IN THE COURT OF APPEAL

GRENADA

Criminal Appeal No. 3 of 1972

Between: WESLEY MIRJAH Appellant

and

THE QUEEN Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

J.O.F. Haynes, with E.A. Heyliger and M. Sylvester for Appellant

D. Lambert (Ag. D.P.P.), and K. St. Bernard for Respondent

1972, September 8,9, October 13

JUDGMENT

The judgment of the Court was delivered by -

CECIL LEWIS, C.J. (Ag.)

The appellant was convicted on July 10, 1972 of the murder of Alwyn Phillip and sentenced to death. He has appealed against his conviction with the leave of the single judge. The case for the Prosecution which rests substantially on the evidence of three eye witnesses, Clyde Thomas alias Zaka, Agnes Thomas and Zephirin White, is that on December 24, 1971, an accident took place at Rose Hill in Morne Fendue opposite the house of one Miss Brownie. The accident involved a bus named Gaiety owned by Carlisle Rathan, the brother of the appellant, and a motor cycle. Two men, Lennard and Lennox who were on the motor cycle were injured. Lennox was a friend of the deceased and of the witness Clyde Thomas. News of the accident spread around the area and came to the knowledge of several persons. The deceased man, Alwyn Phillip heard about it when he was in the shop of one Miss Queenie at Rose Hill. In the shop with him at the time were Clyde Thomas and Agnes Thomas, two witnesses for the Crown, and other persons. Alwyn Phillip, the two Crown witnesses just mentioned, and David Collymore travelled to the scene of the accident in

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a car driven by one Appo. On their way they met the other Crown witness Zephirin White on the road speaking to Patrick Andall and these two men entered the car. On arriving on the spot where the accident had taken place, they came out of the car and found the appellant at the scene. The witness Clyde Thomas said that it was the appellant who had informed him of the accident and that is why he went to the scene, and this statement receives support from the appellant himself who says that when he went to the Rose Hill junction to turn his car he saw some men and told them there was an accident "down the road". According to Clyde Thomas, there was a crowd of persons standing on the road and Alwyn Phillip entered the crowd and said:

> "What happen here? I want to know how these 2 fellas got bounce. Wesley Mirjah answered and said: All yuh hungry niggers its just an accident happeh here and all yuh come running up all yuh mout. Alwyn then answered and said I'm only enquiring. By that time Wesley and Alwyn was about arm's length from each other. I was also standing near ..... Wesley then push Alwyn. Alwyn cuffed him. He cuff back Alwyn. Wesley. Alwyn fell to the ground, got up and they hold on to each other. I tried to separate them. I went towards them trying to pull Alwyn from Wesley. I was unable to separate them.
>
> Wesley then pushed his hand in his pocket pull it out and made a lash which caught me on my right shoulder. He then made another lash which caught Alwyn along his leg underneath his belly here. (Witness indicates groin on left side.) Alwyn hold his belly and walk across the road and Alwyn said ....."

At this stage in the evidenceof the witness notice was given that objection would be taken to the admission of the words which the witness was about to say the injured man Alwyn used.

The words in question were "Oh God Dora, if ah dead you could tell anybody its Wesley that kill me". It should be observed in passing that there is no evidence to indicate who Dora was or whether she was present when Alwyn Phillip received

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the injury from which he subsequently died. The trial judge heard argument in the absence of the jury on the question ~~of~~ of the admissibility of the words and he ruled that they were admissible as part of the res gestae and also as being a statement made in the presence and hearing of the appellant. The appellant now challenges the correctness of this ruling.

