ANTIGUA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 of 1980

BETWEEN:

FITZROY THEOPHILUS MERCHANT - Appellant

and

THE QUEEN - Respondent

Before: The Hon. Mr. Justice Peterkin - Chief Justice
The Honourable Mr. Justice Berridge
The Honourable Mr. Justice Robotham (Acting)

Appearances: H.E. Stevens and D. Hamilton for the Appellant
L. Williams Director of Public Prosecutions for the Crown.

1981; June, 9, 10, 15.

JUDGMENT

BERRIDGE, J.A. delivered the judgment of the Court

The appellant, Fitzroy Theophilus Merchant, was on the 11th day of October, 1980, convicted of the murder of Joseph Nicholas and sentenced to death by hanging.

He has appealed against his conviction on the grounds set out at pages two and three of the record, grounds seven and eight of which have been abandoned.

The facts and circumstances of this case are that on the 16th February, 1980 the appellant encountered the deceased on the Factory Road sometime between 9 p.m. and 10 p.m. An incident ensued in which the deceased was stabbed several times, the fatal stab being the last one to the forehead.

Two persons, namely Donald Maginley and Vincent Yearwood saw part of what happened between them. Maginley's evidence is that he heard a voice shouting which caused him to look in the direction from which the sound came. What he saw is best put in his own words:

/"I noticed....

> "I noticed a man standing with his face turned east and another man face turned west - very close. The man standing facing east has his hands down - no movement. The one whose face turned west was stooping. The one stooping I saw his hand punching like that under the belly of the other man. It appeared as if they were the same height. I lean away about half a minute then I look back and I saw the man facing east down on the ground - falling - The one who was getting the blows. The other man was standing upright - the one delivering the blows. I saw he step over the man that fall. I saw he took something from the one that fall and he went west. He walked leisurely. Apart from these two men I did not notice anybody else out there."

Vincent Yearwood stated in evidence that he was driving his car at about 9.40 p.m. from west to east along the Factory Road. His evidence continues:

> "I saw two men at the side of the road fighting just on the left hand side of the road going east and by the Antigua Printery. One was short and one tall. The tall man was holding the short one in his collar and punching him - around this area (and he indicated his abdomen). The latter man's back was turned so I could not see if he had anything in his hand. The shorter had on a white shirt with some styling on the sleeves and a dark pants. I did notstop, I was on my way to the Gem. I was not able to recognise any of the men."

The deceased was found shortly afterwards at about 9.55 p.m. by Malcolm and Lotte Edwards lying with his head in the road. He was bleeding and breathing in a laboured manner. He was conveyed to Holberton Hospital and when seen there at about 11 p.m. by A.S.P. Goodwin, appeared to be dead.

The following day Dr. Cecil Phillip performed a post mortem examination on the body. There were stab wounds on the left side of the chest anteriorly and left and right sides of the chest posteriorly also on the right shoulder and central area of the forehead. There was an internal exit wound in the pleural cavity for the stab wound on the right posterior chest wall, and the right lower lobe of the lung was punctured. The stab wound on the forehead was found to have penetrated the frontal lobes

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of the brain which were contused. The stab wounds were consistent with those likely to be caused by a thin pointed instrument such as the screw driver produced in Court. In his opinion death was due to a penetrating brain injury secondary to stabbing such as he saw. The wound which went through the brain would have caused the death. He further stated that a considerable amount of force would have been required.

Nalda Merchant, sister of the appellant who lived in the same house, testified that on the 24th February, on the return of the appellant at about 10.30 p.m. she informed him that the Police were looking for him. Her evidence continues:

> "I asked him what he knows about the deceased. I said: what you know about Mr. Nicholas? He said: ah met him down the road and ah stab him up. I said: what you meant you stab him up? He said: all o' dem know about me sickness. I go dead. If you can't get that in your fucking head so long. You head hard like a nut shell. Is dead I go dead. I did not ask him anything. He said: you don't say nothing, hear! He said he used a screw driver to do the stabbing. I asked him what he used to stab him up. There was no further talk between us at that time. I went into my bedroom. The talk took place in his bedroom."

On the 25th February the appellant went to the Police Station at the request of the Police where he was questioned. On the 26th February he was interviewed by A.S.P. Goodwin who told him that he had received information that he had killed Nicholas and would like him to tell him what happened whereupon he is alleged to have made the following oral admission after caution: "Yes, I can't take it any longer. I had to do it. I am going to die."

