MONTSERRAT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 6 of 1978

BETWEEN: SAMUEL GREENAWAY - Appellant

V.

THE QUEEN - Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: J. Kelsick for Appellant,
D. Brandt with him.

Attorney-General for the Crown,
K. Allen with him.

1978; October 9 and 13

J U D G M E N T

DAVIS, C.J. delivered the Judgment of the Court:

The appellant, Samuel Greenaway was on the 8th March 1978, convicted of the murder of William Henry Greer and sentenced to death by hanging. He now appeals against his conviction on the following grounds:-

"1. The Learned Trial Judge misdirected the Jury by failing to give adequate directions as to the Prosecution's burden of proof on the question of provocation having regard to the evidence.

/2. The.....

2. The Learned Trial Judge misdirected the Jury by failing to direct them at all or to direct them in clear and unambiguous terms that they were entitled to conclude upon a consideration of all the evidence adduced by the prosecution that the act which caused the death of the deceased person was provoked even if they rejected the statement made by the accused."

The facts are briefly that one Dorothy Greenaway, a school teacher, who lives at Fogarty in the island of Montserrat uses a path which leads from the main road to get to her home.

On Thursday 9th June, 1977, when she tried to drive her car along the path to her home she found that the road was blocked.

It would appear that she solicited the help of Jack Hogan and William Henry Greer to clear the road for her. Accordingly, on the 11th June, Jack Hogan and the deceased, William Henry Greer, went to the area about 6 a.m. and began clearing the road using a hoe and a shovel.

While they were clearing the road the appellant came up and said "Good morning." They replied "Good morning" and he then asked who sent you all to move these stuff. They replied that teacher Dorothy had asked them to do so because she could not get to her place.

The witness Jack Hogan then went on to state as follows:

"He said you all know this land is mine. I asked him how the land is yours and the Govt. make the road. He said the land was his and we have no right to to be there. Vernon explained that the road would come in useful for him and others so he can drive straight in with a box to his house.

I continued working while accused and Vernon were talking. The accused began moving backwards and forwards as if he was getting roused. Vernon was still throwing away the stuff. I told Vernon

/to.....

to watch him. Vernon said don't worry with that - he don't mean anything. Accused could have heard. Then a few seconds after I heard Vernon say "O God, O God" and then I saw blood spouting after accused pulled out the knife. At that time Vernon was bending over moving the stone.

The knife was about 6 in. long and it had a cross piece by the handle. It looked like a jack-knife. The centre part is thick and both sides have an edge. After he pulled out the knife accused trotted away to his home. I have never seen the knife again. I never saw it before that day. I did not see it on accused when he greeted us.

Vernon had no other conversation with the accused apart from saying about the usefulness of the road. Apart from that, Vernon had no argument with accused. Vernon did nothing at all to the accused on that day.

When accused ran off, I took up a stone, a good sized one, and fired it at him. I threw 2 stones. Accused went past his house to the bushes. He disappeared from my view."

The deceased was taken to the Glendon Hospital where he died next day. Dr. Kothari who performed an emergency operation soon after his arrival at hospital stated,

"At about 9.15 a.m. his pulse and blood pressure improved when we decided to take him to the theatre and see what had happened in the abdomen.

At about 9.30 a.m. he was anaesthetised with a transfer incision across the abdomen. The first thing noticed was bright red blood coming out of the cut in the interior surface of the liver. That cut was about 1cm long. This bleeding was stopped by putting a suture of cat-gut with a gauze over the cut.

On further inspection, the cut had gone through the liver so there was a cut on the other side, which was closed with another cat-gut suture.

/Further.....

> Further inspection showed that there was a cut on the upper surface of the upper border of the pancreas and a large haematoma on the upper surface of the pancreas and on the lesser curvature of the stomach. All the blood vessels on the upper border of the pancreas and the lesser curvature of the stomach were sutured and the bleeding was controlled."

Concerning the wound the doctors evidence was,

> "It was a single wound that had gone through. The instrument used must have been a sharp knife with a blade about 1cm side. The depth of penetration must have been about 6 - 8 cm."

The patient never recovered. He died next day about 11.55 a.m. A post mortem examination was performed on the 12th June by Doctor Wooding and Dr. Kothari.

Dr. Kothari stated as his opinion that death was due to shock and anuria due to extensive haemorrhage from a stab wound involving the liver and the pancreas.

Linda Fergus, aged 15 years, stated that on the 11th June at about 6.30 a.m. while coming from the Post Office walking along the main street towards Fogarty she saw the appellant who asked her to go and phone for his sister. She did so and on returning to his yard she met the appellant who told her that he was waiting for the police because he had stabbed Vernon and he knew they were going to lock him up. The deceased was also known as Vernon. She went on to say that when the appellant's sister arrived he said to his sister that Vernon and Jack came to move the stones and he asked them what they were doing and he and Vernon were fighting and then he stabbed him. He also said to his sister that Jack Hogan hit him on his leg with a stone.