After receiving the wound Alwyn walked across the road "holding his belly" and the witness said he saw blood falling on the ground and that Alwyn fell face downwards. The witness was then holding the appellant because he had seen him "make a lash at Alwyn and I saw Alwyn walking across the road and the weapon he used cut Alwyn." He added that he was holding the appellant "to see the weapon he used to cut Alwyn." His evidence then continues:

> "While I was holding the accused I saw he had a knife in his hand and a yellow handle screwdriver.
>
> In holding him I was trying to take away the knife from him.
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> While trying to take away the knife from the accused Mr. Leon came and hold me and he said to me: What all yuh fighting for? I said I'm not fighting I'm holding Wesley because he cut Alwyn.
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> No Sir, I did not succeed in taking away the knife from Wesley. Mr. Leon take me away from him. He come and hold me from behind and pull me away from Wesley.
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> When Mr. Leon pull me away I saw Wesley running through his mother flower garden."

He went back to where Alwyn was lying and, (to use his own words) "I touched him to hear if he say anything or if he could walk. He said nothing and made no move. I saw the condition of his clothes. It had blood - plenty blood."

He was asked in cross-examination if he had a stick that night and he said no, nor did he see anyone else with a stick. He also denied that on Christmas eve night he and his friends came down from Rose Hill to attack the Mirjahs. He further stated that Alwyn did not have a stick that night, that he, the

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witness, was not beating the appellant and that the appellant never fell to the ground during the time he was at the scene. Agnes Thomas' version is that when she reached the scene of the accident she saw the two men Lennard and Lennox lying on the ground and that Clyde Thomas helped to put one of them in a car. She went with Alwyn Phillip a little lower down the road w[illegible]e she saw the appellant leaning on his car and Alwyn sa[illegible] "Where is Carlisle?" The record of her evidence then [illegible]ntinues as follows:-

> "Nothing happened at that time. Carlisle was also leaning on the car. Then Alwyn move up a little to the car and he ask: Where is Carlisle? There was no answer. He ask the question again and then he said is a question I want to ask. Nobody did not answer. He then said ah asking for Carlisle? He then move up a little closer to the car. I heard Wesley say Man Move! and he make a lash with his hand. It catch Alwyn. I can't remember which leg but some where across his belly. (Indicates region of left groin with her left hand.) Alwyn got cut. The accused had something in his hand. I see the blade of a knife. When I was going down the road with Alwyn he did not have anything with him. When this thing happen there were other people about. I heard Alwyn bawl Oh! and he fall. When he fall I left. I saw Alwyn again. When I came back down I saw Alwyn lying in the car with Zaka."

In cross-examination she emphasised that she saw the appellant with a knife. She said "I saw Wesley with a knife. It was a knife, not something like a knife". And in re-examination she said "yes sir, I saw the blade of the knife."

Zephirin White, the other eye witness went in a car to the spot where the accident occured. As he came out of the car, he saw Lennox Edwards lying on the ground and he assisted Alwyn Phillip in putting Lennox in the said car. He said:

> "I heard a noise lower down. About 60 feet from where I was standing. I walked to where I heard the noise. Reaching there I saw Wesley Mirjah holding on to Alwyn Phillip (Indicates). They fell to the ground.

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> Both o' them fell. Wesley fell on top of Alwyn. I held Wesley and pull him up from Alwyn. (Indicates) I was behind him when I pulled him up.
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> Alwyn get up and say Oh God! I get cut. He held his belly and staggered about 40 feet away. While he was staggering I saw blood oozing from his side. Coming in a bulk. Then he fell on his face like that (indicates.)"

In cross-examination he said that after Alwyn staggered and fell he went up to him and saw him bleeding before he was taken away and he explained that when he said that he saw the blood "coming in a bulk" from Alwyn, he meant that he "was bleeding plenty".

