MONTSERRAT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 of 1986

MERCER ALLEN

and

THE QUEEN - Respondent

**Before:** The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

**Appearances:** Kenneth Allen for the Appellant
Odel Adams (Attorney-General) and K. DeFreitas for the Crown

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1986: Nov. 3, 4.

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JUDGMENT

ROBOTHAM, C.J. delivered the Judgment of the Court

This is an appeal against a conviction for Murder and sentence of death passed on the appellant in the Montserrat Assize Court on 13th March, 1986.

On the night of 11th January, 1985, both the appellant and the deceased John Gerald (who is also known as John John) were in the shop of Fred White in the district of St. Johns. At about midnight, the deceased was at a table eating, when the appellant, according to the witness Peter Tuitt, attempted to "play around" with the deceased's food, as if he wanted to put his hand in it. The appellant said whilst he was in the act of doing this, "only one life a man has to live".

The deceased told the appellant to leave him alone. The next thing that happened as told by the witness Peter Tuitt, was that the deceased got up, went into the kitchen. The appellant went and stood by the kitchen door. The deceased came out of the kitchen with a cutlass in his hand. This cutlass had earlier that night been placed in the said kitchen by the deceased himself.

The witness then said;

> "As John John (deceased) came by the door Mercer the accused pull out his knife from his waist and hold John John's hand with the cutlass. Then I went outside. When accused held John John's hand with the cutlass, accused lifted up his hand with the knife to stab John John. I did not see where the hand with the

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> knife went when the accused held John John's hand with the cutlass. Accused and John John were wrestling. When I went outside I see Mercer come outside. Accused had the knife in his hand down by his side..... The knife had blood..... When John John came to the door, with the cutlass John John did not do anything with the cutlass."

In cross-examination, he agreed that the deceased and the accused were fighting, and he could not say how long "the fight" lasted.

This was the sum total of the eye-witness's evidence which the Crown was able to put forward in so far as the actual clash between the deceased and the accused went. What emerges from Tuitt's evidence is that he witnesssed the encounter right up to the point where deceased and accused became locked in combat so to speak, but he was unable to say in what manner, or under what conditions the three wounds were inflicted on the deceased by the appellant. There was no one else able to give such evidence other than the accused himself. In the end result what the jury had to consider was Tuitt's account up to the point of the clash, the appellant's account thereafter, and the medical evidence as to the injuries received.

The medical evidence, which could have been lead at the trial with more particularity, showed that the deceased on being seen by Dr. Lewis at the Hospital that same night was suffering from three stab wounds; (1) a wound on the right side of the cheek, extending into the mouth, wide enough for the Doctor to see inside the mouth; (2) a wound on the left side of the chest just below the mid point of the left clavicle, which penetrated through to the left lung thereby collapsing it; (3) a wound which extended down between the vertebrae at the base of the neck, and into the spinal canal, and which damaged the spinal cord. This damage to the spinal cord resulted in complete paralysis of the lower part of the body of the deceased.

The deceased remained in a critical condition in the Hospital until his death on 26th September, 1985, but prior thereto he developed complications including a severe urinary tract infection, and bed sores which deteriorated into ulcers.

On 27th September, Dr. Cooper performed a post mortem examination on the body and in his opinion death was due to septicemia as a result of the paralysis to the lower part of the body brought about by the stab wound inflicted to the vertabrae and spinal cord at the base of the neck.

It is to be noted that Dr. Cooper saw the deceased whilst he was in hospital and had conferances with Dr. Lewis on his condition, but neither of the two Doctors was asked any questions at the trial about the depth or direction of the wounds, and more particularly about the degree of

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force required to inflict all or any of them.

Dr. Cooper saw and examined the appellant on the 12th January at about 11.45 a.m. and found him to have a two inch abrasion over the left aspect of the forehead. It could be said have been caused by being struck with the flat part of a cutlass, but not the sharp portion or the point. It could also have been caused by a fall to the floor. The injury was not serious.

In his first cautioned statement to the Police, the appellant said that the deceased took up the cutlass and chopped at his head and that is when he received the injury to the head. When deceased was about to "fire the second chop" he blocked it and the cutlass caught him lightly on the hand without cutting it. They then fell to wrestling on the ground, at which time the deceased got cut with the cutlass. He made no mention of the knife in this statement. Clearly the machette could not have caused any of the three stab wounds.

In his second cautioned statement he made a switch after the point where the wrestling started by saying that whilst they were wrestling, he was trying to get the cutlass from deceased without success; when he could not get the cutlass he saw a knife on the kitchen table "and I take it up and cut him with it a few times."

