

IN THE COURT OF APPEAL

ST. VINCENT

Criminal Appeal No. 9 of 1972

Between: BENJAMIN CHARLES also known as Appellant
BENJAMIN BROWN
and
THE QUEEN Respondent

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

K. John for the appellant
Miss M. Joseph (Legal Assistant) for the respondent

January 30, 1973

The judgment of the court was delivered by -
CECIL LEWIS, C.J. (Ag.)

This is an appeal by Benjamin Charles also called Benjamin Brown who is hereinafter referred to as "the appellant" against his conviction at the Kingstown Assizes on November 1, 1972 of the murder of one Agatha Durrant which the Crown alleged took place on March 18, 1972.

The appellant and Agatha Durrant were living together from the year 1947. When the appellant went to live with the deceased she already had four children and she subsequently had nine others of whom he was the father.

Two children of the family gave evidence for the Crown. They were a fifteen year old boy named George Durrant and his sister Gloria, aged ten. George Durrant is not the son of the appellant. His father is a man called Edward Pope who had been living in Trinidad, but Gloria was child of the appellant and the deceased.

On the morning of March 17, 1972, the appellant went to the mountain and during his absence, George Durrant's father, Edward Pope, visited the house in which the appellant and the deceased were living at Higher Lowmans. He was seen to go there

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by their neighbour Claretha Harry who lived about 15 yards away and she said he had returned from Trinidad that day.

When the appellant returned from the mountain and was passing Claretha Harry's house, she gave him some of his clothes which had been sent there by Agatha Durrant earlier in the afternoon. Jessie Brown had brought them. Claretha Harry told the appellant that Edward Pope was in the house. He went along to the house where he spoke to Edward Pope and to Agatha Durrant, who told him that his dinner was outside on the dresser. He replied "so much years me and you living in the home and you never leave my dinner outside and all you woman is traps because I had my house and you make me sell it to get married."

Edward Pope told him that he had come to visit the children and that he was not staying. He offered him a drink and the appellant told him he neither drank nor smoked. There is, however, evidence from the boy George Durrant that Edward Pope not only remained in the house but actually slept in the same bed with his mother.

The appellant left the house and went to the neighbour Claretha Harry's house where he got his pyjamas from the clothes which had been sent to her, then he went to sleep in a little house in her yard. The following morning he returned to the house in which himself and Agatha Durrant were living. He found her sweeping out the house and told her he had come for the balance of his clothes and both of them "went in the chamber". She gave him his clothes and he asked her for something in which he could put them. According to a statement which he made to the police, she offered him a small suitcase which belonged to the children, but he refused it saying it was too small. He then told her that he had brought plenty things from Barbados and she could give him something better to put the clothes in, and she handed a sheet but he told her that he did not want any sheet. He explained his refusal to accept the sheet in his statement to the jury by saying it was the sheet on which Agatha Durrant and Edward Pope had slept.

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The little girl Gloria was present and she described what occurred in the following words:

"My father spin around and spin around until he got an iron for ironing clothes and started to beat her (i.e. Agatha Durrant) in her head with the iron. Mother bawled out 'Miss Harry, Miss Harry, help, Brown is killing me'. While my mother was bawling my father was beating her in her head and she went out of the house running. The accused ran behind her. He ran with the iron. When she was running down the road he pelted the iron and it caught her in her back and she fell down".

That was her story. The appellant, however, gave a different account. He said that the woman Agatha Durrant was the aggressor, and that it was she who picked up the iron. In his statement to the police he said she "pelt it" at him but in his statement before the jury he said she raised it at him and he ducked. He was therefore very plainly alleging that he was assaulted by Agatha Durrant.

Their neighbour Claretha Harry, hearing the shouts came running to the door. She did not enter but as she got to the door she found Agatha Durrant running out of the door, being pursued by the appellant who had the iron in his hand. She said that the woman Agatha ran into her yard, the appellant ran behind her and threw the iron at her which caught her in the head and she fell to the ground and he then took the same iron and began to beat her in the head with it.