In the meantime, the injured man had been taken to the Princess Alice Hospital in St. Andrew's by Sergeant Giffard where he was seen by Doctor Harinarayanan. On examining him he found that he was dead. This was around 9 p.m. He did a post mortem examination on the body which was identified to him by Sergeant Giffard as being that of one Alwyn Phillip. He found that the left femoral artery was cut and the length of the wound was $2\frac{1}{2}$ inches and the depth 5 inches. The upper end of the wound started one inch below the mid inguinal point and ran down towards the centre of the body cutting all the underlying muscles which were about 1 to 4 inches beneath the wound. The cut, he said, was a lacerated one the ends of which were jagged. The witness indicated the position of the wound as being in the area of the left groin. The cause of death was bleeding from the severing of the femoral artery and underlying muscles. The degree of force required to cut the underlying muscles, he said, would depend upon the sharpness of the weapon used, and the injury he saw was consistent with a wound being caused by something sharp like a knife, sword, cutlass or axe. In his opinion the injured man did not fall on any instrument and get the wound which he saw as it would then have been a punctured wound.

Bunyan Giffard, a sergeant of police had received a report at the Sauteurs Police Station at 8.45 p.m. and as a result he

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went to the Mirjahs' place at Morne Fendue where he met the appellant near to his home. He carried out investigations and looked inside a car on the back seat of which he saw Alwyn Phillip and Clyde Thomas. Alwyn Phillip was in an uncon-cious condition and was bleeding in the region of the stomach. On the following morning at 8.15 ~~a.m.~~ after he had completed his investigations he obtained a warrant for the arrest of the appellant on the charge of murdering Alwyn Phillip. He cautioned him after arrest and he made no statement.

At his trial the appellant made an unsworn statement in which he said that on December 24 he went to Madeys in his car and bought petrol for his car with the intention of going to midnight service. He returned home a little later and saw a crowd of about twenty people about fifty feet from his gap. He also saw the bus Gaiety, a motor cycle and two men lying on the ground. There were people around the two men. He drove to Rose Hill junction and turned his car. There he saw some men and told them that there had been an accident "down the road". He returned to the scene of the accident and there he met his brother Carlisle Rathan who told him that there had been an accident to his bus. He sent for a man called Knox to take the injured men to the hospital. Knox came and took one of the injured men and drove away. His statement continues as follows:

> "After Knox drove away the crowd by the bus became bigger. They came down to our gap. The crowd was hostile. Many of the people in the crowd had sticks and began to chuck Carlisle and hit him with sticks. I said you can't do that to him. I got a blow with a stick. The people held me and pull me across the road and start cuffing me. I held on to a man who was beating me with a stick. We struggled and fell to the ground. We scramble on the ground. The people pulled us apart. I went back to my gap and stood there. Leon Paul came to me and said to me Ray, ah understand you cut Alwyn. I said No Mr. Leon, ah knows nothing about that. I did not cut Alwyn or anybody. That is all Sir."

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The appellant called one witness, his uncle Egerton Mirjah who said that when he went to the scene of the accident he found Carlisle leaning against the appellant's car. There were about 30 to 35 people in the road near the bus. He stated that "a lot of people" live at Morne Fendue which is a residential area, that while he was at the scene he saw "a crowd building" and when he saw this he went back towards his home. He did not reach his home but when he got some distance away, he called out to his daughter Gem and gave her certain instructions. He then went back to where the appellant's car was. Continuing his evidence, he said:

> "There I met Carlisle Rathan around the car and I saw a crowd, a big crowd came down towards Carlisle and myself. About 100 - 150. Between the car and the bus. I saw, in the crowd, Patrick Andall call out to Carlisle. Patrick start cuffing up Carlisle. I went to Patrick and spoke to him. Carlisle back away. Then ah heard on the other side of the road a shout: Look they killing one here. I went across the other side, I saw a bunch of people fighting with Wesley. I recognise Lucky Williams as one of them. I spoke to him and ask him to behave. I saw Zaka too. And Leon Paul. Leon Paul was trying to part them. He succeeded in parting them. The accused got free and went across. He went to his yard. I stood up by the car. Leon Paul came and spoke to me. Having spoken to me he walked away."

