IN THE COURT OF APPEAL

ST. VINCENT

CRIMINAL APPEAL NO.1 of 1975

BETWEEN: EDWIN MCINTOSH Appellant

AND

THE QUEEN Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

B.E. Commissiong for appellant.
M. Joseph (Crown Counsel) for respondent.

1975, May 21, 22, July 1

J U D G M E N T

DAVIS, C.J., delivered the judgment of the Court:-

The appellant was indicted for the murder of one Parton Smart on the 9th day of November 1974 at Calliaqua, St. Vincent. The case was tried before Berridge J. and a jury at the February Criminal Assizes, and on the 18th day of February 1975 the jury returned a verdict of guilty of manslaughter and the appellant was sentenced to five years imprisonment with hard labour. He has now appealed against his conviction.

Originally two grounds were raised in support of the appeal but on the hearing of the appeal learned counsel for the appellant sought and was granted the leave of the Court to argue the following amended grounds of appeal:-

"1. The learned trial judge misdirected the jury on the law relating to the cause of death -

(i) because he omitted to tell them that having regard to

a. the answer of Doctor Rao in cross examination qualifying his evidence in examination in chief that the cause of death was infection of the brain, and

b. the positive evidence of Doctor Cyrus inter alia that the cause of death was tetanus,

there was no evidence or no sufficient evidence on which they could find beyond reasonable doubt that the cause of death was infection of the brain.

(ii) because he failed to tell them that the prosecution had during the trial abandoned their original position

that infection of the brain was the cause of death. In failing to do so he led the jury to believe that the prosecution was always saying that the deceased died from infection of the brain and not from tetanus which was the distinct and separate cause of death.

(iii) because in relation to tetanus as the cause of death, he omitted to instruct the jury on the proper test to apply in determining on the evidence before them whether in the circumstances of the case the wound inflicted by the appellant was a mere setting in which tetanus operated.

(iv) he also failed to direct them that the proper test to apply was whether the prosecution had proved beyond reasonable doubt that the real and effective cause of death was the wound.

(v) the learned trial judge omitted to direct the jury that if they found that

a. on admission to the hospital on the 2nd November 1974 effective treatment was given to arrest tetanus and

b. the wound was healing satisfactorily and was impotent to cause death by the 4th November 1974, yet

c. the deceased died from tetanus on the 9th November 1974 while still a patient in the hospital,

they could properly infer that the bacteria might have been introduced into the wound on or subsequent to the 4th November 1974, that in such circumstances the evidential burden was on the prosecution to negative that there was then any improper or abnormal or negligent treatment to form a separate or independent cause of death.

(vi) because he told them at page 26 of the transcript (page 60 of the record) that as regards the evidence of the doctors that tetanus could have been contracted in the hospital - "But members of the jury I should tell you this, it is not for you to speculate ..... produced to you". The learned judge was in effect there

telling the jury wrongly there was no evidence from which they could so find arrest there was - see 1(v) above - and in any event the burden was on the prosecution to show that it was not contracted in the hospital and if it was it was not as a result of improper or abnormal treatment.

(vii) the learned trial judge omitted to direct the jury as he ought to have done that as a matter of evidence the prosecution had failed to prove that the wound was the cause of death, having regard inter alia to

a. the evidence of Doctor Rao in cross examination at pages 7, 9 and 10 of the record, and

b. the evidence of Doctor Cyrus at page 23 of the record.

2. The verdict was unreasonable and cannot be supported having regard to the evidence, and is unsafe and unsatisfactory for the reasons set out in grounds 1 (i) to (vii) above and because on the evidence before the jury it was clear that the tetanus infection occurred in the hospital and was a separate factor and the real and effective cause of death.

3. The learned trial judge did not put the defence of self defence fairly or adequately to the jury:

a. in his summing up on the law at pages 42 to 43; 54 to 55; 58; 61; 63 of the record (corresponding pages of the transcript pages 8 to 9; 20 to 21; 24; 27; 29), he failed to direct them properly on the question of retreat and/or reasonable apprehension of danger.

b. he omitted to relate the law to the evidence in particular to the evidence for the defence and those portions of the evidence of the prosecution which supported the case for the defence.

c. even where he referred to self defence at pages 56 to 59 of the record, his treatment was insufficient to the extent that the jury could have been led to believe that self defence which was a substantial and independent defence was alternative and subsidiary to provocation.

So also were his concluding directions at pages 62 to 63

of the record."

The case for the prosecution was that, on the 2nd day of November 1974 at about 7 p.m., the appellant and the deceased were on the bay side at Calliaqua. An argument arose between them over some fish. The deceased boxed the appellant in his mouth which caused his mouth to bleed and there is a conflict in the evidence as to whether the deceased was armed with a tiller or paddle. At this stage, someone held Smart and told him not to worry with that. About ten to fifteen minutes later, the appellant went up to the deceased and struck him with a piece of stick on his forehead. The deceased collapsed and blood was running from a wound on his forehead. He was taken to the hospital in a motor car which was on the spot and was admitted to the casualty department. He was seen by a Dr. Phillips who was not a witness at the trial and was then removed to the surgical ward where he remained under the treatment of Dr. Cyrus, Senior Surgeon at the hospital. Parton Smart died on the 9th day of November 1974. Dr. Rao, a general medical practitioner, carried out a post-mortem examination on the body of the deceased and deposed that the deceased died from an infection of the brain. The prosecution alleged that the infection was caused by the wound and therefore the wound was the substantial and operating cause of death.

