IN THE COURT OF APPEAL

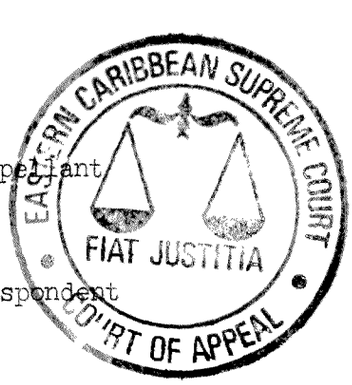
GRENADA

CRIMINAL APPEAL NO.2 of 1975

BETWEEN WILSON JULIEN Appellant

AND

THE QUEEN Respondent



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

Lloyd L. Noel for appellant.
N. Christian Attorney-General, L. St. Paul with him, for respondent.

1975, October 1 & 3

J U D G M E N T

ST. BERNARD J.A. delivered the Judgment of the Court

The appellant was convicted on 14th March 1975 for the murder of one Raphael Sandy and sentenced to death by hanging. The defences raised at the trial were accident, provocation and self-defence.

Before this Court, the grounds of appeal may be summarised into four main categories, namely (a) the failure of the judge to deal adequately with the discrepancies in the evidence of the witnesses for the prosecution (b) the defence of accident was not properly put to the jury; (c) the judge misdirected the jury on the question of provocation and (d) the jury was not properly directed on the question of self-defence. Counsel conceded that there was no evidence of self-defence and this ground was abandoned.

Before dealing with the other grounds of appeal I will relate shortly the facts of the case, in so far as I think it necessary to state them. On the 23rd February 1974, the appellant, the deceased and some four other men were in the shop of one Mrs. Marina Augustine of Concord. The time was about 9 to 9.30 a.m. Some of the men were having strong drinks, whilst there was a game of cards among one Mark, Terry and the deceased. The appellant came from outside and asked whether he could join the card game. The deceased replied in the negative but the appellant insisted that he should play. He did not however play. Mark stopped playing and one Andros took his place. The deceased then gave Andros a cigarette and took one for himself. The appellant tried to take the cigarette from the deceased. The deceased asked him to behave and asked for a bottle. Mark, who was there, then passed the bottle and, on the

appellant approaching the deceased he struck him on the shoulder with the bottle. The appellant, however, sustained no injury. The appellant said "You should not have done that to me", and he began leaving.

Cogland Julien spoke to the appellant, who told him that he was going to damage the deceased. Cogland said "Why damage him when you receive no injury?" He also spoke to Stevenson Chance, stating that he was not taking it.

One witness said the appellant remained for a little while in the shop and then left; another said he remained a minute. One said he left for a few minutes and another stated the appellant left and returned in about twenty minutes. He lived about a quarter of a mile away, and it might be presumed that he went home as at the time he was in the shop he was dressed in new clothes - new shirt, new pants and shoes. When he returned he was dressed in old clothes and he had with him a knife, a kitchen knife, some nine inches long. He went up to the deceased and stabbed him in the stomach, and there was a struggle for the knife. In that struggle the appellant seemed to have let go the knife. The deceased was able to grab him by the back, take the knife out and plunge it into his back, which resulted in severe injury to him. Both men went to the hospital one with an injury to the stomach and the other with an injury to the lung. They received medical attention, but the following day the haemorrhaging of the deceased, which had ceased, continued and he died.

The appellant's defence was that he went to the shop to buy cigarettes but there was a crowd, and as he went through the crowd, his side brushed against the deceased, who asked for a bottle, and as he turned back the deceased struck him on the shoulder with the bottle. He said, "I do you nothing and you hit me?". The deceased replied, "If you don't like it, do what you want". He left and went to the shop door and heard someone say "Look out!". He turned and saw the deceased pulling a knife from his waist. The appellant rushed up to him apparently to take the knife. There was a struggle and they fell against a juke box. Then when he got up someone gave him a push and he got a stab in his back.