In his examination-in-chief this witness does not mention that Alwyn Phillip had any altercation or fight with the appellant, or indeed that he was even present in the crowd. He made it clear in cross-examination that he knew Alwyn Phillip but he did not see him there when Carlisle was being beaten by Patrick Andall or when the appellant was being beaten by Lucky Williams. He said that when Lucky Williams was beating the appellant, Zaka was there "standing moving around" but he did not see him do anything. He repeated that he was quite sure he did not see Alwyn "by Wesley" and that when Carlisle was being cuffed Alwyn was not there. He was quite sure of this. He also stated in cross-examination that

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when the crowd came down and Patrick started cuffing Carlisle, Wesley was not where the cuffing was taking place and he said he saw the whole of the incident with Carlisle. As regards Wesley, he saw Lucky "throwing cuffs" at him and Wesley was "breaking the cuffs". He did not see any stick in Lucky's hand. He was merely "throwing cuffs". Towards the end of his cross examination he said this:

> "When I heard 'look they killing one here' I went across. I saw Wesley then. Yes I did see when Wesley went across the road. It is correct to say that I only saw Lucky beating Wesley. Yes there were other people around".

Despite the fact that neither the appellant nor his witness admitted that the deceased was on the scene, nevertheless there was evidence led by the prosecution from which the jury if they believed it might reasonably have concluded that the deceased was present and that there was some physical encounter between himself and the appellant in view of the fact that the latter said he had held on to a man who was beating him with a stick, that they struggled and both fell to the ground. On these facts and others to which reference has been and will later be made we are of the opinion that the defence of self-defence could reasonably be said to have arisen. We are also satisfied that on the same facts the question of manslaughter based on provocation should have been put to the jury.

The questions which fall to be determined in this appeal are:

1. Was the statement, "Oh God Dora if ah dead you could tell ~~every~~ anybody its Wesley that kill me", allegedly used by the deceased immediately after he was injured admissible in evidence -

(a) as part of the res gestae

(b) as a statement made in the presence and hearing of the appellant, and

(c) as a statement made under paragraph (i) of s. 30 of the Evidence Ordinance, Cap. 109?

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2. If the statement was admissible under 1(a) (b) and (c) above, respectively, were proper directions given by the trial judge to the jury in regard thereto?

3. Did the trial judge deal adequately with the defence of self-defence?

4. Were the directions on manslaughter adequate?

5. Was there sufficient evidence to require the trial judge to ~~leave~~ put the defence of accident to the jury?

Counsel contended that the statement was inadmissible on two grounds at common law and also under paragraph (i) of section 30 of the Evidence Ordinance, Chapter 109 of the Laws of Grenada.

Admissibility of statement under 1(a)

In respect of the admissibility of the statement as part of the res gestae counsel urged that it did not amount to an allegation against the accused as it was not part of the transaction. He stated that the transaction was over and there was the possibility of fabrication by the deceased. In support of this argument he cited the cases of R. v. Bedingfield (1879) 14 Cox 341; Teper v. R (1952) A.C. 480; and Ratten v. Reginam (1971) 3 All E.R. 801. Bedingfield's case and Teper's case were two of the cases considered by the Privy Council in Ratten's case where the principle of the admissibility of such a statement was laid down. The Court stated the principle as follows at p. 807:

> "The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as a relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by

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> preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it."

In this case the evidence leading up to the making of the statement was that the deceased, immediately after he was injured, walked a relatively short distance (as indicated by a witness) and, holding his stomach, used the words complained of. Applying the principle laid down in Ratten's case we are of the opinion on the evidence in this case "that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction" could be disregarded by the judge and in our view he was right in admitting the statement as part of the res gestae. Having concluded that the statement was admissible as part of the res gestae we have now to consider whether proper directions were given to the jury as regards its probative value.

Counsel submitted that the trial judge failed to direct the jury that the statement should not be used as direct evidence implicating the appellant. He stated that the judge should have directed them that the statement was not affirmative evidence of the facts stated but only of the knowledge of, or the belief in, those facts by the person who made the statement .