Goodwin's evidence continues as follows:

> "I then asked the accused what he used to kill Nicholas with. He said: 'a screw driver'. I asked him: 'where is it now'? He said: 'at home'. I told him: 'I would like to get it'. He said: 'You'll have to go home for it'. I then told the accused that I would like him to tell me what happened that night and if he is going

/to do...

> "to do so I intend to take it down in writing. He said: I will tell you what happen; it's a long story."

The Police then accompanied the appellant to his home at Potters where he took them to a room in the yard, opened it with a key and took two screw drivers from a bag in a corner of a room, which he handed over to the Police saying "these are what I had with me the night when I killed my step father, but is the longer one I used."

On his return to the Station the appellant is alleged to have dictated a statement to the Police which was reduced to writing. It reads in part:

> "On Saturday night the 16th of February 1980 I took a walk down town. I left Nalda in the house. I left home at about 7.30 or 8 o'clock. I went to the West Bus Station to look for my brother Denfield. I stayed down there for a while and I did not see him. I started to walk back home. I walked up Hospital Hill..... When I reached by the Service Station I saw Mr. Nicholas walking going towards Potters like if he was going home.....
>
> I walk up behind him until I reach the peak of St. Johnston's Village hill. I was about 30 feet behind of him. I then got up closer to him and I had two screw drivers with me in my pocket, one was a small green one and the other a long black and yellow handled screw driver. As I got up to Nicholas I pulled the long screw driver at him when I was more to his side. I did not say anything to him. He put his hand in his pocket as if to take out something. But he did not have any chance. I hit him three or four stabs with the screw driver in his face, stomach and back. After I hit him the first stab in his stomach he grab onto me around my neck and it was then I stab him in the back. He staggered but did not fall. I then hit him the one in his face and he fell to the ground. I walk off and went back down St. Johnston's Village Road."

At his trial the appellant testified on oath in his defence. He denied making the oral admission to A.S.P. Goodwin whilst at the same time admitting that he had told Nalda Merchant that he had stabbed Nicholas. In

/regard.....

regard to the portions of the written statement referred to above the appellant contended that it was inaccurately recorded albeit that the remainder reflected an accurate account of what he told them.

The appellant then gave the following account on oath of what is alleged to have happened.

> "I saw Mr. Nicholas crossing the junction by the Service Station. He was ahead of me a good ways. From here to the Deluxe. I continued walking along the Factory Road. Cars were passing on the road.
>
> Yes, I got close to Mr. Nicholas just as he reach the peak of St. Johnston's Village close to the Printery.
>
> When I got up close to him, like close to his side - on same side of road - I had the screw drivers in my pocket. As I got by his side, he turned in my direction and said to me: The obeah didn't finish you, this will. He grab for his pocket. I pull one of the screw drivers. I did so because he made a grab at his pocket and I thought he had something as I know he was a shoemaker - like a knife. With the big screw driver I made a stab by the belly. Then he grab me round the neck and he was like squeezing my neck. The screw driver fell. He picked up the screw driver. He loose me and pick up the screw driver. I grab his hand and I pluck the screw driver from him. Then he grab me round my waist like pressing. Then I stab him in the back - about twice. I did so because he was like pressing me. Then he stiffen and he was still approaching and coming forward towards me. We were struggling and I flung a stab in his face and I turn off. After I stab him in the back and he stiffened we were there struggling.
>
> Yes, when I stab him in his back he let me go.
>
> I turn off and turn west. I heard something fell. I kept going.
>
> When Nicholas said the obeah didn't finish you but this will I felt frighten and I feel he have something like he arm with.
>
> I went west to the Village. St. Johnsons. I went straight through. Yes, I eventually got home."

We have given careful consideration to the arguments advanced on behalf of the appellant and have come to the conclusion that the only grounds which merit consideration are grounds 1,2 and 4.

/Counsel...

Counsel argued grounds 1 and 2 together. In regard to ground 1 he submitted that the committal for trial was improper in that the committal order signed by the Magistrate purely recited that the appellant "has been charged before me with an offence contrary to common law" and did not state the particular offence for which he was committed, and that in those circumstances the indictment would have been null and void.

Whilst it is true that the committal order lacked the necessary particularity and clarity, a careful perusal of the form containing the statutory caution to the accused shows that the charge was set out therein as murder and in answer to the statutory caution his reply was "nothing to say".

The record looked at as a whole disclosed that the only offence that the Magistrate was inquiring into was one of murder against the accused and that his committal could have been for no other offence but murder.

