(4C)

SAINT CHRISTOPHER NEVIS ANGUILLA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 OF 1978

BETWEEN:

PHILLIP REVAN — APPELLANT

AND

THE QUEEN

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge

Appearances: T. Byron for Appellant

M. Joseph (D.P.P.) for the Crown

1978; Dec. 12 and 15

J U D G M E N T

DAVIS, C.J. delivered the Judgment of the Court:

The Appellant, Phillip Revan, was charged with the offence of murder, the particulars of which were, that he on the 15th day of January 1978, at "The Abbott" West Farm in the Parish of Trinity, murdered John Hendrickson. He was tried before Mr. Justice Glasgow sitting with a jury, and at the end of the trial, the jury found him guilty of murder and he was sentenced to death by hanging. He now appeals against his conviction on the following two grounds:-

"(1) That the Learned Trial Judge misdirected the jury when he ruled that the evidence of the witness for the prosecution was not capable of disclosing a basis in law for a finding by the jury that the defendant was provoked.

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(2) That the Learned Trial Judge failed properly to direct the Jury that in considering the totality of the evidence they were entitled to reject the defendant's version of his provocation and on their assessment of all the relevant circumstances infer that he had been provoked."

The facts, stated briefly, are that on the 15th January, 1978, the Appellant and the Deceased, together with Victor Charles and Eustace Storrod, were listening to a broadcast of a cricket match in a yard at "The Abbott" West Farm. The evidence is that they were all good friends. The Appellant had a pot cooking on a fire in the yard close to his room. The Deceased got up and lit a cigarette by taking a firestick from the Appellant's fireplace. According to Victor Charles, a witness for the Crown, the Appellant called on the Deceased to move from his fireplace, at the same time threatening to wound him if he did not do so. The Deceased then said to the Appellant, "You want me to out the fire?" The Appellant entered his room and emerged with a cutlass. He went up to the Deceased, and, raising the cutlass, said, "I bet I cut your mother's cunt." He did not attempt to cut the Deceased with the cutlass, but, instead, put back the cutlass in his room and returned with a long knife. He advanced towards the Deceased who, in backing away, stumbled on a stone and fell backwards; whereupon the Appellant thrust the knife into the left side of the Deceased. The Deceased got up and holding his side, said to Appellant, "Phillip", you mean to say you stab me for true?" The Deceased then fell to the ground bleeding from his side. The Appellant returned to his room with the knife, then came out and walked away in the direction of the sea. When the Police arrived some time later that day, John Hendrickson was seen to be dead and the Appellant handed them the knife.

The evidence of Victor Charles was supported by that of another witness for the Crown, Eustace Storrod.

/Dr. Charles.....

Dr. Charles Jong arrived some time later and viewed the body of the Deceased. He performed a post mortem examination on the body at about 6.30 p.m. the same afternoon. Externally, there was a 3½ inch long horizontal sharp stab wound 3 inches below the left nipple. On internal examination he found a 4 inch long lateral stab wound on the fifth rib through the chest cavity which cut right into the heart chamber. The cause of death was due to shock and excessive haemorrhage. In the doctor's opinion maximum force was necessary, and that the knife shown to him could have caused the injuries.

The Appellant's defence at the trial was put in an unsworn statement which he elected to make from the dock. Substantially it was the same as that given in a statement made to the Police on the same day of the incident. The Appellant stated that he was at his dresser peeling some food with his pot on the fire when the Deceased came over his pot. He told him to move but he did not do so, and he accordingly pushed him away. He went on to state that the Deceased then took up a big can which he had on the dresser and struck him three times on his face with it, threatening to put out his fire. The Deceased, he said, then pushed him three times, after which, he, the Appellant, took up a knife which he had on the dresser and pushed it into the side of the Deceased. The Appellant stated that he had no evil in his mind against him.

The Appellant's account was put in cross-examination to the two eye witnesses for the Crown, namely Charles and Storrod, who both rejected it.

