Hon. Mr. Justice St. Bernard (3)

IN THE COURT OF APPEAL

ST. VINCENT

CRIMINAL APPEAL NO.11 of 1974

BETWEEN: CONRAD THOMAS Appellant

AND

THE QUEEN Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice E.L. St. Bernard
The Honourable Mr. Justice N. Peterkin

St. A. Cato for appellant.
Monica Joseph (Crown Counsel) for respondent.

January 20, 1975

J U D G M E N T

CECIL LEWIS C.J.(Ag.) delivered the judgment of the Court:

The appellant was convicted on 5th November 1974 of the murder of Clunis Rodney and was sentenced to death. The appellant and the deceased were brothers. According to the evidence of Wilmore Peters, at about 10 a.m. on 14th December 1973 he was at a place called Simon at New Prospect cutting a piece of wood for the deceased. The appellant came along with a load of grass and gave it to a cow. The deceased was at that time at his sister's house. He came down towards the appellant who "met him part of the way and cut him by his neck with a cutlass across his face" (to use the witness's own words). After the injured man fell down, the appellant continued chopping him about the head. Alec Castello, Christopher Peters, Caesar Rogers, Theophilus Rodney and Rosalie Andrews were present when the incident took place. Alec Castello and Wilmore Peters held on to the appellant, disarmed him and took him to the police station.

Rosalie Andrews, the woman with whom the deceased was living, also said that she saw the appellant take a cutlass and chop the deceased, and the deceased fell down. But before that, she said she was washing in the river and the appellant came to her and told

her that he was going to kill somebody today for what his mother had died and left. He was referring to a piece of land which his mother had left. The deceased, she says, came while the appellant was talking to her, and she saw the appellant take the cutlass and chop the deceased behind the neck, and he fell to the ground. After he fell to the ground, the appellant continued to chop him. This was substantially the evidence given by Alec Castello, Christopher Peters, Theophilus Rodney and Caesar Rogers, with but one exception, namely, Christopher Peters who said in cross-examination that the deceased man chucked the appellant on the chest and told him to behave himself. This particular piece of evidence will be dealt with later as it forms the basis of one of the grounds of appeal.

Dr. Prasada Rao who performed the post-mortem examination on the body of the deceased man said that he noticed two injuries on the head. One was an incised wound about 9" long extending from a point 2½" from the left eye and running along the occipital region of the scalp to a point about 3" from the right ear. This wound was 3" deep and exposed the scalp, the skull, the meninges and the posterior portion of the brain. In the region of this wound were several incised marks on the skull bone. The second injury was an incised wound about 3" long situated obliquely in the occipital region of the scalp about 2" above and parallel to the first described injury. In the opinion of the doctor, gross brain damage and severe haemorrhage following on the first wound were the cause of death.

It was not denied by the appellant that he inflicted fatal injuries on the deceased but he said that at the time he did so he had been drinking, and therefore it has been contended before this Court today that because of excessive drinking he became insane.

The notice of appeal contained a ground of appeal which reads as follows: "that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence". These words do not appear in the West Indies Associated States Supreme Court (St. Vincent) Act No.8 of 1970. Section 39(1) of this Act (which is similar to section 2 of the Criminal Appeal Act 1968 of England) authorises the Court

"to allow an appeal if it thinks that the verdict should be set aside on the ground that it is unsafe or unsatisfactory". The words contained in this ground of appeal do not have the same meaning as those appearing in section 39(1) of St. Vincent Act No.8 of 1970 which have been quoted above. This was pointed out in R. v Cooper (1969) 1 All E.R.32; 53 Cr.App.R. 82 C.A.; and in Phillips and Lutchman v R. 14 W.I.R.460. The Court can therefore only deal with this ground of appeal in the manner authorised by section 39(1) of Act No.8 of 1970.