The trial judge directed the jury as follows:

> "That statement by itself is not evidence on which you could convict the accused. That statement which Clyde Thomas or Zaka is alleged to have heard Alwyn say is not by itself evidence from which you could convict the accused, but it may be used by you to appreciate and understand the circumstances that existed at the time, and compare it, as counsel for the accused invited you to do, with the statement made by Zephirin as to what was

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said; and it will be for you to say first of all, whether you believe that Alwyn said so, and if he did say so, how does it help you? It is abundantly clear that the prosecution does not really rely on that statement to prove that Wesley inflicted the injury, because the prosecution have called eye witnesses, who said they saw Wesley strike Alwyn, and that this was when the injury was inflicted; but the prosecution invites you to consider it as supplying support to the testimony of the eye witnesses and as accusation made in the hearing of the accused. The prosecution asks you to bear that in mind as the statement made by Alwyn when he was holding his belly and going across the road."

This direction by the trial judge did not indicate to the jury the probative value of the statement. It is true he told them that the statement by itself was not evidence on which they could convict the appellant but in the same passage he told them that it could be used to appreciate and understand the circumstances that existed at the time - (a difficult statement to follow) and it was for them to say how the statement helped them. He further told them to consider the statement as supplying support to the testimony of the eye witness and as an accusation made in the hearing of the accused. We think this amounted to a misdirection and we do not know in what way the statement was used by the jury. The trial judge should have directed the jury that even if they believed the deceased did ' make the statement it was not evidence of the truth of the facts stated therein, but only evidence of the knowledge of, or belief that he had been cut by the appellant.

Admissibility of the statement under 1(b)

Counsel submitted that the statement was inadmissible as a statement made in the presence and hearing of the appellant as there was no evidence of the reaction of the appellant and it was the reaction of the appellant upon which the admissibility of the statement could be founded. He referred to Christie v. D.P.P.(1914) 10 Cr. App. R. 141 in support of his submission. In Christie's case, at page 155, Lord Atkinson stated the rule as follows:

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"As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement is made amounts to an acceptance of it in whole or in part."

In the present case the evidence was that one Clyde Thomas was holding on to the appellant when the deceased who was a relatively short distance away made the statement. All that could be said of that evidence was that the appellant was in a position to hear the statement as the witness Clyde Thomas had heard it. There was no evidence to show that the appellant might have accepted the statement by word or conduct, action or demeanour when it was made. A few minutes afterwards the witness Leon Paul went to the appellant who was then on the verandah of his home and said to him, that he understood the deceased was cut and that it was he who had done it. The appellant denied the accusation. On that evidence, and applying the principle enunciated in Christie's case, in our view, the statement was not admissible as a statement made in the presence and hearing of the appellant. However, even if it were admissible as such, no proper directions were given by the trial judge to the jury how such a statement should be used. The jury were told to use it as an accusation made in the hearing of the accused. However it is a rule of law that an incriminating statement made in the presence and hearing of an accused person, even on an occasion which would reasonably be expected to call for some explanation from him, is not evidence against him at his trial of the facts therein stated save in so far as he has accepted the statement so as to

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Admissibility of statement under 1(c)

In the ground of appeal which dealt with the question whether the statement made by the injured man Alwyn Phillip was admissible under s. 30(i) of the Evidence Act Cap. 109, it was stated that this was "highly prejudicial evidence" and that it was inadmissible "under the provisions" of the said Ordinance. Moreover "even if the said evidence was admissible under Chapter 109, section 30(i) the trial judge failed to point out to the jury specifically that the evidence of what the deceased said was not subject to cross-examination and further that it should be weighed and considered with special care and attention."

Section 30(i) reads:

> "30. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:
>
> (i) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question.
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> The ~~This~~ statements are relevant, whether the person who made them was or was not at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of death comes into question."

In his argument counsel frankly admitted that he would "not quarrel with a submission that the statement was admissible under this section. He submitted however, that in construing the section the Court, if it held the statement to be admissible thereunder should treat it in the same manner as a dying declaration and say what was the proper direction which should have been given in relation thereto.

