

IN THE COURT OF APPEAL

VIRGIN ISLANDS

Criminal Appeal No. 1 of 1972

Between: DENNIS EDWIN Appellant
and
THE QUEEN Respondent

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

McW. Todman for appellant
Miss P. F. Beaubrun (Attorney General) and
E.A.C. Hewlett (Legal Assistant) for respondent

March 5, 1973

The judgment of the Court was delivered by -

CECIL LEWIS, C.J. (Ag.)

This is an appeal by the appellant from his conviction by the High Court at the Assizes held on October 12, 1972 at Road Town, Tortola of the murder on March 16, 1972 of Lennox Carlyle Durante also called Lennox Mathias.

On March 16, 1972, about 9 a.m. Judith deCastro, a State Registered Nurse, was called by her husband Lambert deCastro from their home which was about 90 feet away from the Liquid Petroleum Gas Plant at West End. The gas plant is operated by a firm trading under the name of Carlton deCastro & Sons Ltd. When Mrs. deCastro got to the plant she saw the man Mathias on the ground with a spear in the left side of his chest and he was bleeding profusely. She decided that the only thing to do was to get him to hospital as soon as she could and with the assistance of Leslie McMasters he was placed in a van and driven by him to the hospital. One Hugh Duplessis went with them. Mrs. deCastro sat at the head of the injured man and held it to make sure he could breathe properly while Duplessis held the spear so that it could not move. This was done in order to prevent further injury to the wounded man who was taken to the casualty department of the Road Town Hospital where he was seen by a surgeon Mr. Tattersall and also by Dr. Thomas. Mr. Tattersall observed that the shaft of a fish spear was protruding from the front of his chest and that

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it was moving at the same rate as the beating of the heart, so it was obvious that the spear had entered the heart. They performed an operation but unfortunately this was not successful and the man died. According to the surgeon's evidence, the cause of death "was hypovolaemic shock, which in easy terms means loss of blood volume, as a result of penetrating wounds of the heart caused by the spear".

The appellant, the deceased, Leslie McMasters, Donald Supersuade, Wilson Supersuade, Lambert deCastro and Hugh Duplessis were employees of the firm of deCastro & Sons Ltd. McMasters and Duplessis were salesmen. Lambert deCastro was the plant manager and Leslie deCastro appeared to be the owner of the firm. All these people were witnesses for the Crown. McMasters' evidence was to the effect that on the 16th March last year there was a jeep at the plant which had a flat tyre and the deceased asked the appellant to change the tyre and replace it by a spare. When the appellant was doing this the deceased went and pushed him aside remarking as he did so that the appellant was taking too long to put on the tyre. The deceased pushed the appellant in turn; the appellant again pushed the deceased who returned the push, then the deceased picked up a jack handle and the appellant a stone and each attempted to hit the other but neither did so. Lambert deCastro came between the men and attempted to get the jack handle from the deceased and the stone from the appellant but he was not able to get away either weapon and the appellant ran off in the direction of the road. Then he threw the stone which he had in his hand at the deceased. Deceased dropped the jack handle and he in turn picked up a stone which he threw at the appellant. It did not strike the appellant. The appellant told the deceased that he could duck stones but he had something else inside which he (the deceased) could not duck and as he said this he went into an office at a distance of about thirty feet away and came back with a fish gun in his hand which McMasters said he was "trying to get loaded with a spear by pulling some rubbers." Lambert deCastro tried to intervene and take away the fish gun from the appellant but the appellant avoided him and ran towards Durante. Durante said "Lord look what going to happen to me now" and as he said that the appellant told Durante "Take that" and shot him in his chest with the fish gun.

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The witness McMasters said that he saw when the spear went into the chest of the deceased man. The appellant then ran away and McMasters pursued him, struck him in his back once or twice with a mop handle or a stick. Then he held the appellant and threw him to the ground and he fell on his back in the street. The appellant got up and ran into the sea. The witness McMasters was about to pursue him but did not do so as deCastro called him back. When he got back to the jeep he saw Durante lying on his back with the spear sticking into his chest. There was no doubt at all in the mind of the witness McMasters, that the spear gun belonged to the appellant because he had seen him with it in the office, where he had kept it. He had brought it a few days before to the office where they were both working. McMasters said that when the appellant shot the spear into the deceased, he was about 14 feet from him in a space not bigger than the court room. In cross examination he said that he heard no abusive words being used by the deceased to the appellant. He did not see the deceased slap the appellant nor did he see him kick him. These facts are mentioned here because they were incidents which the appellant said took place and which, it has been submitted, amounted to provocation.