In his sworn evidence at the trial which he said was the true version, he admitted for the first time having in his possession a knife when he arrived at the shop that night. It would seem that this is the more credible account of his possession of the knife as there were two witnesses, namely, Michael Farrell, and the appellant's own brother, John Allen who said in evidence that they saw the appellant with the knife in his waist hours before this unfortunate encounter took place.

His evidence at the trial taken up from the point where the witness Peter Tuitt left the shop, runs thus;-

> "I was there sitting on the stool with my hand under my chin looking at the bartender. I heard a little hard talking in the kitchen and some movements. I did not pay that no mind. I believe was my friend talking. While there I heard one rush and I received a lash on my head. I got a black out..... When I come up and catch myself John John (deceased) was resting on me. He had the cutlass in his hand, like he go to fire the cutlass again. I give one grab and catch the same hand with the cutlass. We start to wrestle. After I find he was more than me I pulled my knife
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> /from.....

> from my waist and cut him. I did not get the cutlass from him. We wrestle from the bar into the kitchen....."

It is not necessary to go any further into the evidence or the facts of the case as the main issue which the jury had to decide was whether or not the appellant was acting in self-defence. On these facts as were available to the jury, a very clear exposition by the trial Judge on the law of self-defence and the use of excessive force was therefore called for along the lines laid down in Palmer v R. 55 Cr. App. R. 223 - (1971) 1 All E.R. 1077.

It was for the prosecution to establish that the appellant was not acting in self-defence. If they succeeded in doing this, then the issue of self-defence is eliminated from the case but all the other issues remain. In this case, it is patent from the verdict of the Jury that they rejected the appellant's plea of self-defence. The issues which remained, were whether he was guilty of Murder, or Manslaughter on the basis of provocation.

Upon the hearing of this appeal, Counsel for the appellant argued as ground 1 that the learned trial Judge erred in law in not upholding the submission by Counsel for the defence, that there was no case for the accused to answer on the charge of Murder. A reading of the record of the submission made to the trial Judge led to the impression that what Counsel was seeking then was a total withdrawal of the case from the Jury. The record shows his final submission to read thus: "A Judge ought not to allow a case to go to the jury when the case is so weak, that there may be danger of an unsafe or unsatisfactory verdict. When there is the slightest risk of prejudice, the case should be withdrawn."

Before this Court however, Counsel said that what was meant was that the case of Murder should be withdrawn, because at its highest, the case amounted to no more than one of Manslaughter. That admission before us was self-defeating of his ground of appeal because the main defence raised was one of self-defence, and a verdict of Manslaughter could only have been reached on the basis of provocation, after the issue of self-defence had been eliminated from the case.

The circumstances under which a judge has a duty to withdraw a case, or any issue in that case, from a jury are too well known today to warrant repetition here. Suffice it to say that on the facts of this case, whether or not the appellant acted in self-defence was clearly a matter for the jury to decide, and the trial Judge was quite correct in overruling the submission. There is therefore no merit in this ground of appeal.

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The second ground, namely misdirection of the jury on certain aspects of the case, warrants no more than a passing reference to the fact that they were completely devoid of merit.

By far, the most important ground was the third and final ground, namely that the decision is unreasonable and cannot be supported having regard to the evidence. Having informed this Court earlier that the effect of his no case submission was that the Crown's case went no higher than one of Manslaughter, there was not much left for Counsel to argue on this final ground. He made the only submission open to him at that point which was that a verdict of guilty of Manslaughter would have been more reasonable in the circumstances. It is on this ground only that the Honourable Attorney General was called upon to reply.

He submitted that he could see no legal basis for a verdict of Manslaughter to be substituted, as the verdict arrived at by the jury, after they rejected self-defence and provocation was a "good lawyers verdict". He did however make one significant concession in the course of dialogue with us, that this would have been a fitting case for acceptance of a plea of guilty of Manslaughter by the Crown at the trial, if it had been offered.

Acts of provocation he submitted must precede the course of conduct which resulted in death and the Judge had correctly put the law of provocation to the jury, and pointed out to them that the blow to the head of the appellant could be regarded as a provocative act. This he said the jury rejected, presumably on the basis that all the appellant had to show was an abrasion.

The problem with which this Court has to wrestle, is whether indeed we can say that the verdict of guilty of Murder in this case is unsafe and/or unsatisfactory, or even unreasonable because whichever word is used, the effect is the same. We prefer not to have resort to the "lurking doubt" or "feel of the case" theories (R v Cooper - 1968 - 53 Cr. App. R. 82) and in this we join our brethren in the Court of Appeal in Jamaica. - R v Linton (1985) L.R.C. (Crim) (Jamaica). If therefore this Court is to intervene in this case and substitute a verdict of Manslaughter, we would be doing so only after we are satisfied on an examination of the evidence

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as a whole, and a consideration of all the relevant factors that such a course of action was justified . One of the relevant factors which would fall to be considered by us in such a case is whether or not the jury were properly assisted with a clear exposition of the law as indicated in the case of Palmer (supra).

