

IN THE PRIVY COUNCIL

No. 7 of 1968

ON APPEAL  
FROM THE COURT OF APPEAL JAMAICA

UNIVERSITY OF LONDON  
INSTITUTE OF JURISPRUDENCE  
16 JAN 1968  
25 RUSSELL SQUARE  
LONDON, N.W. 1

BETWEEN :

GLASFORD PHILLIPS Appellant

- and -

THE QUEEN Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal against the judgment and order of the Court of Appeal, Jamaica (Henriques, Moody and Eccleston JJ.) dated the 4th October 1967, which had dismissed the Appellant's appeal from his conviction by the Saint Mary Circuit Court (Smith J. and a jury) dated the 13th June 1967 on a charge of murder upon which the Appellant had been sentenced to death.

pp. 141-146

p. 135

2. That relevant statutory provisions of Jamaica are:-

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Offences against the Person (Amendment)  
Law No. 43 of 1958

3. The principal Law is hereby amended by inserting therein immediately after section 3 the following sections as sections 3A, 3B, 3C and 3D, respectively -  
.....

3B.(1) Where a person kills or is a party to the killing of another, he shall

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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 of murder. 10

(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.

(4) .....

3C. 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 things said or 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. 20  
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p. 1

3. The Appellant was indicted on the charge that on the 24th April 1967 in the parish of Saint Mary he had murdered Joyce McNair.

4. The trial took place in the Saint Mary Circuit Court (Smith J. and a jury) on the 12th and 13th June 1967. The prosecution called material evidence to the following effect:-

- 10 (a) Veronica Reid said that the Appellant had lived at her house with Joyce McNair, the deceased, for a year up to the 16th April 1967, when, after a row, the deceased had left; on the 21st April, she had returned with her sister to collect her bed, when there was a dispute and the Appellant assaulted the deceased and her sister with a machete; as a result, the two girls had reported him to the police, and on the 24th April a police constable had come in the morning and served two summonses on the Appellant, which he threw on the floor; he then started sharpening his machete; the witness had said that she was going to tell his mother to caution him, to which the Appellant replied "what I have in mind neither you nor mum can take it out"; later on the witness had gone into the road outside her house and seen the deceased lying dead a few yards away.
- 20
- 30 (b) Eunice McNair, sister of the deceased, said that on the 21st April she had been with her sister when they had been assaulted by the Appellant, who had had to be disarmed by Mrs. Reid; they had reported him at the police station. p. 21-26
- (c) Dr. Reginald Peat, the pathologist, said that he had found six wounds on the deceased caused by blows of considerable force from a machete, any one of which could have caused death; one had severed the right hand, and three had been to the skull and neck. pp. 27-31
- 40 (d) Joyce Tucker had seen the deceased in the street on the afternoon of 24th April; the Appellant had come from a bar and joined his mother who had been carrying a machete; they and Meva Arthurs had gone off in the same direction as the deceased; as the pp. 35-41
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witness was going home, she heard a cry, went up the road and saw the deceased lying dead in the road.

pp. 43-49

- (e) Meva Arthurs, aged 16, had worked in the fields with the Appellant's mother; on the 24th April they had been returning from work at 2 p.m. when they met the Appellant and the deceased standing talking in the road; the mother, after speaking to the Appellant, had asked the deceased why she didn't leave the Appellant, and the deceased had replied "don't come up in my face and talk" and said that the mother had spat at her; the mother turned away and the deceased had spat towards her; the Appellant had seized the machete from his mother's hand and had attacked the deceased; the first blow had severed her right hand; she fell to the ground and he had struck other blows; then the Appellant had walked off up the road and into his aunt's yard, and the witness said she had seen him throw the machete away. In cross-examination the witness agreed that she had been frightened and had run off and had not seen the Appellant throw the machete away.

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pp. 51-56

- (f) Hazel Vassell said that she had seen the fatal accident; the mother had spoken to the deceased who had replied "don't call me name", and the Appellant had then taken his mother's machete and attacked the deceased.

pp. 57-60

- (g) Rose Williams said that the Appellant had come to her house and asked for her son; he wanted him to take him to the station because he had killed the deceased; his clothes were spotted with blood.

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(h) P.C. Johnson had received the complaints of the deceased and her sister on 21st April; on 24th April he had served the summonses on the Appellant, who had said 'I hope this is the last time I going to court'; later he had seen the body of the deceased, and had found the Appellant at his mother's house; the Appellant took him to his own house and had shown him a bloodstained machete lying in a gutter.