Lambert deCastro supports Leslie McMasters' statement that the deceased asked the appellant to change the tyre and he saw them both together. He said he was doing something and when he looked up he heard the deceased and the appellant arguing. At that time the deceased had a landrover jack handle in his right hand and was pushing the appellant with his left hand and waving the jack handle at him. They did not come to blows at that stage but the appellant told the deceased that he did not want to fight with him in the yard, and as he said that he ran out of the yard telling the deceased if he wanted to fight him to follow him into the street. The witness then made a strange statement. He said that the deceased "turned and cried" and he saw his tears. The deceased took a stone which he threw at the accused who was in the street some 80 feet from the deceased. The appellant "returned" two stones at the deceased but they missed him. However the stone which the deceased threw at the appellant struck him in the lower part of his body, he did not know exactly where. In regard to the incident with the fish gun, he said after a few seconds

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the appellant returned, ran to the office building of the plant and returned loading his fish gun. He went towards where the deceased was and he saw him return in the direction from which he had gone, but this time he was loading the second catapult in the fish gun. The witness moved towards the appellant with the intention of stopping him or taking the fish gun away from him but when he was fairly close to him the appellant told him do not touch him or get in his way. He then ran around the witness and went in the direction of the deceased who was still in the same position between two landrovers. The appellant, he said, was blocking his vision but when the appellant moved he saw that the spear was sticking in the deceased. It was then that he called his wife and the injured man was taken to the hospital. He says that when the incident took place the distance between the two men was about 10 feet. He also said that the stone which the deceased threw at the appellant was thrown with considerable force, but although it struck the appellant he did not fall.

The witness Wilson Supersuade was busily engaged with his meters and he did not see very much of what took place between the two men, but he did remember seeing the appellant take up a stone and throw it over by the trucks in the direction of three other men - Lambert, McMasters and Durante, the deceased. Then he saw when the appellant rushed down by the plant and came back with the fish gun and he also saw when Lambert deCastro came running up to the appellant. He said that the appellant "just sheered off from Lambert" and he came nearer to him by the plant. He called out to the appellant and told him not to get himself into any trouble. The accused was going on his way towards the truck and he was holding the fish gun with both hands. The witness did not see when the appellant fired the spear from the fish gun into the deceased.

The deposition of the witness Hugh Duplessis was read at the trial with the consent of the defence. It was to the effect that he saw the appellant changing a tyre, and he referred to the fracas between the appellant and the deceased. He said that Mathias (that is the deceased) went to the appellant and said something to him - he did not know what he said, but he saw when the deceased pushed the appellant and heard when he told the appellant to let him take over the tyre which he was changing.

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The appellant pushed the deceased, then the deceased stood up. The appellant pushed him again, and they started pushing each other. The deceased then picked up a jack handle which was on the ground. He raised it up, then he lowered it. It was still in his hand. He raised it a second time and the appellant ran away from him. When the appellant ran away he picked up a stone which he threw at the deceased; the deceased in turn threw a stone at the appellant and the appellant threw a second one at the deceased. He next saw the appellant going in the direction of the office and he returned about 10 seconds afterwards with a fish gun which he said he was "setting up", that is to say loading it for use. The exact words in his deposition were these:

"...He was pulling the string. He had the piece of iron thing that he does fire, setting it up. The fish gun was blue. I don't know if anybody spoke to him while he had the fish gun. After he done set it he walked straight to Mathias and shoot him. When he walked to Mathias he had the gun pointing to Mathias. I did not hear him say anything to Mathias. I did not hear Mathias say anything. I saw when Mathias got shot, at this stage Mathias was about six feet away from the accused."

Now after the appellant had fired the spear from the fish gun which wounded the deceased and subsequently caused his death, he went to the police station at Road Town and reported to Llewelyn Solomon, the Corporal of Police there that he had just shot a man with a fish gun and that he did not know if he was dead. He showed him a cut in his head and told him that the deceased, Mathias, had cut him with a stone. The witness, Corporal Solomon asked him to have a seat and reported the matter to Sergeant Williams. Sergeant Williams in the meantime had had a report and had gone from the Road Town Police Station to the hospital where he started making enquiries about the incident between the appellant and the deceased. He saw the deceased lying on his back on a bed. He appeared to be unconscious.