If one examines the verdict of the jury, they had to evaluate the evidence on the basis of the account of the witness Tuitt, up to the point where he absented himself, the various accounts of how the injury was inflicted as given by the appellant, and the severity of the three wounds inflicted on the deceased, as against the slight abrasion which the accused had on his forehead. The question of the use of excessive force must have weighed heavily on their minds. They expressed the result by their negation of the plea of self-defence and by recording a verdict of guilty of Murder. We are of theopinion that the verdict of the jury, in so far as it expressed the rejection of the plea of self-defence was not an unreasonable one in the circumstances. The question remains however,whether the verdict of guilty of Murder was a reasonable one in the end result.

The prosecution having shown that what was done by the appellant was not done in self-defence, meant only as was said in the case of Palmer (supra) that that issue was eliminated from the case. The other issues which remained were, is the appellant guilty of Murder, or guilty of Manslaughter on the basis of provocation bearing in mind that the same evidence which has been rejected on an unsuccessful plea of self-defence, is evidence fit for consideration by the jury in deciding whether there was provocation sufficient to reduce the verdict to one of Manslaughter.

In this respect, there are certain factors which cannot be overlooked. The first is that there was a heated inter-change of words between the deceased and the apellant in the shop, which led to the deceased going into the kitchen and arming himself with the machette which he had earlier that night deposited therein. Then there followed the clash between the deceased and the appellant. From the appellant's account, the deceased it was who struck the first blow which caught the apellant in his head and thereafter they were engaged in a "wrestling". In the course of this the deceased

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received three serious injuries. The witness Tuitt spoke in examination-in-chief of the accused and the deceased wrestling. In cross-examination he said;

> "When John John came out with the cutlass he and accused start to fight - wrestling is the same as fighting. I agree that accused and John John were fighting..... I do not know how long the fight by the kitchen went on.....

In six other places as shown on the record of his cross-examination he used the word "fight".

The trial Judge gave directions on the law of self-defence, and on provocation. Whilst these directions segmented as they were, and when taken by themselves were correct, we are of the opinion that the jury could and should have been given more assistance on the complicated and difficult process of reasoning in so far as the law on self-defence and provocation were inter-related. Nowhere can we find where the jury were told that the same evidence which is rejected on an unsuccessful plea of self-defence, is evidence fit for consideration in determining whether or not there was provocation. Bearing in mind also that the only account of how the injuries were inflicted came from the appellant, it was desirable that there should have been a more detailed co-relating of the law to the facts as spoken of by the appellant.

We also find that isolated but important sections of the summing up lacked clarity. One instance occurs at page 90/91 when having concluded his directions on provocation he said when outlining the possible verdicts:

> "The burden of proof is always on the the prosecution. It is for the prosecution to prove to your satisfaction that the accused was not provoked. If the accused was provoked when he stabbed the deceased, then he would be guilty not of Murder but of Manslaughter. If you are in doubt that the accused was provoked or not, then he would still be guilty of Manslaughter but not of Murder. If you are satisfied the accused was not provoked when he stabbed the deceased and you reject self-defence, then he would be guilty of Murder. So Mr. Foreman, Ladies and gentlemen of the jury, the verdicts which are open to you are (1) not guilty if you find that the accused was acting in self-defence when he stabbed the deceased

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> (2) the alternative either not guilty if you find that he was acting in self-defence or (3) guilty of Manslaughter if you find the accused was provoked when he stabbed the deceased. You will bear all the directions in mind; or lastly, guilty of Murder if you reject both self-defence or provocation. I hope that is clear....."

The initial order of approach here is reversed somewhat in that the first matter to have been considered was whether or not the accused was acting in self-defence. If the answer was in the affirmative, that was an end of the case and an outright acquittal would follow. Provocation only would arise if a negative answer was given. When this passage was brought to the attention of the Attorney General, he was obliged to concede that it was obscure.

These deficiencies however, would only have led to this Court asking itself, would a jury, had they been given sufficiently clear directions, have inevitably arrived at the same verdict. If the answer in our view was yes then there would be no need to interfere with the verdict as no basically wrong directions were given. We have however, given careful and anxious consideration to the evidence, and having taken that and all the other relevant factors into consideration, we are constrained to say that on an overall consideration, the verdict of guilty of Murder is unsafe and accordingly ought not to be allowed to stand.

The order of this Court therefore is that that verdict should be set aside and a verdict of guilty of Manslaughter substituted therefor.

The sentence which this Court now imposes, is one of ten years imprisonment with hard labour.

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of Appeal

G.C.R. MOE,
Justice of Appeal.