In regard to ground 2 the main contention of the appellant was that the record did not show that the Magistrate complied with the statutory provision of the Magistrate's Code of Procedure Act, Cap 48. His submissions are of a negative nature and he produced no positive evidence to show that the provisions had not in fact been complied with. In this respect we are of the view that the maxim "Omnia praesumuntur rite esse acta" is clearly applicable.

The burden of displacing this presumption clearly, in our view, rested with the appellant and this he failed to do.

We adopt the words in the judgment of the Court of Appeal of Belize (Criminal Appeal No. 4/78) in the case of Tiburcio Keme v Regina at page 3. The Court was then dealing with the validity of the committal in which it was alleged that the Magistrate did not follow the requirements of the Indictable Procedure Ordinance."

/Counsel....

> "Counsel for the appellant has accepted that the onus of showing a departure from the statute would rest on him, as he has alleged it, but he claimed that this onus had been discharged, as a perusal of the Preliminary Inquiry record disclosed no such request by the Magistrate. We have reservations, to which we will return, about this assumption that the Preliminary Inquiry records which form no part of the Supreme Court trial proceedings, should be persued in this way but, putting these reserva ions aside for the moment, we are not satisfied that the mere absence of a reference in the record of the Inquiry would displace the presumption of omnia praesumuntar rite esse acta."

We agree with the learned Director of Public Prosecutions that the matter should have been properly raised by way of motion supported by affidavit. In support of this we would also quote from Keme's case (supra) the following passage at page 5:

> "We may add that we have dealt at some length with the matters raised under the first ground of appeal, but we are by no means satisfied that the appellant was entitled to raise them in the fashion adopted in either this Court or the court below.
>
> The court sitting to try an indictment is not there to act in appellate or revisory capacity in respect of the committal proceedings and there is much authority for the view that its power to go behind the indictment and explore how it came to be preferred are limited."

For the reasons stated we are of the opinion that there is no merit in either of these grounds.

We turn now to ground 4 viz: "The learned trial Judge was wrong in law in withdrawing from the consideration of the jury the question of provocation. In directing the jury on this aspect the learned Trial Judge said at p 189 of the record:

> "While on this aspect of self defence, I think it was advanced, even not forcefully, the matter of provocation; but in this case it is my direction to you that there is not sufficient evidence on which to leave the question of provocation with you and therefore you should not consider provocation in this case."

/Immediately...

Immediately before giving his direction the trial Judge had directed the jury on the use of excessive force in self defence in these terms:

> "Now the burden is on the Prosecution to prove that Merchant was not defending himself and to satisfy you that it was Merchant's intention to fight with or attack Nicholas and that Merchant was not merely acting to prevent harm which was endangering his life or any serious bodily injury. But the accused does not have to prove that he was defending himself. Now if you find that Merchant, in all the circumstances, was acting to defend himself but that the force which he used was excessive then he would be guilty of manslaughter and not of murder."

Learned Counsel submitted that on the basis of the testimony of the appellant the trial Judge ought to have left the issue of provocation to the jury and that he ought to have directed them that if they rejected self defence they should consider the same evidence used in that behalf to ascertain whether provocation in law existed in which case the verdict would be one of manslaughter only.

It would appear that the trial Judge was of the view that there was sufficient evidence from the appellant's own account of how the stabbing took place for the jury to have considered whether or not it amounted to the use of excessive force so as to reduce it to manslaughter.

However, in the case of R v Anthony Williams (1974) 26 W.I.R. 541, the Court of Appeal of Trinidad and Tobago held that where a person charged with murder is found to have intended to act in self defence but to have used more force than was necessary for that purpose no question of manslaughter arises apart from the issue of provocation. In coming to this decision they applied the principles enunciated by Lord Morris in R v Palmer (1971) 1 AIL. E.R. 1077. In our view for this reason only, if for no other, he ought not to have withdrawn provocation.

But there is yet another reason. In the instant case the trial Judge had left self defence to the jury.

/The....

The fact that the jury respected the defence of self defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the Prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Conduct which cannot justify may well excuse. And in the language of the judgment of Bullard v Regina (1957) A.C. 635 "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

We are, therefore, for the reasons given, in agreement with the submission of Counsel on ground 4. And so, without either allowing or dismissing the appeal this Court will substitute for the verdict of murder one of guilty of manslaughter. The appellant will serve a term of imprisonment of 10 years with hard labour.

N.A. BERRIDGE,
Justice of Appeal

N.A. PETERKIN,
Chief Justice

L.L. ROBOTHAM,
Justice of Appeal (Acting)