ANTIGUA

IN THE COURT OF APPEAL

CRIMINAL ~~CIVIL~~ APPEAL NO. 1 of 1982

BETWEEN:

SYLVESTER GEORGE - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Mr. Justice Berridge - Chief Justice (Acting)
The Honourable Mr. Justice Robotham
The Honourable Mr. Justice Bishop (Acting)

Appearances: D. Hamilton for the Appellant
Mr. Cenac, Director of Public Prosecutions for the Crown

1984: March 19, 21,
1984 ~~Nov.~~ June 18

JUDGMENT

BERRIDGE, C.J. (Acting) delivered the Judgment of the Court.

The appellant was, on the 7th day of October, 1983 convicted of the murder of Peter Elkin Octave on the 23rd August, 1982 and sentenced to death in the manner prescribed by law.

At the hearing Counsel for the appellant argued the following three grounds of appeal:-

(i) That the learned trial Judge misdirected the jury with regard to the Intent to be proved having regard to the malise of the evidence adduced by the prosecution.

(ii) That the learned trial Judge misdirected the jury with regard to the question of drunkeness.

(iii) That the accused trial was seriously prejudiced as a result of certain news reports prior to the learned trial Judge's summary.

With the leave of the Court Counsel also argued Accident as a further ground of appeal.

Briefly the Prosecution story is that on the night of 3rd August, 1982, during the Carnival Celebrations the appellant arrived at Castle /Harbour.....

Harbour Hill accompanied by one Devon Drew. He was armed with a gun and was sitting on a wall of Castle Harbour Hotel when he saw the deceased with a female companion approach. The appellant then pulled the gun from his waist telling Drew that he was ready for action. Drew asked him what he was talking about, left and when he got a certain distance away he glanced back and told the appellant "mind you don't shoot them people". Later he heard the sound of a shot whereupon he headed for his home.

The account of Blondell Lewis, the female companion of the deceased, is that she and the deceased having gone to this place which appears to be secluded and a bit of a lover's rendezvous she and the deceased were standing together when she heard a voice say "stick it up, don't move". She looked in the direction from which the voice came and saw a man with what she described as a "blue thing" across his nose and mouth. Lewis further stated that the deceased moved from before her and faced the person moving his shirt as he did so after which she heard a gun shot and the deceased fell to the ground. The person then fled.

In his unsworn statement from the dock which Defence Counsel argued differed little from the account given by Blondell Lewis, the appellant stated that on the night in question he had consumed one and a half glasses of brandy plus one bottle of bear and then at about 10 p. m. he went to the area where the incident occurred. He had the gun in his hand playing with it and had no intention of harming anyone. While approaching the top of the hill he saw a shadow move towards him he panicked, drew backwards, his foot shuffled on some stones his hands were flung into the air and the gun exploded. He stood up shocked when he saw a young man lying on the ground and then he ran away.

In arguing grounds (i) and (ii) together Counsel contended and we agree, that the pivotal issue in this appeal was whether the appellant

/had....

had the intention to kill. In developing his argument Counsel contended that the question of drunkeness was relevant to the state of the mind of the appellant at the time of the fatal shooting and that the failure of the trial judge to emphasise to the jury the fact that the appellant had imbibed intoxicating drink and indulged in "smokes" (which he asked the court to interpret as meaning smoking marijuana) amounted to a misdirection.

Counsel for the appellant relied on R v Sheean and Moe [1975] 2 All E.R. 960 a case in which both appellants were convicted of the lesser offence of manslaughter it having been argued in the case of Sheean that he was so drunk that he did not form the necessary intent to murder and in the case of Moe that he had a lot to drink and was overcome by excitement. Counsel invited the Court to relate the excitement of Moe to the general excitement prevailing at the festive period of Carnival which could conceivably have affected the appellant but this we are unable to do as this would make a mockery of justice.