The case for the defence was that the deceased, a burly young man, attacked the appellant, boxed him in his mouth and knocked him to the ground; that the appellant got up; that the deceased was still in an angry mood and holding a piece of stick in his hand; that the deceased was using obscene language to the appellant and, as he surged towards the appellant, he, the appellant, picked up a stick and pelted it at the deceased and ran away. The deceased collapsed.

Dr. Cyrus was called as a witness for the defence and he deposed that the deceased died from tetanus. We shall return to examine more fully the medical testimony of both Dr. Rao and Dr. Cyrus when we come to consider the submissions of learned counsel on grounds one and two.

Learned counsel for the appellant argued grounds one and two together. He began by stating that nowhere in his summing up did the trial judge draw to the jury's attention the fact that Dr. Rao had admitted that the cause of death could have been tetanus and not infection of the

brain. He then submitted that the trial judge ought not to have left two causes of death to the jury but ought to have taken away infection of the brain as a cause of death from the jury. He further submitted that in leaving the two causes of death to the jury it led them to believe that the wound was the substantial cause of death. He conceded however that if infection of the brain was in fact the cause of death, he could have no quarrel with the summing up. Counsel argued that the wound was not dangerous to life and was not the substantial and operating cause of death, and submitted that this was the first question to be answered. He further argued that the judge should have told the jury that on 2nd November when the deceased was admitted to hospital he received normal treatment for the wound, and that on 4th November the wound was healing satisfactorily without any complications, that the deceased died on 9th November of tetanus while still a patient at the hospital, and that they could properly infer that the tetanus bacteria could have been introduced into the wound on or subsequent to 4th November and that in those circumstances the evidential burden was on the prosecution to negative improper treatment causing tetanus. He further submitted that the wound was merely the setting in which another cause of death (tetanus) operated.

In reply, learned counsel for the respondent submitted that the learned trial judge dealt adequately with the cause of death in his summing up and told the jury how to sort out the medical testimony; that both doctors agreed that there was an infection; that the infection entered through the wound and that as a result of that infection the deceased died. What they differed about was the type of infection. The question which the jury considered and which the judge directed them to consider was would the infection have been introduced if he had not received a wound? Did the infection flow from the wound or was it a separate and distinct cause of death? Was death traceable to the wound or a likely result of it? Was there any abnormal treatment at the hospital? She further submitted that the infection in this case is a complication of the wound in the same way as haemorrhage was in the Smith's case; the infection took longer whereas haemorrhage was immediate. The size of the wound is unimportant. If the wound is the result of an unlawful act and it becomes infected, then the person who inflicted the wound would be held liable if, as a result of the infection the person dies. There was no burden on the [illegible]

to negative abnormal or improper treatment when there was no suggestion of it in the evidence. The evidence is that the treatment was normal and that came from the defence.

At this stage we must take a look at the medical testimony of Dr. Rao and that of Dr. Cyrus. Dr. Rao, who performed the post-mortem examination on the body of the deceased, gave his findings as follows:-

> "My findings were as follows:- The body was that of a man aged about 45 years. Rigor mortis was present in all parts of the body. There was an incised wound about 2" long on the right frontal region of the scalp. The outer table of the scalp was fractured for a distance of 2" immediately below the wound on the scalp. The inner table of the skull at the same place was fractured and a piece of it about 1" long and ¼" wide got separated. Epidural haemorrhage i.e. haemorrhage immediately below the skull and the outer membrane of the brain was present at the same place and the amount of blood was about 7 millilitres, i.e. about 1½ teaspoons. The right frontal lobe of the brain, i.e. that portion of the brain immediately below the injury on the skull, was softer in comparison with the portion of the brain elsewhere. There was no evidence of any other injury present in any other part of the body. All the organs of the body were found to be normal."

He gave as his opinion that the brain was softer in one spot on account of infection and that softening and liquefaction were some of the changes which are the results of infection to the brain; that taking into consideration the fact that the portion of the brain involved was immediately below the injury, the infection may have entered through that wound. He then stated that the cause of death was infection of the brain. In cross-examination Dr. Rao stated that the evidence of the infection he saw could have been tetanus, and he agreed to the suggestion of learned counsel that the cause of death could have been tetanus, and it was very likely that tetanus might have been introduced into the body by a round blunt weapon which caused the wound.