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5. The Appellant made an unsworn statement from the dock. He said that on the 24th April he was drinking with some friends from 10 a.m. onwards; he had spoken to the constable who had given him the summonses; later he had gone to have a drink, and then saw the deceased in the road; they had spoken about the prosecution and he had offered to pay the medical expenses; his mother had then come up and an argument started between the two women; the deceased had spat in his mother's face; he had tried to get between them to force his mother away; he turned quickly to punch the deceased and received a blow on his head which made him dizzy; he remained on the spot for two minutes, and then recovered and walked away; then he heard people shouting that he had killed the deceased; he spoke to Mrs. Williams and then went home and waited for the police. In 1960 he had had an accident on his motorcycle, and had been unconscious for twelve hours; since then he had suffered giddiness and if he happened to get a blow in his head he got a blackout easily.

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pp. 67-70

6. The Appellant called Dr. R. Mair, a consultant psychiatrist. He had examined the Appellant on 26th May 1967 and had found nothing abnormal; an E.E.G. examination had shown an abnormal result, which indicated an abnormality of mind, which could be the result of an accident, and which could account for a period of amnesia. In cross-examination he said that, apart from the E.E.G. test, there was no

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pp. 73-87

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evidence of abnormality or diminishing of mental responsibility.

pp. 89-134

7. The learned trial judge (Smith J.) began his summing-up by directing the jury that the burden of proof was on the prosecution, and continued by defining the necessary elements which the prosecution had to establish to justify a verdict of murder. The learned judge then considered in detail the evidence of all the witnesses called, including the unsworn statement made by the Appellant; he said that from the evidence the jury could hardly find otherwise than that the Appellant had killed the deceased, but the onus remained on the prosecution to prove all the necessary elements of murder. He then directed the jury upon the law relating to the state of mind of the Appellant, and the evidence relating thereto; the jury must be satisfied that he had not had a black-out or had suffered from amnesia. After directing the jury upon the question of criminal intent, the learned judge then dealt with provocation. He said that defending counsel had told them that provocation did not arise in this case, but that nevertheless it was for them to say whether there had been provocation. The learned judge then gave the legal definition of provocation and the circumstances in which it was available as a defence, and then reminded the jury of the evidence which they should take into account in considering the question; finally he said:-

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pp. 125-126

"When you are considering this question of provocation there is one other matter that 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

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10 you must consider the provocation received  
and the manner of the retaliation, and ask  
whether a reasonable person provoked in the  
way that the accused was provoked would  
retaliate in the way that the accused  
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 the  
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 man  
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  
20 have told you about, or any other  
circumstance 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.  
30 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."

8. The learned trial judge then directed the  
jury upon the issue of diminished  
responsibility; he directed them upon the legal  
requirements of the defence and reminded them of  
the evidence of Dr. Mair, and then said:-

40 "So it is for you to say whether, as  
the accused is required to do, he has  
satisfied you that it is more probable  
than not that he had abnormality of mind,  
and, members of the jury, there is  
nothing in the evidence, as far as I can  
see which can contradict what this  
doctor said; there is nothing which you

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can take into account in saying he did not have an abnormality of mind. That is as far as I see it; so it is a matter for you; but on the question of whether the accused had an abnormality of mind, it seems to me quite clear on the medical evidence that he did have an abnormality of mind, but that isn't all the accused is required to prove. The accused is required to go further; he has to satisfy you that the abnormality was caused either from some condition of arrested or retarded development of mind, or some inherent cause, or was induced by disease or injury. There is no question of any disease here; there is no question of any arrested or retarded development of mind; the doctor said that this abnormality which he saw could have been caused by the injury which the history given by the accused disclosed. That is to say, this accident which he said he had in 1960, injuring his brain, where he was unconscious. So as far as that part is concerned it appears that you can also say that there is evidence on which you can find that he not only had an abnormality of mind, but that it was caused by this injury which the accused said he received; that is if you believe the accused did receive this injury.

So, members of the jury, on a balance of probabilities, how do you find? Do you say that the accused did have this abnormality of mind, and that it arose from the injury which he said he received? Even that is not enough. He has to go still further. He has to show not only that he had an abnormality of mind, and that it arose from this injury he received, but he has to show further that it was such as substantially impaired his mental responsibility for his acts in doing the killing."

This question depended upon whether the



jury thought that the Appellant had had a blackout at the time of the killing; if the jury were sure that there had been no blackout, there was no evidence that the mental responsibility of the Appellant had been impaired at all.

The learned judge ended his summing up by reminding the jury of the possible courses and verdicts open to them.

10 The jury returned a verdict of guilty of murder, and the Appellant was sentenced to death.

9. The Appellant appealed against this verdict and his appeal was heard and dismissed by the Court of Appeal, Jamaica (Henriques, Moody and Eccleston JJ.) on the 4th October 1967.