Now the girl Gloria says that after the appellant started to beat her mother in the head with the iron she ran out of the house, fell down and her father began to beat her in the head with the iron. She ran into Barnwell's bananas and the appellant picked up a cutlass in Claretha Harry's yard and started to chop Agatha Durrant across the neck. When he was finished he hit her across the belly with the cutlass, the cutlass had blood on it and the appellant took it away with him.

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The neighbour Clarethia Harry does not say anything about the assault with the cutlass because she says after Agatha ran into the banana cultivation she went back to her home, but she does say that she saw Agatha Durrant's body that afternoon.

George Durrant had left the house about 9.00 a.m. to go to buy meat at Lowmans. He saw the appellant behind Barnwell's shop and his mother running. As she fell down the appellant ran and started to chop her with a cutlass. He saw him give her a chop across the head on the left side while she was lying on the ground and he went home and reported what he had seen.

The appellant was seen by one Teddie Fergus, a farmer that morning "going towards the mountain in a haste." He had with him a piece of cutlass about 18" long. Fergus asked him what was the matter he said "nothing, nothing" but "continued hastily." For some reason or the other Fergus told him that someone was tracking him down and he said the appellant spun around and told him that he must "go down and he will hear". Fergus went down to his home in the village and later saw Agatha Durrant lying in a banana field. She had some cuts and was groaning. Agatha Durrant subsequently died from these injuries.

A post-mortem examination was carried out by Dr. Prasado Rao who found five injuries on her. One was an incised wound seven inches long and five inches deep extending from a point one inch below the left eye to a point about one inch beyond the mid line at the nape of the neck at the base of the skull. This wound passed through the pinna of the left external ear and cut transversely the cervical spine and the spinal cord, immediately below the base of the skull. This was probably the wound which George Durrant said he saw the appellant inflict on the left side of his mother's head. Secondly, there was a lacerated wound of the scalp in the occipital region raising a flap two inches wide and five inches long with the outer table of the skull chipped off immediately below the wound. Then there was a small lacerated wound in the
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left sub-mandibular region. Fourthly, an incised wound on the inter-digital space between the right thumb and the right index finger about one inch deep, and finally there were bruises on left thigh, left arm, and left inframammary region i.e. the region below the left breast. He gave as his opinion that the cause of death was traumatic shock and respiratory paralysis due to a complete transection of the spinal cord in the region of the neck. It was also his opinion that the instrument which could have caused that wound was one with a sharp edge and not less than 7 inches long.

The appellant was arrested on March 22, by one Lester Bacchus a sergeant of Police and charged with the murder of Agatha Durrant. He made a statement after caution in the presence of Erry John, a Justice of the Peace, and he asked the sergeant to write down the statement, which he did. In this statement he said that he had returned to his house on the afternoon of March 17 and had asked Agatha why she had sent his clothes to Clarethta Harry's place. She had told him that Edward Pope had come. He went away and did not sleep there. He went back the next morning and asked her for the balance of his clothes and both of them went into the chamber. He said that the deceased woman gave him the clothes and he asked for something to put them in, she told him that "the children have a small suitcase" and he must take that. He told her the suitcase was too small. He also told her that he had brought plenty things from Barbados and she could give him something better and she handed him a sheet and he told her that he did not want it. Then (to use his own words) " she bend down to bedside and when I look I see she with a iron what they does iron clothes with. When I see she coming with it, she pelt it at me but I go back it didn't catch me. I had a knife in my pocket and I pushed it at her. It caught her by her neck. She start to bawl out saying "Miss Harry, Miss Harry, Brown ah kill me". After she pitch out of the house with the

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bawling. I run behind her. I meet a hafa piece of cutlass in the yard and I pick it up. I run behind her and fire two chops at her by vexation, then I run away". That is what he told the police when arrested.

