it another way, the accused must have been so provoked that he lost his self-control, and a reasonable person would have lost his self-control in similar circumstances". Later the trial judge, in dealing with the facts and matters potentially constituting provocation said: "then members of the jury, there is the question of the spitting.

p.122, 1.48-
p.123, 1.9p.123, 1.32-
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According to him, the deceased spat a slimy spit - according to him - into his mother's face. Is that the sort of thing that would have an effect on a reasonable person, somebody spitting in one's mother's face; would that be the sort of thing that would cause a reasonable person to lose his self-control?" It is respectfully submitted that this definition of, and application of the facts to, the defence of provocation is too restrictive. The general principle of law is that the standard of behaviour to be observed, and hence to be regarded as reasonable, must be the standard of the average person in the community or group in which the accused person lives, and that in a plural society (such as Jamaica) there is not one standard of behaviour for all Jamaicans but several standards applicable to the various social groupings within Jamaica. Moreover the standard is not a fixed and unchanging standard. If the average person in the community in which the Appellant lives would have regarded the action of spitting on a close relative as a serious insult such as to warrant violent retaliation then the act of killing is not murder but manslaughter.

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16. The trial judge directed the jury on what constituted provocation in law and then summarised the evidence tending to support the defence of provocation. After concluding that summary, the judge then added: "When you are considering this question of provocation there is one other matter you have to consider. If you are satisfied, if you find that the accused did commit the act as a result of provocation, you will have to consider the retaliation as against the type of provocation that he received. You have to determine whether the provocation under which the accused was labouring was enough to make a reasonable person do as the accused did. In deciding this question you must consider the provocation received and the manner of retaliation and ask whether a reasonable person provoked in the way that the accused was provoked would retaliate in the way that the accused

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p.125, 1.34
p.126, 1.16
and p.142-
143

10 retaliated. If a reasonable person would not retaliate in the way that the accused retaliated, the defence of provocation cannot avail the accused because the standard fixed by law is that of a reasonable man and you the jury must be satisfied not only that the accused was so provoked that he lost his self-control and retaliated, but that a reasonable person would have lost his self-control in the same circumstances and do as the accused did. So, if you find that he was provoked by these circumstances that I have told you about or any other circumstances in the case which you think fit, you will have to consider whether a reasonable person would retaliate in the way that the accused retaliated, and if a reasonable person would not retaliate in that way, because of that type of provocation, then the defence of provocation is not made out. In other words, it would not avail the accused. As I say, he has not got to prove that he was provoked, it is for the prosecution to prove that he was not provoked". It is submitted (which submission was accepted by the Court of Appeal) that in so far as this passage indicated to the jury that the manner and degree of retaliation in fact used had to be related to the type of provocation received (the jury having first determined that there was provocation in law) was a major mis-
20 direction. And by directing the jury that it could bring in a verdict of manslaughter only if it came to the conclusion that the form of retaliation was reasonably proportionate to the act or acts of provocation, the trial judge, in effect, withdrew the issue of provocation from the jury. It is submitted that, while the accused's
30 reaction to the alleged provocative behaviour of the victim is a relevant consideration to the issue of the loss of self-control (and may properly be accepted by the jury as such) the question whether after reasonably losing his self-control the accused acted unreasonably is irrelevant to the defence of provocation. It is inconsistent that a reasonable man who loses his self-control on being provoked must, to substantiate the offence, establish that
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he continues to behave reasonably after he has lost his self-control. R. v. Southgate [1963] 2 All E.R. 388. It is submitted, in any event, that the "reasonable relationship" rule established in Mancini v. D.P.P. [1942] A.C.1 has been abolished in Jamaica by section 3C of the Jamaica Offences Against the Person (Amendment) Law No.43 of 1958.

- p.139 17. The Court of Appeal of Jamaica accepted the Appellant's submission that the directions of the trial judge on the question of provocation vis-a-vis retaliation were inconsistent with the law. The Court of Appeal rejected the Appellant's prayer that his conviction be quashed or alternatively that a new trial be ordered; instead the Court of Appeal applied the proviso to section 16 (1) of the Jamaica Judicature (Court of Appeal) Law, that, notwithstanding that the point of law on the direction as to provocation might be decided in the Appellant's favour, dismissed the appeal on the ground that it considered that no substantial miscarriage of justice had occurred. It is submitted that the Court of Appeal was, for the following reasons, wrong to apply the proviso in the Appellant's case: 10
- p.140
- p.145 (a) The Court of Appeal approached the question of the proviso in a wrong way when it said that "the next question which arises for our consideration is whether such a misdirection when looked at in its total context has resulted in a substantial miscarriage of justice." The question is not whether there had been a misdirection in the context of the whole of the summing up, but whether, if the jury had been properly directed - i.e. the misdirection had never occurred - the jury would inevitably have come to the same conclusion that it in fact came to. 20
- (b) The Court of Appeal applied the wrong test for applying the proviso when it stated the test to be applied was "whether there was material on which a view most favourable to the applicant a reasonable jury could form the view that a reasonable person provoked in the manner alleged could be driven through a transport 30 40

of passion and loss of self-control to do as the Applicant did ...". The proper test is whether a reasonable jury properly directed would inevitably and without doubt have reached the same conclusion: Chung Kum Moey v. Public Prosecutor for Singapore [1967] 2 A.C. 173.

10 (c) The Court of Appeal, in applying its own test of the proviso, wrongly imported the consideration that the trial judge would have acted correctly if he had withdrawn the issue of provocation from the jury. Once the jury was left (even if incorrectly) to determine the issue of provocation, a misdirection on that issue was not irrelevant on the question of any miscarriage of justice.

20 (d) The Court of Appeal failed to consider whether and to what extent the power to order a new trial, specifically requested by the Appellant as an alternative to the quashing of his conviction, affected the application of the proviso.

(e) The Court of Appeal failed to apply the principle that the proviso should never be applied where its application means the difference between a sentence of death and a sentence of imprisonment: R. v. Dunbar [1958] 1 Q.B. 1, 12.

30 (f) The Court of Appeal, had it found there was a further misdirection on the lines set out in paragraph 15 hereof, could not have properly applied the proviso.

40 18. The Appellant submits that the order of the Court of Appeal, dated 4th October 1967, dismissing his appeal against conviction and sentence of death passed on him by the Supreme Court of Jamaica on 13th June 1967, was wrong and should be set aside; and that this conviction should be quashed, alternatively, that a new trial should be ordered for the following,

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among other,

R E A S O N S

- (1) BECAUSE the trial judge failed in his summing up on the issue of automatism to distinguish between expert opinion evidence and unchallenged and uncontradicted clinical evidence.
- (2) BECAUSE the trial judge, in his summing up on the issue of automatism, misinterpreted the medical evidence, and in particular omitted to refer to the electro-encephalograph recording. 10
- (3) BECAUSE the trial judge failed in his duty to ensure that all available medical evidence was placed before the jury on the issue of automatism.
- (4) BECAUSE the trial judge applied too restrictive a standard of behaviour in applying the test of provocation.
- (5) BECAUSE the trial judge (as the Court of Appeal so held) misdirected the jury on the question of the amount of force used as a retaliatory act to the act of provocation. 20
- (6) BECAUSE the Court of Appeal wrongly applied the proviso, that notwithstanding the misdirection of the trial judge no substantial miscarriage of justice had occurred, and hence the appeal should be dismissed.
- (7) BECAUSE the judgment of the Court of Appeal was wrong in dismissing the Appellant's appeal and its judgment ought to be reversed. 30

L.J. BLOM-COOPER

L.G. WOODLEY

No. 7 of 1968

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