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Before a dying declaration in the case of homicide can be admitted in evidence, "it must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant". (Per Willes J. in Reg v. Peel 2 F & F 21, approved by Lord Alverstone C.J. in delivering the judgment of the Court of Criminal Appeal in Rex. v. Perry (1909) 2 K.B. 697 at 703). On the evidence as revealed in this case the statement under consideration was not a dying declaration as it was not proved that the injured man was dying or entertained a settled hopeless expectation of death. In fact the words attributed to him showed that he was by no means certain that he would die. However, s. 30(i) of the Evidence Ordinance Cap. 109 specifically provides that a statement made by a person "as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death" is relevant, and so admissible, in proceedings "in which the cause of his death comes into question" and this is so whether the person who made the statement was or was not at the time it was made "under expectation of death". This provision therefore sharply distinguishes a statement made under the section from a dying declaration which requires as a condition of its admissibility that the declarant should at the time of making the statement be in the condition referred to earlier in this judgment.

In our view however a statement made by a person as to the cause of his death in the circumstances contemplated by section 30(i) of the Evidence Ordinance should be regarded as being analogous to a dying declaration and the same safeguards applied in relation thereto as are required in the case of a dying declaration.

In Waugh v. The King (~~1900~~ 1950) A.C. 203 an incomplete dying declaration was admitted in evidence by the trial judge. It was held by the Privy Council [(1950) A.C. 212] that "it was inadmissible because on its face it was incomplete .... that it was in any event a serious error to admit it in part, and that it was a further and even more serious error not to

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point out to the jury that it had not been subject to cross-examination".

We are accordingly of the opinion that the statement was admissible under s. 30 (i) of the Evidence Ordinance but the trial judge did not admit it under this section. Had he done so, however, it would have been incumbent on him to direct the jury that the statement was unsworn, had not been subjected to cross-examination and that they should approach it with care and caution.

Self Defence

The trial judge gave adequate directions as to the principles relating to the law of self-defence but he failed to apply that law to the facts of the case as it affected the appellant.

The evidence of two of the witnesses for the prosecution disclosed that there was a fight between the appellant and the deceased. The appellant in his statement said there was a hostile crowd which came down to his gap and that many of the persons in the crowd had sticks. He remonstrated with them and "he got a blow with a stick". The people held him, pulled him across the road and started cuffing him. He held on to a man who was beating him with a stick. They struggled, fell and scrambled on the ground. The appellant's witness, Egerton Mirjah, stated that he heard a shout, "look they killing one here". He went across the road and saw a "bunch of people fighting with Wesley."

On this evidence, the jury could have come to the conclusion that the man who the appellant alleged was beating him with a stick was the deceased.

The trial judge dealt with the matter thus:

> "You have to ask yourselves what were the circumstances? Was Wesley being attacked by Alwyn or not? Was he defending himself or not? Did he use force, and if so, what degree of force did he use? Was it greater than what was reasonably necessary in the circumstances? Was it out of proportion to the

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seriousness of the attack on him, if you find there was an attack and to the danger that he was facing? Again you must put the account of Wesley alongside the account of the other witnesses, both for the Prosecution and for the accused, in order to decide what facts you find on your analysis as a whole. The statement of the accused was that he held on to a man who was beating him with a stick, that they fell to the ground where they scrambled. They were pulled apart and he went to his gap. He did not indicate to you who that man was, and he didn't, in fact, mention the name of Alwyn as being concerned in any attack on him so far as I remember."