In his statement at the trial he said that when he returned to the house next morning, he told Agatha Durrant -

"You give the neighbour half of my clothes last night and I come back for the other half. She Agatha Durrant told me if any more clothes there for me I must come in and take them and both of us went into the chamber and I started to pack up what I see and when I was finished packing I asked her to lend me a suitcase, she said the children have one take it. I said it was too small to put in the clothes. After that me and she were in the house arguing. I told her that I gave her \$70 to put up the Thursday before give me some money to take a bus to go in town. She said she didn't have any. I told her I brought plenty things from Barbados when I came here. She said she didn't have any. She said take the sheet from the bed and wrap up the clothes. I told her I dont want the sheet you all sleep on last night. After I told her so, I took a shirt and started to button it up and as soon as I was finish buttoning it up I took down a knife from overhead and put it in my pocket as I was packing up my clothes to go away. I saw her bend down at the bed side and pick up a 5lb iron, and when she raised it at me I ducked and I pulled the knife at the same time and made a "fend" (witness demonstrates) and she bawled out "Miss Harry, Miss Harry Benjie is killing me". Harry came and say "behave all yourselves". Harry did not come into the house and both of us run out the house. When I saw her running in the yard I called her back and asked her where she is running going. When she saw me coming behind her she started to run more. She ran over a bank and she fell down and when she saw me coming she got up to run again and I fired two lash after her with a cutlass and she fall down back".

So the appellant was saying that he had been assaulted by Agatha Durrant with a 5lb iron and that she was the aggressor. In those circumstances, the allegation of an assault was very important and the trial judge quite properly left it to the jury in relation to the issue of self defence. The jury rejected this defence. However, the issue of provocation was also raised and the question therefore which arises for consideration in this appeal is whether the facts relating to provocation were

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adequately and properly left to the jury by the trial judge. Undoubtedly, the question of provocation was left to the jury, but the manner in which it was left was, in the opinion of this court, so unsatisfactory that its whole purpose and probable effect were destroyed. The trial judge in dealing with the facts relating to provocation said this:

"The defence is saying that there was provocation. Provocation sufficient for him to so lose control of himself as to do what he did in fact do and they are saying that the provocation was grounded on the statement first of all, by the deceased woman to the accused, the statement about "aint you bring your clothes here on a crocus bag"?

This was a reference to a statement which the little girl said her mother had made when the appellant was complaining that Agatha Durrant did not give him a proper receptacle for his clothes. The judge continued as follows:

"They are saying too and ask you to find that the provocation which is sufficient was also brought about by her refusal to give him his own money even to buy a bus ticket into town or to give him a proper container in which to put his clothes. They are saying that all these caused mental torments and cause him to lose his self control."

So there the judge is putting provocation on the basis of the taunting remark that the appellant had brought his clothes in a crocus bag, that Agatha Durrant had refused to give him his money and refused to give him a proper container in which to put his clothes. In so directing the jury he was adopting the approach of counsel for the defence, but this in the opinion of this court was the wrong approach. The substantial and relevant facts on which the plea of provocation should have been left to the jury were those in connection with the incident relating to the iron, namely, the allegation by the appellant that the deceased woman took up a 5lb iron and attacked him with it. The same facts should have been used by the trial judge as the basis of his direction on provocation. The result of his failure to do so was

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that the essential facts on which a verdict of manslaughter, based on provocation might have been returned, were never really considered by the jury. It is probable that in the circumstances of this case the jury might well have rejected that defence but that is beside the point. The fact is, it was never properly put to them and consequently the appellant was deprived of the possibility of having a more favourable verdict returned by the jury than the one they actually returned. In the opinion of the court this verdict cannot stand. The appeal will accordingly be allowed, the conviction for murder quashed and the sentence of death set aside and in lieu thereof the court substitutes a conviction for manslaughter and imposes a sentence of ten years imprisonment with hard labour.

P. Cecil Lewis
Acting Chief Justice