JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 232/88

BEFORE THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. V. DAISY ALGERNON

Delroy Chuck and Miss Helen Birch for Appellant

Miss Sheryl Richards for Crown

February 19, 1990

ROWE P.:

Charmaine McDonald, aged 17 years, was stabbed to death on February 12, 1988 by the appellant, who on December 1, 1988 was convicted of murder and sentenced to suffer death in the manner authorised by law.

At trial the prosecution's case rested almost entirely on the evidence of a single witness Christopher Chambers. He told of seeing the deceased standing at a food-vendor's stall holding a baby in her arms. He saw the appellant walk past the stall, enter her house, return with a newspaper parcel in her hand and went to the end of the pathway. He watched the appellant as she approached stealthily towards where the deceased stood. In his words: "When Charmaine turn her back, Puggy screechie fe come down fe stab her". Chambers described how the appellant first cut the deceased in her forehead with a long knife which the appellant had wrapped in newspaper and tucked in her waist.

Then the appellant ran off, chased by the deceased who had by then rested the baby on the ground. As they ran the appellant spun around and thrust her knife into the body of the deceased, with such force that the knife penetrated the body right through. Charmaine held on to the appellant who flashed her off. Charmaine was dead soon after and before medical help could be summoned.

Chambers denied defence suggestions that the deceased had a knife and used it to inflict injuries upon the appellant in a wild attack which had the appellant retreating to a wall before she delivered the fatal blow.

In her defence the appellant gave an unsworn statement from the dock. The appellant told of an incident on the night of February 11, when she and the deceased had a fuss. The deceased, she alleged: "Back her knife at me and threaten me". On the following day she saw the deceased holding a baby. "She put down the baby and start to curse me. She back her knife and cut me on me lip. A wall was at the corner. A wall between us and she grab hold on me and a flash her off. Then she start cut at me. Then I took a knife out of me waist and we start cutting after each one another. Then she cut me on my neck and I cut her in her forehead and she start cutting at me again and I cut her in her chest. In my defence I have to try to prevent - I try to stop her from killing me."

Patterson J. adequately directed the jury on self-defence. He left the issue of manslaughter:

(a) on the basis of the two parties having been engaged in an unlawful and dangerous act, viz., a fight with knives;

(b) on the basis of chance medley;

(c) on the basis of lack of intention to inflict serious bodily harm.

He, however, expressly withdrew from the jury the issue of provocation. At page 55 of the Record he directed the jury that:

> "..... at the very outset I intend to tell you that on this case the question of provocation does not arise, legal provocation, and I do not intend to leave that issue to you. It is not an issue in this case."

The single ground of appeal was a complaint that the trial judge was wrong in law in failing to leave the issue of provocation to the jury since that defence could easily be inferred from the case presented by the appellant. The decision of this Court in S.C.C.A. 56/89 - R. v. Carlwood Thompson (unreported) judgment delivered on December 11, 1989 is but a recent illustration of the principle that an accused person may raise the issue of provocation in an unsworn statement. In a fully considered judgment in R. v. Hart (1981) 27 W.I.R. 229, this Court re-stated the principle that every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. The Court went on to say that to deprive an accused of this right must of necessity constitute a grave miscarriage of justice and that it would be idle to speculate what verdict the jury would have reached.

Provocative acts of which the appellant spoke consisted of the quarrel and threats on the night of February 11, the attack with a knife on the morning of the 12th, the infliction of a wound to her neck and the further attempt to cut her with the knife. From the ferocity of the appellant's thrust which carried the knife clean through the body of the deceased, the jury could well have drawn the inference that the appellant had lost her self-control. The jury while rejecting self-defence

might not have been satisfied beyond reasonable doubt that the appellant was not acting under provocation. We are therefore of the view that the defence of provocation ought to have been left to the jury. In consequence, we will treat the hearing of this application as the hearing of the appeal, we will allow the appeal, quash the conviction, set aside the sentence, and enter a verdict of guilty of manslaughter. We have considered the gravity of the offence and conclude that the appropriate sentence is twelve years imprisonment at hard labour to commence on the 19th of February, 1990.