There were discrepancies in the evidence of the witnesses for the prosecution in respect of the sequence of events, but substantially the evidence supported the story as given by the witnesses for the prosecution. Counsel for the appellant submitted that the direction of the trial judge in respect of these discrepancies was to persuade the jury to accept testimony of the witnesses for the prosecution and to excuse them because of their intelligence, and further

he did not detail any of the discrepancies in order to assist the jury.

Among other things, the trial judge stated on page 13 of the record

> "Some of us have a greater eye for detail, some of us a quicker mind, a better hearing. We are all different and, when we are dealing and trying to assess the evidence of a witness, you must have regard for the human element. Two persons looking at the same incident will not see everything the same, exactly as it happened, because he looks through the eyes of a particular person. Similarly with hearing - some heard words spoken, some do not. You have got to have regard to the class of person who is giving evidence, bearing in mind and using your knowledge of these people. That is why you are there - to use your knowledge of the people of the country in assessing the individual witnesses and giving to their testimony the weight which you think it deserves."

He went on and at page 15 he said

> "By examing the evidence you have heard, deciding what you believe to be true and what you believe to be false. Not everything said by a witness will be true, not everything said by a witness will be false. You are entitled to use your intelligence and from facts proved, you are entitled to deduce inferences which you think the facts proved properly support. Members of the jury, you may think I have dealt unusually long on the quality of evidence of witnesses. I have done so because in this case almost every witness for the prosecution has been pointed out by counsel for defence to be guilty of discrepancies. Bearing in mind my observations, it is for you to decide to what extent, if at all, you believe them."

Counsel stated further that there were no instances where the judge pointed out these discrepancies.

The judge did not point out all of the discrepancies; he pointed out some, but the jury heard all the evidence, and he adverted their attention to the discrepancies. Counsel's main submission on this point was really one which

concerned inconsistent statements that is, where a witness gives at a trial a totally different story to his previous statement on the same issue. In the present case the testimony of any witness was not substantially different from any previous statement.

There is nothing in the summing up, in the view of the Court, to come to the conclusion that the trial judge was persuading the jury to accept the story of the prosecution despite the discrepancies therein. This ground of appeal must fail.

With reference to the defence of accident, counsel submitted that the trial judge did not properly define the defence of accident to the jury. What the trial judge did, he stated, was to read the evidence as given by the appellant in the statement from the dock to the jury but did not define the meaning of accident. The trial judge, in relation to this defence, told the jury

> "So now, if you think as he said his explanation is one of accident, if you accept that at this stage he may be acquitted. On the other hand you will have to look at the case for the Crown. Remember the duty is on them from the very start to the very end of the case, the burden is on them to prove the guilt of the accused."

And again he said:

> "This question of accident, if you accept the story of the accused as to how it happened, as I have said that is an end of the matter because the act would be involuntary and death accident in the eye of the law, and then you will have to acquit him; and if you are left in doubt - some state of doubt - similarly you will have to acquit him. Because you do not believe his story it does not mean he is guilty ....."

Further to those statements there is evidence from the surgeon who attended the deceased that, for that injury to be caused, it must have been with a considerable degree of force. This Court, in these circumstances, feels that there is no merit in this ground of appeal which must also fail.

In respect of the issue of provocation, counsel for the appellant submitted that the judge was in error when he directed them that the objective test and not the subjective test applied. The Attorney-General conceded that there was some error in the judge's direction to the jury. This Court is not of

the view that the subjective test applies in this State. Section 244 of the Criminal Code, Cap.76, states

> "The following matters may amount to extreme provocation to one person to cause the death of another person namely -
> (a) an unlawful assault and battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of accompanying words, gestures, or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control."

The other paragraphs of this section do not apply. Section 245(1)(a) states:

> "Notwithstanding proof on behalf of the accused person of such matter of extreme provocation as in the last preceding section is mentioned, his crime shall not be deemed to be thereby reduced to manslaughter if it appears either from the evidence given on his behalf or from evidence given on the part of the prosecution -
> (a) that he was not in fact deprived of the power of self-control by the provocation ....."