Counsel for the appellant has argued that the verdict of the jury is unsafe or unsatisfactory because they refused to accept the evidence of Dr. Cordice and find that the appellant was insane at the time he committed the act with which he was charged. Dr. Cordice, who was at one time Medical Officer in charge of the Mental Health Centre, did not examine the appellant at any time which could be regarded as being recent in relation to the date of the commission of the offence and so was unable to say anything as to his mental state at the relevant time. He had seen the appellant on 9th June 1969 when he came to him at his private clinic, and he advised that he should be admitted to the Mental Health Centre for necessary treatment. The appellant was admitted to the Mental Health Centre on the same day and discharged on 20th August of the same year. At the time of his admission to the Mental Health Centre he was suffering from the delusion that there was a spirit in his stomach. Dr. Cordice did say in cross-examination that persons who are prone to mental illness cannot be considered to be permanently cured after being discharged. However, when the authorities discharged the appellant from the Mental Hospital, they must have been satisfied that he was sufficiently recovered from his mental illness to be returned with safety to society. Accordingly, the legal rule that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved must be applied in this case. The burden is on the defence to establish insanity "and it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the

act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

It has been urged that by reason of excessive drinking the appellant was rendered insane but in fact the only evidence that he was drinking is based on his own unsupported statement. The jury had this evidence before them. He had said to them "it is because of drinking that I did it and I never did anything like that before." Dr. Cordice in answers by the jury had said that he had given the appellant strict instructions to avoid alcohol but as he was of the opinion that his intelligence quotient was low he may well not have understood his instructions. In the opinion of the Court the defence of insanity had not been established in that there was no evidence that at the time the appellant committed the act he was insane within the meaning of the McNaughton Rules. The submission therefore that the jury's verdict was unsafe and unsatisfactory because they did not act on Dr. Cordice's evidence is erroneous and this ground of appeal fails.

The second ground of appeal argued on behalf of the appellant is that the trial judge did not leave the issue of provocation to the jury. This submission is based on the following statement appearing in the cross-examination of the witness Christopher Peters:

> "At that time I did not see Clunis Rodney. I saw him later coming from about the house. He came to the accused and chucked him on his chest and told him to behave himself."

It was submitted that the action of chucking the appellant on the chest constituted provocation and imposed on the judge a duty to leave this issue to the jury. In this connection it might be of interest to refer to a passage in the judgment of Lord Devlin in the case of Lee Chun-Chuen v The Queen (1963) A.C.220 at 231, where he specifies the elements of provocation and comments on this defence:

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct."

In the opinion of the Court this passage aptly applies to the circumstances of this case. Assuming that an incident did take place in which the deceased man chucked the appellant on the chest and told him to behave himself, this may be regarded as being no more than a provocative incident and in itself did not constitute a sufficient act of provocation to make it incumbent on the judge to leave this issue to the jury. In this connection, counsel conceded that he did not raise the defence of provocation in the Court below, but this did not absolve the judge from the responsibility of leaving this issue to the jury if in his opinion there was sufficient material on the evidence for so doing. A somewhat similar situation arose in Julien v R. 16 W.I.R.395. In this case Fraser J.A. in delivering the judgment of the Court of Appeal of Trinidad and Tobago said at page 400

> "While it is true the trial judge did not direct the jury that if they were in doubt as to whether the facts showed sufficient provocation to reduce the killing to manslaughter, they should determine the

> issue in favour of the accused and return a verdict of manslaughter, we do not think that his omission to do so was a misdirection, for the reason that not only was provocation not raised as a defence in this case, but it did not sufficiently arise in the evidence so as to make it incumbent on the trial judge to give such a direction."

We are of the opinion that on the evidence before the Court the question of provocation did not sufficiently arise and that the trial judge was under no duty to leave this issue to the jury. Accordingly this ground of appeal also fails and the appeal is dismissed.

CECIL LEWIS
ACTING CHIEF JUSTICE

E.L. ST. BERNARD
JUSTICE OF APPEAL

N. PETERKIN
JUSTICE OF APPEAL (AG.)