The injured man died about 11.30 a.m. and Sergeant Williams left the hospital and returned to the Road Town Police Station at about 12.05 p.m. where he met the appellant sitting in his office. He told him that he was making enquiries into the death of Lennox Durante. He cautioned him and the appellant made a statement which he wrote down. In this statement the appellant said that he was changing the tyre at the

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request of the deceased, but when he went off to get a jack, to put under the jeep the deceased came and began putting back the tyre which he had taken off. They had an argument about it and he the appellant tried to grab the tyre from the deceased. The deceased then gave him a push. He did not worry with him. Then he slapped him, and the appellant pushed him. He said that the deceased then picked up a jack handle and attempted to hit him with it and at the same time Lambert DeCastro came up and tried to stop the deceased from striking him with the jack handle and told him to behave himself but the deceased did not pay any attention to Lambert. He, the appellant, then left and decided to go out into the street, whereupon the deceased picked up a stone threw it at him knocking him to the ground. Then he pelted another stone at him as he lay on the ground and hit him on the head. At that time he said his back was turned. His statement continues as follows:

"The stone burst my head and I ran in the office. Mathias had the said jack handle in his hand and I grab the fishing gun and fire at him to stop him. The fishing gun went inside of him. I did not know where inside of him the fish gun went but I hear him crying and ran back to the jeep. At that time I saw a friend of mine car on the other side of the road and I told my friend what happen and he must give me a ride up to the Police station to report the matter. I stayed at the Police station until I gave this statement. Thats all".

So there the appellant at the first opportunity after the incident occurred told the police that he fired the fish gun to stop the deceased attacking him with the jack handle. He was therefore clearly raising the defence of self-defence.

Aaron Williams the Corporal of police to whom he had made the statement said that he arrested the accused for murder. He cautioned him, and he made no further statement. The accused showed him a wound at the back of his head and a bruise at the back of his left shoulder, and told him that he had been wounded by Mathias (that is the deceased) while Mathias was throwing stones at him. There was also a cut in the centre of the accused's head at the back. He took him to the hospital where he received medical attention. The doctors who examined the accused at the hospital testified to the fact that he did have these wounds on his person.

Mr. Tattersall, who examined the accused said that he saw him at the hospital

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with Dr. Caine and that he had a superficial laceration at the back of his skull approximately 1" in length which he sutured. He also complained of pains in the left shoulder but there was full range of movement in that joint and an X-ray confirmed no bone injury. His left arm was rested in a sling and analgesics were prescribed for the pain, following which he was returned to the Road Town prison. He said that the superficial laceration could have been caused by a blunt instrument and could also have been caused by the appellant striking his head on falling. It is clear from this evidence that the appellant's injuries were not serious. Indeed the surgeon described them as being superficial but they were undoubtedly consistent with his story that they may have been caused by stones thrown at him by the deceased.

The appellant gave evidence on oath at the trial and he recounted what had happened at the plant between himself and the deceased. He said the deceased had asked him to change the tyre, that he removed it and he went off to get a jack to put under the landrover. When he turned his back he heard a voice saying: "the stupid ass Dennis I tell him to change the left tyre and he taking off the right tyre. Why he taking it off for"? He then saw Mathias trying to put back the tyre on the right hub on which he was working, so he the appellant went up to him and held the tyre with two hands and pulled it, and he told him that this was his job and that he had just told him that he was the service man. "With that" he said Mathias (that is the deceased) got up and slapped me at the side of my face, knock my head on the jeep and told me, who the hell I think I am". The appellant then said he made an attempt to get at Mathias to box him, but he "reverse backwards". He stepped back without looking around". There was a jack handle lying on the side of the landrover between the two of them and the deceased grabbed it up and McMasters who was nearby began to laugh. Mathias, he says then slapped him again, and he put up his arms and tried and fend off the slap, and he asked him what was all this about. McMasters began laughing and the deceased told McMasters he felt like kicking him, that the deceased in fact followed up his remark by actually kicking him. He gave him a kick against the front side of the landrover. The appellant then tried to hit the deceased but he was unsuccessful as he was afraid of /the iron....