The judge told the jury

> "Provocation is some act or series of acts done by the deceased to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind."

In our view, though the trial judge did not advert to the provisions of the statute, these words equate to the words of the statute. Then he went on to say "no provocation of course can render homicide justifiable". He pointed out to them that if they found provocation, then it would be manslaughter. He said the test to be applied was whether the provocation was sufficient to deprive a reasonable man of his self-control. Counsel argued that was not the test, it is a subjective test. From the reading of the statute, the test is to

deprive a man of ordinary character placed in the circumstances in which the appellant was.

The judge pointed out that, in considering whether the killing upon provocation amounts to murder or manslaughter, the instrument with which the homicide was effected must also be taken into consideration for if it were effected with a deadly weapon, the provocation must be great indeed to reduce the offence to one of manslaughter. If the weapon or other means of retaliation was not likely to produce death, a lesser degree of provocation will be sufficient.

Now that statement equates in our view to the provisions of the statute section 245(1)(d):

> "that his act was, in respect either of the instrument or means used or of the cruel or other manner in which it was used, greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstances to be deprived of his self-control by the provocation."

Up to that stage this Court feels that the direction on provocation was not in error. What the learned trial judge did not tell the jury was paragraph (c) of section 245; that after the provocation was given and before he did the act which caused the harm, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. The judge did not point out to them that there was this striking of the bottle his remaining there for a little while, his going home, changing and returning. That was not pointed out to the jury - what is usually called, I think, at common law, "cooling time". Well, that was not pointed out to the jury and it is in that respect that this Court finds that the trial judge was in error.

Now, the question this Court has to ask itself is whether, despite this non-direction or misdirection in respect of what we may call the "cooling time" to the jury, whether in the circumstances the proviso to section 41 of the West Indies Associated States Supreme Court Act should be applied. Section 41 (1) states:

> "Provided that the Court of Appeal may notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no miscarriage of justice has actually occurred."

In applying the proviso the Court wishes to adopt the words of Lord Chief Justice Parker in the case of Whybrow v. The Queen 35 Cr.App.R.141 at page 152, where he stated:

> "In considering whether the proviso is to be applied in any particular case, this Court must consider the whole of the circumstances of the case. We do not for an instant wish to put ourselves into the position of the jury. We take the verdict of the jury, which is one of guilty and which means that the jury are satisfied that the prisoner did do a criminal act. We then have to see how far the case is affected by the wrong direction given by the presiding judge, and we must take the whole of the facts into account and regard the whole of the circumstances. As I have already said, there was at the outset of the summing up a mistake made by the learned judge who was thinking, if I may put it compendiously, in terms of murder and not in terms of attempted murder."

Now, apply that statement to this case. What is the evidence? The jury clearly rejected the defence of accident. The jury was told of provocation. Of course there was this non-direction, but when we take the fact that here you are struc on the shoulder with a bottle which causes no injury to you, and you threaten that you are going to damage the man, and then you are told you need not do that because you suffered no injury. You leave and go back home and procure a knife nine inches long and plunge the knife into the stomach of the man who struck you on the shoulder. Of course we are not the jury but it seems that a man of ordinary character would not have acted in this manner. It would seem to be an act of revenge rather than loss of self-control.

The instrument was a deadly one and the means used was so cruel and was greatly in excess of the measure in which a person of ordinary character would have been likely to act in the circumstances to be deprived of self-control. The Court feels that any jury, any reasonable jury properly directed would have inevitably or without doubt come to the same conclusion and therefore in these circumstances the proviso would apply despite the misdirection in law or the omission in law. The appeal will be dismissed, and conviction and sentence affirmed.

E.L. ST. BERNARD
JUSTICE OF APPEAL

MAURICE DAVIS
CHIEF JUSTICE

N. PETERKIN
JUSTICE OF APPEAL