Again at page 71 of the summing up the trial judge said:

"The accused himself makes not mention of Alwyn at the time of the incident. He neither accuses Alwyn of doing him anything nor, according to him, did he do Alwyn anything. Do you believe that Alwyn was there or not? The accused referred to a particular person - a man - who was beating him with a stick, and he explained to you that he had a struggle with that man and that they both fell to the ground before they were parted. He also indicated to you that they were a hostile crowd, that many of them had sticks, that they chuck Carlisle and hit Carlisle with sticks; and he told you he went up to them and he said "you all can't do that", and he was then hit with a stick and pulled across the road, where he was cuffed before that fight with the man. So that it would seem that the accused, having said that he did nothing to Alwyn and that he and the man were separated, after which he went and sat in his gap, that the accused is not saying that he was defending himself against any attack from Alwyn, but he is saying that it all began because he went and told the crowd that they can't do Carlisle that; and then the crowd or some of them turned on him."

It appears to us that the trial judge in the first passage of the summing-up quoted above intended to leave the issue of self-defence to the jury but in the other passage he clearly withdrew this issue from the jury when he told them that the accused having said "that he did nothing to Alwyn and that he and the man were separated, after which he went and sat in his gap, that the accused was not saying he was

/defending .....

defending himself against any attack from Alwyn". The effect of withdrawing self-defence from the jury may have been to deprive the appellant of the chance of an acquittal.

Were the directions on manslaughter adequate?

Counsel submitted that the directions on the question of manslaughter were inadequate on three grounds: firstly, that there was no direction on this question on the basis of provocation and there was on the evidence material fit for the consideration of the jury in this respect. We agree. The same evidence on which the defence of self-defence should have been left to the jury was in our view sufficient to justify the issue of manslaughter on the basis of provocation being left to the jury for their consideration.

Secondly, the trial judge failed to direct the jury properly as to manslaughter on the basis of the infliction of unlawful harm which caused death there being no specific intent to cause death. Counsel contended that as regards intent if the trial judge had pointed out to the jury the evidence which he claims he should have brought to their notice, viz that there was only one wound, the degree of force used and the part of the body on which the wound was inflicted, it would be improbable that the jury would have found that the appellant had an intent to kill.

Thirdly, he failed to tell the jury that if they were satisfied or were in reasonable doubt about whether the offence was murder or manslaughter they should convict of manslaughter. The trial judge undoubtedly failed to give the directions referred to in the second and third grounds of this submission as he should have done but in view of the order which the Court proposes to make it is unnecessary to comment further thereon.

Accident

It was also submitted that there was material fit for consideration by the jury that the death of the deceased was caused accidentally. The points urged in support of

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this submission were (i) the appellant did not name the person with whom he had the struggle on the ground but it was open to the jury to find that this person was the deceased on the basis of the evidence of Zephirin White that on arriving at the scene he saw the appellant holding on to the deceased, that they both fell to the ground, that the appellant fell "on top of" the deceased and that when the deceased got up he said he "got cut", held his belly and he saw blood oozing from his side; (ii) the appellant had a knife in his possession, (iii) the appellant's statement that he was struggling with a man and that they both fell to the ground; (iv) the evidence of Dr. Harinarayanan that moderate force might have caused the injury found on the deceased; (v) the evidence of Dr. Friday, a witness called for the defence, that it was possible that the wound could have been caused by a fall depending on the nature of the instrument on which he fell and the momentum with which he fell; (vi) the absence of any evidence as to the position in which the deceased fell, i.e. whether he fell on his face, back, or otherwise; (vii) the position of the injury in the area of the left groin.

It was contended that these pieces of evidence should have been drawn to the attention of the jury from one of two points of view - either that they might consider whether the deceased met his death from a fall on a weapon which was on the ground or that he might have met his death in the course of a struggle on the ground while the appellant had a knife in his possession. Counsel submitted further that there was a third aspect which was worthy of consideration by the jury in relation to the evidence of Zephirin White, which he said was to the effect that the appellant had a knife in his possession, but that White did not say that there was any positive act by the appellant of using a knife on the deceased nor did he say that there was a stabbing or cutting by the appellant. All, it was submitted, this witness