In directing the Jury the learned trial Judge said at p.32 of the record,

> "You may well think that Victor Charles and Eustace Storrod were so pre-occupied with the cricket commentary that they did not notice a lot of the things that the accused has told us about, because if you

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> find that what Victor Charles said is the truth or what Eustace Storrod sai' is the truth you cannot also find that what the accused said is the truth, because the two things differ substantially. But if you find that what Victor Charles said or what Eustace Storrod said is the truth, is what really happened then there was nothing, no act done by the deceased to the accused which could cause him to be provoked. None at all. Certainly, taking a fire stick from his fire without his permission is not such an act."

And again, at p.34 of the record,

> "If you believe that the deceased shoved the accused as he claims, struck him with that can as he claims you may well think that these things caused the accused to lose his self control and so inflict the stab on the deceased. But if you find that Hendrickson treated the accused as the accused claims and the accused lost his self control you have to ask yourself the further question, would a reasonable person in those circumstances have lost his self control and if you answer that question in the affirmative then the accused is entitled to the benefit of the defence of provocation and then you have to say he is not guilty of murder but guilty of manslaughter by reason of provocation. Now members of the jury if you are in doubt as to whether the accused was provoked or not you will give him the benefit of that doubt and find him not guilty of murder but guilty of manslaughter. But again of course you may reject provocation all together. This will happen if for instance you accept the evidence of Victor Charles and disbelieve the accused. You may find that the accused did not act under the stress of provocation. You may well be satisfied that he intentionally and unlawfully without provocation, not in self defence stabbed the deceased with intent to kill him or to cause him serious bodily injury. If that is what you find the proper verdict is guilty of murder."

On ground I Counsel submitted that the trial Judge misunderstood the respective functions of Judge and Jury as applicable to the issue of provocation, and further that he misconstrued the evidence of the prosecution witnesses and failed to draw obvious inferences in presenting the evidence to the Jury.

He further contended on ground II that the Jury were entitled to reject the Appellant's account yet to draw from the totality of the evidence the inference that he was provoked. He referred to

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what he claimed was the omission by the trial Judge to tell the Jury that they were entitled to infer that the Appellant had been provoked. He referred the Court to the following cases:-

(1) R v Woolmington, 1935 A.E.R. p.1

(2) R v Prince, 1941 3 A.E.R. p.37

(3) R v Roberts, 1942 1 A.E.R. 187.

(4) Francis v Regina 1967, 12 W.I.R. 375.

(5) Jobe v Regina, 1969 14 W.I.R. 491.

Counsel conceded that the Jury by their verdict showed that they believed the Crown Witnesses and rejected the account given by the Appellant. He also conceded that there was very little such evidence of provocation, but contended that there was some evidence in the Crown's case from which provocation could be inferred, namely, the taking of wood from the fireplace of the Appellant by the Deceased. We do not agree.

In dealing with provocation, Lord Devlin in the case of Lee Chun-Chuen v Regina 1963, 1 A.E.R. 73, stated:

> "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."

And again, at page 80:-

> "Their Lordships have carefully examined the four cases cited and are satisfied that in each of them there was in the narrative of events on which the jury might reasonably have acted material that showed a possible loss of self-control connecting the provocation and the retaliation. In all these cases there was, besides the accused's story, other

/evidence.....

> evidence of the struggle on which a jury could act. A jury may reject, as well as an accused's denial of loss of self-control, a part or the whole of his account of events. What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one."

He then went on to cite the following passage from the Judgment of Viscount Simon, L.C., in the case of Mancini v Director of Public Prosecutions 1942 A.C. at p. 12:-

> "...it is not the duty of the judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is upon the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it."

We would adopt the passages referred to for the purposes of the instant case. We are of the view that had the trial Judge directed the Jury as contended for by Counsel for the Appellant he would have been inviting them to speculate as to provocative incidents of which there was no evidence and which could not have been reasonably inferred from the evidence.

The question of intent was not argued, but in our view was adequately dealt with by the trial Judge. Malice may be inferred where death results from a deliberate cruel act which was both unlawful and unprovoked.

For the reasons given we find that there is no merit in this appeal, and it is accordingly dismissed. The conviction and sentence are affirmed.

/Sir Maurice Davis.....