Dr. Cyrus stated that the X-ray revealed a compound fracture of the right frontal bone with a small depression [illegible]

and that such a fracture involved up to 7 - 10 days detention to ensure against complications; that the patient was given an injection of tetanus toxoid and also a penicillin injection as an antibiotic. He explained that the tetanus virus is an organism in the air and could have been introduced into a wound at any stage. He gave as his opinion that the cause of death was due to tetanus; and that if the wound was caused by a round object he did not think that tetanus could have been introduced thereby.

In the case of R. v Smith (1959) 2 All E.R.198, Lord Parker C.J. in the course of his judgment had this to say:-

> "It seems to the Court that, if at the time of death, the original wound is still an operating cause and a substantial cause, then death can properly be said to be the result of the wound albeit that some other cause of death is also operating."

We are unable to accept the submission of learned counsel for the appellant that the wound must have been from the outset dangerous to life. A man who receives the type of wound to his head as described by Dr. Rao must have suffered serious bodily harm with the attendant possibility that infection may occur, making it dangerous to life. In our opinion, it was necessary for the trial judge to have put to the jury the evidence of both doctors as to the cause of death and it was for them to say whether the wound was the operating cause of death. We have looked closely at the whole of the summing up on the question of the cause of death and the directions given thereon by the learned trial judge, and are satisfied that it was both fair and adequate.

On ground three it was submitted that the trial judge did not apply the law to the facts of the case, and that he failed to direct the jury that, if on the evidence they should find that the prisoner honestly believed and had reasonable grounds for believing that his act was necessary to prevent the deceased from doing serious bodily injury to him, the act would be justified and therefore not punishable at all. In support of his submission learned counsel cited R. v Johnson 10 W.I.R. 402; R. v Samad and Others 15 W.I.R.35; R. v Palmer (1971) 1 All E.R.1077 at pp.1080 and 1081. He further submitted that the effect of this was that the jury were left to roam at large over the rugged terrain of critical evidence without guidance.

Counsel for the respondent on the other hand referred the Court to the

directions given by the trial judge relating to self-defence and submitted that there was no set formula to express the law to the jury; that the trial judge had outlined the position in law as it fitted the circumstances of the case; and that he did not have to fit every bit of evidence to the law.

In directing the jury on the issue of self-defence the trial judge stated:

> "From there, members of the jury, I go on to the question of self-defence. It is good law and it is good common sense that a man who is attacked may defend himself, but he is only entitled in law to do what is reasonably necessary to prevent or to resist attack and everything would depend on the particular facts of the case and the particular circumstances of the case; some attacks, members of the jury, may be of a minor nature in which case it would be reasonable only to take what may be regarded as "avoiding action", and it will clearly be unreasonable for anyone to take retaliating action which was entirely out of proportion to the necessity of the situation, but in taking avoiding action in regard to minor attacks a person who is attacked is expected to retreat, that is to say, expected to retreat from danger, he is expected to withdraw physically from battle, as it were. On the other hand if by retreating he is likely to open himself to equal or greater danger, then the question of retreating does not enter into consideration. As in provocation, members of the jury, so in self-defence the accused is under no obligation to satisfy you that he acted in self-defence. The onus is on the prosecution to negative self-defence and to satisfy you that he did not so act."

In dealing with the defence the judge related to the jury the facts as given by the appellant, and referred to the evidence in the appellant's favour as given by certain of the prosecution witnesses. Immediately after, he continued:

> "They are saying, too, that the accused acted in self-defence and they remind you of the evidence of Sharp who said that when the accused hit the deceased the deceased had a piece of stick in his hand and of the evidence of Goodluck who

tells you that the accused was backing away while the deceased man was going forward to him, an indication that at one stage or another there was some form of retreat on the part of the accused and that there was some sort of attack by the deceased man on the accused."

Later in the summing up he told them:

"..... going back to the question of self-defence you will consider the comparative sizes of the men, one is supposed to have been a big strapping man and the other one you see in the box; the defence is asking you to take that into account when you consider the question not only of self-defence but also of provocation."

He finally directed them:

"If you find that the accused acted in self-defence or if you are in reasonable doubt as to whether he did in fact so act then it will be your duty to acquit the accused of any offence whatsoever."

In our view the learned trial judge erred in not directing the jury that, if the appellant honestly believed and had reasonable grounds for believing at the time he struck the deceased that he was in imminent danger of serious bodily hurt by the deceased, he would be justified in what he did. The failure to give this direction, especially in the circumstances of this case where there is evidence that the deceased had earlier struck the appellant with his fist and at the time of his injury was armed with a paddle similar to that used by the appellant, may have deprived the appellant of an opportunity of being acquitted. We are not in a position to say whether a reasonable jury properly directed would have arrived at the same verdict. Accordingly the appeal must be allowed, the conviction quashed and the sentence set aside. The interest of justice requires, however, that there should be a new trial upon a fresh indictment for manslaughter. Order accordingly. The appellant must remain in custody pending the retrial.

MAURICE DAVIS
CHIEF JUSTICE

E.L. ST. BERNARD
JUSTICE OF APPEAL

N. PETERKIN
JUSTICE OF APPEAL