the iron which the deceased had in his hand. He further added that the deceased attacked him three times with the iron and tried to hit him with it on three occasions but he missed on all occasions. He said that Lambert deCastro who was present intervened and tried to take the jack handle from the deceased but he was not able to do so. The appellant says that he turned his back and walked away towards the gas plant, and Mathias was there behind him shouting he would kill him. As he got some distance away from the deceased, about thirty feet from him he received a blow on his upper part of his back and he fell frontwards with his hands out-stretched. He did not know where he was. He shook his head and while lying on the ground he grabbed a stone and pelted it in the direction of the deceased Mathias who returned the stone. Mathias he said had a stone in his right hand and a jack handle in his left coming towards him when he was in a sitting position on the ground. He grabbed another stone and from his sitting position on the ground he pelted it at the deceased. Then he ran off in the direction of the building and as he was doing so, he received another blow in his back which knocked him down a second time. He ran into the building jumped into the office and closed the door. As he was standing on the platform he saw a fish gun resting by the door on a table in the office. He grabbed the fish gun with his left hand and "jumped aside by the fence towards the road". When he jumped "he pulled the rubbers of the fish gun." "The rubbers" he said "are used to set up the fish gun." In the meantime he saw Mathias and Lambert deCastro behind the office, they were still wrestling for the iron. McMasters shouted to the deceased "Don't go, he got a spear gun!" and at the same time, Lambert deCastro left Mathias, and came running towards the appellant. The appellant described what next ensued in the following words:

"Lambert said "give me that". I said "move from there, dont you see him coming behind you?" At that same time when I push Lambert my right arm was like this (stretched sideways). Then Mathias lift the iron upwards and grabbed the front of the spear gun and pulled it away from my hand. At that time I lift my head up and I saw Mathias reversing backwards holding the spear with the gun dragging in front of him. The spear was attached to the gun by a string. Then I made a few steps backwards and stood with my hand over my mouth, shock. Mathias reversed all the way backwards to where the Landrover was. He didn't say a word. After the spear was stuck in Mathias' chest he didn't go forward. He went backwards. Then he said "McMaster, Oh God I get shot."

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The appellant was thus describing the manner in which Mathias received his wound. He was saying that Mathias held the spear gun and tried to pull it away from him, and in so doing the spear was discharged and went into the chest. In other words he was setting up the defence of accident.

The defence called one witness, Dr. Gordon. He was called to give evidence as to the appellant's mental condition. He is a psychiatrist physician and he saw the appellant for the first time about 4th May, 1972 at the Road Town Prison. He went there at the request of the Chief Medical Officer and examined the appellant. He says he saw the appellant on the 4th and 12th May although the appellant himself says that he saw him on about four occasions while he was in prison. He sent certain recommendations to one Dr. Smith with a report. He made these recommendations because of the gravity of the offence and suggested that the appellant be hospitalized for further studies. He recommended hospitalization in a psychiatric hospital for neurological examination. Now apparently the appellant had told the doctor that he had had a fall at sometime in his life and the doctor acting on that said that an injury to the head early or late in life could cause behavioural disturbances such as were seen in the appellant. But he does not say what these behavioural disturbances were. He also recommended that an electroencephalogram, which is a recording of the electrical brain waves which would give an indication and evaluation of a head injury should be carried out in respect of the appellant. He also suggested continued qualified psychiatric examination in order to detect any psychological disturbance not seen at the time when he examined the appellant. He said that when he studied the appellant he made an enquiry into his mental history. The appellant, he said made a complaint of a head injury before 16th March, 1972 which the doctor said he believed was caused in an automobile accident but he was not certain. He submitted his report to Dr. Phillip Smith the Chief Medical Officer. He added that he did not believe that any of the recommendations were implemented. He also said that there were no other medical psychiatrists practising in the territory and that he was not further requested to observe the appellant and that the appellant had never attended

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any of his weekly clinics. In cross examination he said that at the time he saw the appellant "he was able to tell the difference between what was right and what was wrong," and on each occasion he saw him for about an hour. He added, and this is significant, that "the accused suffers from a personality illness," and that he would not use the words "mental illness" to describe the appellant's condition. In re-examination by Mr. Todman he said he "suspected" (and that word is to be emphasised) that there might be latent mental disorder. His suspicion was based on something going back to the past, to the appellant's childhood.