At the trial the appellant elected to remain silent and called no witnesses but on 11th June 1977 when he was arrested by the

/police.....

police and cautioned he said, "I cut Vernon with my fingernail." Later that morning he made a voluntary statement to the police which was reduced to writing and tendered in evidence at the trial. The statement reads as follows:

> "I Samuel Greenaway wish to make a statement. I want someone to write down what I have to say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.
>
> (Sgd.) Samuel Greenaway
> (Sgd.) James E. Wade P/C 76
>
> I own a piece of land at St. Peters through which a Government bulldozer cut a road around the beginning of this month. On Friday 10th June 1977 me and my sister Elizabeth Greenaway removed the stones which the bulldozer pushed on the side of the road and put them back in the road leaving sufficient space for a footpath. On Saturday 11th June about 7.00 o'clock in the morning I saw Jack Hogan and Vernon Greer clearing away the said stones from the road, I went up to them and asked what are they doing. I then said that they should not move the stones, as I said so Jack Hogan took a stone and throw it at me. I get it in my left side. I then looked around and picked up a stone with a sharp point and pitch it at at them, and Vernon get it somewhere under his stomach and I run away.
>
> Sgd. Samuel Greenaway
> Sgd. James E. Wade
>
> The above statement have been read over to me. I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.
>
> Sgd. Samuel Greenaway
> witnessed: Sgd. James E. Wade P/C 76"

/Counsel.....

Counsel for the appellant argued both grounds of appeal together. He conceded that the only issue in the appeal was whether the learned trial judge had misdirected the jury on the question of provocation. He argued that provocation sufficiently arose in the evidence of Linda Fergus who had deposed that the appellant told his sister that he and the deceased had a fight and then he stabbed him. He further argued that nowhere in the summing up did the learned trial judge tell the jury that if they were in doubt as to whether there was any or any sufficient provocation that doubt should be resolved in favour of the accused and they should find him guilty of manslaughter.

We are of the view that this submission is unfounded. The evidence of Linda Fergus as to what the appellant had told his sister was admissible only as to the fact that he had spoken the words but not as to the truth of what he had said. In other words, the statement by her was not evidence of what had happened but only what he had said to his sister. It was not, therefore, evidence that there was a fight and should not have been left to the jury as evidence which was capable in law of amounting to provocation.

Counsel, in our view, correctly, did not rely on the written statement to the police as being evidence capable of amounting to provocation. Clearly it was merely a self-serving statement and could not be evidence of the truth of the matter. What is more the medical evidence made it clear that the injury to the deceased was not caused by a stone.

It is clear from what we have said that there was no evidence in the case on which a defence of provocation could be based and therefore, there was no misdirection on the part of the trial judge when he failed to tell the jury that if in doubt they should convict of manslaughter only.

/From.....

From the arguments which we have heard, and from looking at the summing up, it is clear that there is a misconception of the law relating to the defence of provocation. It may be helpful, therefore, if we refer to the judgment of Lord Devlin in the case of Lee Chun-Chuen v Regina (1963) 1 All E.R. 73 at page 79.

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from Holmes v. Director of Public Prosecutions. In Mancini v. Director of Public Prosecutions the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate."

In the instant trial, however, the trial judge took the view most favourable to the accused and directed the jury as follows:

/"Having.....

> "Having gone through the evidence, Members of the Jury, you have to go back to the main issues in the case, because the accused is charged with murder. The defence is telling you that he was provoked and therefore the offence is Manslaughter. There has been a killing. Greer Greer is dead; and it was an unlawful killing. Was it an unprovoked killing? Was there the intent? (To cause death or serious bodily harm?) You've got to decide was there a fight, a sudden fight? because if there was a sudden fight and in that fight - without anytime for cooling off, in the midst of this unlawful fighting the deceased is stabbed, he dies, then that would be manslaughter. If you find that there was this unlawful killing, that he was provoked, that would be manslaughter."

We do not agree that this direction was in keeping with the law but undoubtedly it was most favourable to the accused. With such a direction from the learned trial judge it is clear from their verdict that the jury must have rejected the suggestion that there was a fight and we agree with them.

For the reasons stated we are of the view that the appellant was properly convicted and the appeal is accordingly dismissed.

(Sir Maurice Davis)
CHIEF JUSTICE

(N.A. Peterkin)
JUSTICE OF APPEAL

(N. A. Berridge)
JUSTICE OF APPEAL (ACTING)