(17)

IN THE COURT OF APPEAL

ANTIGUA

CRIMINAL APPEAL NO.4 of 1974

BETWEEN: ST. CLAIR MASON Appellant

AND

THE QUEEN Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

McChesney George for appellant.
C.C. Kennard D.P.P. for respondent.

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1975, July 14 & 15

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J U D G M E N T

PETERKIN J.A., delivered the judgment of the Court:

The appellant was convicted on 5th October 1974 of the murder of Jeremiah Joseph and sentenced to death by hanging. He now appeals against conviction.

The facts and circumstances may be stated quite briefly to be as follows On Christmas Day 1973 Jeremiah Joseph also called Miah was playing "John Bull" along with Zachariah Joseph also known as Zachie. It took the form of pantomime, and to play his role as John Bull Miah was dressed in plantain leaves tied around his waist. He also had a crocus bag filled with grass on the upper part of his body and horns on his head. Zachie played the role of his driver and carried a stick with a rope tied to it which he used to drive the John Bull. Miah and Zachie left the yard of one Leena Joseph, ran as far as the school fence and then returned to her yard, where the accused was seen to approach Miah at his back, sprinkle some liquid from a bottle on to the plantain leaves and set them alight. Miah fell to the ground ablaze. Leena then threw some water on him and put out the fire. She then put flour on his burns and he was taken to the Holberton Hospital by the accused where he died on 13th January 1974. The cause of death was stated by Dr. Jayasuri to be septicaemia, the direct and consequential result of the second degree burns which he received.

At the trial the Crown called four eye witnesses to the incident who all testified that they had seen the accused set fire to the plantain leaves in which the deceased was dressed. Two of these witnesses were children of 12 years of age. They both gave evidence on oath. The third

witness was a schoolgirl of 15 years who attended the Jennings Secondary School. She too testified on oath. The fourth witness was Zachariah Joseph.

In his defence at the trial the accused denied that he had set the deceased on fire. He stated from the dock that he was at Leena Joseph s house, heard a shout looked out of the window and saw the deceased ablaze on the ground.

The first issue for the determination of the jury was a simple one namely, whether or not the Crown had proved to them to the extent that they were quite sure that the accused was the person who set fire to the deceased. They indicated by their verdict that the Crown had done so.

Learned counsel for the appellant in the course of his arguments referred to the discrepancies in the evidence of the Crown witnesses. He also referred to the fact that Zachariah Joseph had made statements at the trial which were inconsistent with the statement which he had given to the Police. He then submitted that the trial judge had not given the jury an adequate warning in regard to the evidence of the two Crown witnesses who were 12 years of age and so could be regarded as being children of tender years. He also submitted that the trial judge had failed to direct the jury on how they should evaluate the evidence of Zachariah Joseph having regard to his inconsistent statements.

Reference to the record shows that the learned trial judge did exhort the jury in dealing with the evidence of the children to examine it with care.

As to Zachariah Joseph's evidence, even if it were regarded as being negligible, there would still remain the evidence of Joycelyn Reid who stated at the trial that she was actually 16 years of age, and whose evidence the law does not require to be corroborated. We are of the opinion that there was an abundance of evidence on which the jury could have found that the accused did set fire to the deceased, and that they did so find is a matter of little surprise to us.

Learned counsel then dealt with ground (9) which reads as follows:

> "9. The learned judge misdirected the jury when he told them that the prosecution had proved a case of murder, and failed to leave to them the question as to whether mens rea had indeed been proved if they found that the accused had in fact done the alleged act."

Counsel referred the Court to certain aspects of the evidence in relation to

the incident namely -

(i) the absence of any motive;

(ii) the fact that it was a festive occasion

(iii) the fact that the act of setting fire was done quite openly and in the presence of others;

(iv) the total absence of any hostility between the parties prior to the incident.

He then submitted that there was a possibility of the jury accepting that this was a prank, and that the trial judge should have adverted to it and put the alternative of manslaughter to the jury. We agree. In dealing with malice aforethought the learned trial judge directed the jury as follows:

"The questions which now face you are: Was the killing with malice aforethought? Was it unlawful? On the first question my direction to you is this: If you are satisfied that the accused lit the plantain flags with the intention of killing the deceased, you are entitled to infer malice aforethought: if he lit the flags with the intention of doing the deceased some really serious bodily injury, then he acted with malice aforethought: if knowing that if he lit the flags which the deceased was wearing the deceased ran the risk of death or serious bodily injury and with that knowledge he still deliberately and without lawful excuse set fire to the flags thus exposing the deceased to that risk of death or serious bodily injury, then he acted with malice aforethought.

You have heard the evidence and it is for you to draw or not to draw the inference that the accused's action was one of those indicated. If you do so infer, you will then have to answer the second question - whether the killing was lawful or unlawful. A lawful killing is one which may be justified or excused. Into the former category, for example, would fall a killing to prevent a forcible and atrocious crime. If someone is killed to prevent another one from committing a forcible and atrocious crime, such killing would be justified. That is one example of the first type of lawful killing. Excusable killing would be, for example, when one kills by accident or in self defence or is drunk,

> so drunk as is recognised by the law as to constitute an excuse for the killing. On the evidence adduced for the Crown, there seems to be neither justification nor excuse for the act of the accused."

At a later stage, in giving his final directions, he said:

> "That, Mr. Foreman and members of the jury, completes my review of the law and evidence by which you are to be guided in reaching a verdict of "guilty" or "not guilty" in this case. You are the judges of the facts supplied to you by the witnessed and the accused, all of whom you have seen and whose demeanour as they spoke you have watched. If you believe the evidence of the Crown witnesses it is your plain duty to convict the accused. If you accept the story given to you by the accused, your duty is equally plain to acquit him. If you have a doubt, such doubt as a reasonable man would have as to whom to believe, the Crown witnesses or the accused, that doubt must be resolved in favour of the accused and you must return a verdict of "not guilty"."

He ought in our opinion to have defined manslaughter to the jury and then gone on to direct them that without an intention of one of the three types mentioned the accused's conduct was not by itself enough to convert a homicide into the crime of murder, but that the question of manslaughter would arise.

The learned D.P.P. has drawn to the Court's attention the case of R. v Hyam (1974) 2 All E.R.41. The facts there are however not on all fours with the instant case. In Hyam's case not only was there an obvious motive, but in addition the act of setting fire to the house was a clandestine act done in the early hours of the morning. All the facts and circumstances pointed to that case being a carefully premeditated case in contradistinction to the instant case.

Had the jury been directed in regard to manslaughter we are unable to say that they could not have arrived at such a verdict. For the reasons stated the Court will allow the appeal and set aside the conviction for murder and sentence of death. Instead, the Court will substitute a conviction for manslaughter. The appellant will serve a term of 10 years hard labour from the date of conviction in the High Court

MAURICE DAVIS
CHIEF JUSTICE

E.L. ST. BERNARD
JUSTICE OF APPEAL

N. PETERKIN
JUSTICE OF APPEAL