Before the Court two grounds of appeal were argued. The first was that the verdict of the jury should be set aside on the ground that it was unreasonable or cannot be supported having regard to the evidence. Counsel for the appellant admitted that the four possible defences which were raised at the trial were all put clearly to the jury and that he was not attacking the trial Judge's summing up in any way. What he contended was that despite the evidence before the jury the verdict of guilty of murder which they returned was unreasonable in the circumstances and he asked this court to interfere with the verdict because it was flagrantly wrong and that no reasonable jury acting honestly under proper directions could have returned such a verdict. It seems to me that there was abundant evidence on which the jury could have returned a verdict of guilty of murder. It having been conceded that the trial judge did not err in any of his directions to the jury and that he placed all the relevant material before them to enable them to decide on the issues of accident, self-defence and provocation, and the jury having returned the verdict which they did, it seems to me impossible to say in the light of such evidence that their verdict was unreasonable. The jury were very obviously aware of what their duties were and how they should approach the matter because it will be seen at page 23 of the record that they put certain questions to the witness Lambert deCastro to which the following answers were given:

"The deceased was pushing accused and raising a jack handle at him immediately before accused move. I don't remember whether deceased still had the jack handle in his hand when he got shot. The stone which struck the accused hit him in the lower part of the body. I don't know exactly where".

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So there the jury were themselves enquiring how the incident between the appellant and the deceased took place. They were addressing their minds to the circumstances in which the deceased man received the wound and this evidence shows that they were fully seised of the facts on which the various defences were based. Having considered all the relevant defences raised before them they came to the conclusion that on the evidence the proper verdict was one of guilty of murder. Accordingly this ground of appeal fails.

The second ground of appeal alleged that there was a miscarriage of justice having regard to the following:

"(i) The prison authorities having failed to implement the recommendations (or any of them) with regard to suspected severe mental disorder of the appellant made to the Chief Medical Officer by Dr. G. Gordon the medical psychiatrist, the appellant was thereby precluded from obtaining evidence which he might have put forward at the trial to displace the resumption of sanity.

(ii) Positive evidence of insanity having been thus precluded, it cannot be assumed that a reasonable jury would necessarily have held that the appellant was responsible for his actions at the time of the commission of the offence of which he has been convicted."

It was submitted by counsel for the appellant, that the appellant was deprived of any opportunity of putting evidence of insanity before the jury. He admitted however that it was for the defence to prove insanity and he submitted that the evidence of Dr. Gordon at page 42 of the record was enough to satisfy any reasonable jury that the appellant was suffering from a disease of the mind. He conceded however that Dr. Smith was under no legal duty to carry out the recommendations made by Dr. Gordon and that in any event no facilities existed locally for implementing these recommendations. Dr. Gordon was sent to examine the appellant at the request of the Chief Medical Officer and this request was obviously made in an attempt to help the defence. It was the duty of the defence if they wanted to raise the question of insanity to produce evidence to this effect and this has been conceded by counsel for the appellant. The evidence of Dr. Gordon is couched in the most general terms and in language which can only be described as imprecise. There was no specific statement that the appellant was in his opinion insane, and in fact he stated that he would not use the expression "mental illness" to

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describe the appellant's condition. It was clear that the doctor was acting merely on an unsupported statement made to him by the appellant that he had received some head injury in his youth or at least some time before the 16th of March, 1972. No evidence whatever was called to say how this injury (if there ever was one) had been caused. It is significant that the appellant does not ~~on~~ⁱⁿ his own evidence refer to the alleged head injury in his youth or at any time in his life. The doctor's evidence in this respect is extremely vague. He said he believed the alleged injury was caused in an automobile accident, but he did not give any facts in support of his belief. He said also that he saw certain behavioural disturbances in the appellant but he did not elaborate on this point. The jury were left to speculate as to the nature of these disturbances.

It is to be noted that there was no evidence of any unusual behaviour on the appellant's part from any one who knew him. He had been working with deCastro & Sons Ltd., he was known by Duplessis and he must have had friends in the territory. Nobody came forward to say that the appellant had ever behaved in a strange and abnormal manner. There was no evidence of any history of mental illness in his family. All that was before the jury was the bald and unsupported statement of Dr. Gordon which he himself got from the appellant that he may have had a fall when he was a young man and although Dr. Gordon referred to latent mental disorder in the appellant this was based only on suspicion and not on fact. He merely said that he suspected this and in view of the nature of the evidence which the defence called on the issue of insanity it is not surprising that the jury rejected this defence. In the circumstances the Court is of the opinion that this appeal fails and it is accordingly dismissed.

P. Cecil Lewis
Acting Chief Justice