For reasons which will unfold themselves later we do not propose to pronounce on the adequacy or otherwise of the trial Judge's directions to the jury on the issue of drunkeness. Suffice it to say it is well established that if the defence suggests intoxication as negativing intent it is incumbent on them to offer evidence of it, if indeed they do not have to prove it. D.P.P. v Beard 14 Cr. App. Rep. 159 at 199 refers. The evidence must at least suggest intoxication or that the appellant's mind was affected by drink at the time of the incident and the mere fact that the mind of the appellant was affected by drink so that he reacted in a way in which he would not have done had he been sober does not assist him provided the necessary intent is there. A drunken intent is nevertheless an intent.

In addition to the foregoing R v Howell [1974] 2 All E.R. 806 listed among the cases submitted by Counsel for the appellant is authority for saying that self induced intoxication resulting from drink or drugs was no defence to Manslaughter (an issue on which the

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trial Judge adequately directed the jury) however great the degree of intoxication.

The foregoing propositions when placed alongside the evidence show that (i) the only suggestion of intoxication was the imbibing by the appellant of one and a half glasses of brandy and one bottle of beer. (ii) Far from the mind of the appellant being affected by the drinks consumed his recollection of all that happened immediately before and after the incident is crystal clear. He describes in detail and with precision inter alia how he got to the area of the incident, he gives what he describes as an explanation as to how the firearm went off, the route he took to get home after the shooting and how he sat on a stone for about an hour saw a gentleman whom he questioned and asked for a cigarette. All this does not bespeak someone whose mind was affected by drink and/or drugs for that matter.

In the circumstances we are of the view that the trial Judge was under no obligation to direct the jury on the issue of drunkeness as that issue did not properly arise but having done so we are of the view that his directions were adequate. Even if his directions or non directions had amounted to a misdirection it would avail the appellant nothing on the authority of Gaston v R [1978] 24 W.I.R. 563. In Gaston's case it was argued that the trial Judge misdirected the jury on the issue of provocation. The Court while agreeing that there was misdirection found that on the evidence the issue never arose and it was thus unnecessary for the trial Judge to direct the jury on that issue and there was no miscarriage of justice.

Divorced from the issue of drunkeness the trial Judge at page 93 of the record gave adequate directions on the question of intention to kill in dealing with malice aforethought and again at page 100 in dealing with manslaughter and at page 148 in dealing with accident and finally at page 156 in relation to Manslaughter.

/Counsel...

Counsel was permitted to argue the defence of accident as a separate and additional ground. He complained that in the closing stages of his summing up the trial Judge omitted to tell the jury what their verdict should be in the event of their finding that the killing was accidental.

The trial Judge adequately put the issue of accident to the jury at page 92 and pages 146 to 147 of the record and on the latter occasion referred to a decided case the facts of which resulted in the acquittal of the person accused. Counsel agreed that the summing up must be read as a whole and we do not consider that any injustice resulted from the omission in question moreso as the evidence of Devon Drew as to the statement of the appellant that having drawn the revolver from his waist he was going "into action" and more particularly the evidence of Dr. Ramsay as to the trajectory of the bullet discharged (according to the appellant, after his hands were flung in the air) making it abundantly clear that the defence of accident must fail.

In arguing that the appellant's case prejudiced by the erroneous radio report that he had previous convictions Counsel conceded that at the trial he informed the trial Judge that as a result of action taken by the latter in open court that any prejudice had been removed but at the hearing he contended that prejudice had already seeped in and festered in the minds of the jury.

We are of the view that it was open to Counsel to apply for a new trial, he did not do so and the trial Judge was under no duty to discharge the jury and to order a new trial. This ground of appeal cannot be entertained. Charles James v R [1959] 1 W.I.R. 117 refers.

In the light of the foregoing we find that there is no merit in this appeal which is dismissed.

N.A. BERRIDGE
Chief Justice (Acting)

L.L. ROBOTHAM,
Justice of Appeal

C.M.D. BYRON,
Justice of Appeal (Acting)