20 The judgment of the Court was delivered by Henriques J., who said that two grounds of appeal had been advanced. One ground was that there had been a misdirection in relation to the evidence of Meva Arthurs, who, in cross-examination, contradicted her evidence that she had seen the Appellant throw a machete away. The trial judge had dealt adequately with the point in his summing-up and there was no merit in the point raised.

30 The other ground of appeal was that there had been a misdirection of the jury in relation to the law of provocation. The trial judge had directed the jury that they must consider whether a reasonable person provoked in the way the Appellant had been would retaliate in the way that the accused had retaliated. That direction in the present case, in the view of the Court of Appeal, was comparable to the direction which had been held to be wrong in the case of R. v Donald Bennett in 1967. Accordingly the direction complained of did  
40 amount to a misdirection.

However a close analysis of the evidence showed that the judge would have been right to

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withdraw the issue of provocation from the jury. Counsel for the defence expressly stated he was not raising such a defence. The judge had thought there might have been provocative acts and had otherwise given clear and accurate directions on the issue of provocation. The Court of Appeal was satisfied that the verdict was correct and that the misdirection could not reasonably be said to have brought about the verdict; the only reasonable and proper verdict was one of murder and accordingly the proviso would be applied and the application for leave be treated as a hearing of the appeal and the appeal was dismissed.

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pp. 147,148

10. The Appellant was given special leave to appeal in forma pauperis by the Judicial Committee on the 19th March 1968.

11. The Respondent respectfully submits that this appeal should be dismissed. It is submitted that there was no material misdirection of the jury upon law or upon the facts by the learned trial judge in his summing up. The learned judge dealt fully with all the relevant evidence given at the trial; he sufficiently drew the attention of the jury to the inconsistency in the evidence of Meva Arthurs. The learned judge also directed the jury properly as to what evidence there was relating to the defence of diminished responsibility; it is submitted that the question of whether the Appellant was suffering from diminished responsibility was properly left to the jury; the onus was upon the Appellant to raise the case that there had been a substantial impairment of his mental responsibility at the time of the killing, and, as the learned judge correctly told the jury, the issue upon the facts in effect depended upon whether or not the jury believed that the Appellant suffered a blackout at the time of the killing.

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12. The Respondent submits that the learned judge correctly directed the jury upon the law relating to provocation. In view of the

applicable legislation, set out in paragraph 2 above, it is submitted that it is open to a jury in a case of murder to consider whether acts done by an accused man were done under such provocation as would be enough to make a reasonable man do such acts; the direction of the learned judge was in accord with this principle. If necessary, the Respondent will submit that the case of R. v. Bennett, referred to in the judgment of the Court of Appeal, should be reconsidered, if it is a relevant authority in the present case.

In the later case of the Queen against Samuel Gray (15th May, 1968) the same Court expressed disagreement with the proposition enunciated in Donald Bennett's case in the following words:-

"The case of R. v. Donald Bennett supra presents some difficulty. The court in that case held that it was wrong to treat the principles of reasonable relationship as an element of provocation and that it was a misdirection for a trial judge to tell the jury that if the acts of the accused did not bear reasonable relationship to the words which the accused complained were used to him, then they could not find that there was provocation. This ruling was re-stated by the court in its judgment in the case of R. v. Glasford Phillips delivered on the 4th of October, 1967. The rulings in those two cases are unfortunately in conflict with the views of the court in the instant case, and the matter must be left for the present in this unsatisfactory state until the opportunity presents itself of having the question determined by the full court. "

If, contrary to the foregoing submissions, the Court of Appeal correctly held that there was a misdirection to the jury upon the law of provocation, the Respondent submits that the Court of Appeal correctly decided that the issue of provocation did not in any event arise in the

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present case, and could properly have been withdrawn from the jury. It is further submitted that, having regard to all the facts and circumstances of the case, the direction to the jury upon provocation could have caused the Appellant no miscarriage of justice and that upon a correct direction the verdict of the jury must have been the same as that given.

13. The Respondent respectfully submits that this appeal should be dismissed and the judgment and order of the Court of Appeal, Jamaica, should be affirmed for the following, among other

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R E A S O N S

1. BECAUSE the jury were correctly directed both on the facts and the law of the case.
2. BECAUSE the jury were correctly directed upon the issue of diminished responsibility.
3. BECAUSE the jury were correctly directed upon the issue of provocation.
4. BECAUSE there was no issue upon provocation sufficient to be left to the jury.
5. BECAUSE of the other reasons in the judgment of the Court of Appeal.
6. BECAUSE the Appellant has suffered no miscarriage of justice.

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JAMES S. KERR.

MERVYN HEALD.

No. 7 of 1968

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL JAMAICA

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B E T W E E N :

GLASFORD PHILLIPS      Appellant

- and -

THE QUEEN      Respondent

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C A S E   F O R   T H E   R E S P O N D E N T

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