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said was that the two men fell and Alwyn got up and said: "Oh God I get cut". The Court has already stated in connection with the issues of self defence and manslaughter based on provocation that it was open to the jury to find that the person with whom the appellant said he struggled was the deceased. It must be remembered that the appellant never admitted being in possession of a knife and it is therefore incorrect to say that Zephirin White's evidence is to this effect. In fact, Zephirin White never mentioned that the appellant had a knife and accordingly, it would be inaccurate to say on the basis of his evidence that the deceased might have met his death by falling on a weapon which the appellant had in his possession. Moreover, to contend as counsel does that Zephirin White does not say that there was any positive act by the appellant of using the knife on the deceased or that there was any cutting or stabbing by the appellant might be misleading as any such acts must proceed on the following assumptions (a) that the appellant had a knife in his possession, which was not admitted (b) that Zephirin White saw this knife, which on the evidence is not so, and (c) that he saw the appellant use the knife, which again is not supported by the evidence.

Doctor Harinarayanan's evidence is not that moderate force might have been used to cause the wound on the deceased. What he said was:

> "The degree of force required to cut those underlying muscles would depend upon the sharpness of the weapon used. If it is blunt a great amount of force is needed, if it is sharp not so much of force. The injury I saw was consistent with being caused by something sharp. Moderate to good force would have been necessary."

He later stated that a razor blade could not have produced that wound. Its edges were not consistent with being caused by a razor blade but were consistent rather with being caused by a knife, sword, cutlass or axe.

All that Dr. Harinarayanan's evidence amounts to is that

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if the weapon which caused the wound had a sharp edge then less force would be necessary than if a blunt instrument had been used. Dr. Friday who gave evidence for the defence said in relation to the wound:

> "Basically a puncture wound and a stab wound would be similar. The difference would lie with the instrument of injury. It is possible that that wound could have been caused by a fall, depending on the nature of the instrument on which he fell and the momentum with which he fell."

In cross-examination he said:

> "Based on what I heard, the injury is in fact by definition a stab wound. Based on what I heard the injury is consistent with being inflicted by a knife. Of course, if the wound were caused by a fall it would also depend on the position of the instrument. I would agree with the opinion as to cause of death. No I never examined the deceased in this matter."

It is important to remember that Dr. Friday never saw the wound nor did he examine the deceased man and his opinion is based on the evidence he heard in Court and on reading the findings of the post mortem examination by Dr. Harinarayanan. He conceded that the wound could have been caused by a knife, cutlass, or sword. He also said that "if the wound were caused by a fall it would depend on the position of the instrument". In the circumstances Dr. Friday was at a great disadvantage in not having examined the deceased before he gave his evidence and so he could not speak with any degree of authority based on his own observations as to the nature of the wound. There is no evidence whatever that there was any instrument on the ground on which the defence is saying the deceased might have fallen and this in our opinion considerably weakens the theory of accident.

Despite the fact that counsel listed several matters which the jury might have considered in relation to the defence of accident had they been brought to their attention, the fact remains that this defence rests substantially on a theory

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based on inferences which he says may be drawn from the evidence of the witness Zephirin White, but the defects of such a theory become readily apparent on a close analysis of the evidence of this witness as we have already shown.

In the light of the clear evidence of Dr. Harinaraynan that the wound was not a puncture wound and that "the victim could not fall on an instrument and get this wound" we are of the opinion that on the evidence before him the trial judge was under no obligation to put the defence of accident to the jury.

For these reasons the Court will allow the appeal, quash the conviction and sentence and order a new trial.

In exercise of the powers conferred upon the Court by s. 45(5)(a) of the West Indies Associated States Supreme Court (Grenada) Act No.17 of 1971 the Court hereby directs that the appellant be tried upon a fresh indictment.

P. Cecil Lewis
ACTING CHIEF JUSTICE

E.L. St. Bernard
JUSTICE OF APPEAL

Allan Louisy
JUSTICE OF APPEAL (Ag.)