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DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 3 of 1986

BETWEEN:

CYRILLE EDWARDS - Appellant

and

THE STATE - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Mr. A. Piper and Mr. A. Astaphan for appellant
Mr. D. Christian, D.P.P. for Respondent

1987: Feb 9.

JUDGMENT

BISHOP J.A. delivered the Judgment of the Court

Cyrille Edwards and Edward Corriette were charged with the murder of Francis Bellot on the 16th December, 1984. The former was tried separately in January, 1986; and on the 31st January, 1986, the jury returned a verdict of Guilty.

On the 14th February, 1986, a Notice of Appeal against conviction was filed. The only ground of appeal stated was that "the learned trial Judge erred in law in that she failed to direct the jury that an intent to kill or to cause grievous bodily harm does not negative provocation".

On the 15th January, 1987, a Notice of Motion was filed seeking the leave of this Court to file and argue seven additional grounds of appeal. Leave was granted when the matter came on for hearing on the 9th February, 1987, but in the course of his presentation, learned Counsel informed the Court that his arguments and submissions would be limited to a complaint against the directions to the jury on the question of provocation.

It was submitted on behalf of the appellant that the learned Judge failed to direct the jury adequately or at all on the issue of provocation, and that the directions given had the effect of withdrawing provocation from consideration by the jury.

The learned Director of Public Prosecutions submitted that in her

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summing up the trial Judge did direct the jury on the issue of provocation and that, in the circumstances of this case, the directions were adequate. He contended that the impact of the summing up must have left the jury with a clear understanding of what they ought to consider when determining whether or not there was provocation on the facts before them.

After hearing learned Counsel's submissions fully, this Court, in a unanimous decision quashed the conviction, set aside the verdict of Guilty of Murder, substituted a verdict of Guilty of Manslaughter and imposed a sentence of 10 years imprisonment with hard labour. In addition, it was indicated that the reasons for our decision would be put in writing and given at the next sitting of the Court in this Commonwealth.

The reasons are as follows:

Francis Bellot died on the afternoon of the 16th December, 1984. Two days later Dr. de Ridder carried out a post mortem examination on the body. His finding that the cause of death was severe brain damage remained unchallenged. When he examined the skull he saw a ½ centimetre entry hole and a 2 centimetre exit hole, a fracture of the base of the skull and a subdural haematoma on the left. Fragments of bullets were removed. The doctor formed the opinion, which was uncontradicted, that the injuries which he saw could have been the result of penetrating bullets.

The case for the State was contained essentially in the accounts of two eye witnesses and in a statement dictated to the police by the appellant on the 17th December, 1984.

In their testimony, Anthony Agar and his wife Carmel, said that they were travelling in a pick-up along a road leading from Soufriere Village to Morne Rouge, at about 4.00 p.m. when they saw three young men running - one behind the other - very quickly, on the said road. They then turned off the road into a downward sloping footpath. When the man in front reached a little more than half way along that path, he fell face forward. The second man caught up with the first one, stopped when he reached him, bent over, stretched out his hand and immediately thereafter the sound of a .22 pistol was heard. (The role of the third young man was irrelevant to this appeal). The two young men ran away leaving the other man on the ground.

It was the State's case that the young man who fell was Francis Bellot and the second young man was the appellant. The trial was conducted on the basis that it was accepted that the appellant shot Francis Bellot and that Francis Bellot died as a result.

The jury.....

The jury was invited to find that the appellant chased Bellot along the main road and down the footpath, and that this chase and the subsequent shooting were deliberate and unprovoked, and that this conduct by the appellant amounted to an attack carried out with the intention of killing Francis Bellot. Further, there was no justification or excuse in law for doing so.

That was the State's position based upon the evidence of Anthony and Carmel Agar. However, the description of the incident, as given in the statement dictated under caution, differed strikingly from that related by the eye-witnesses; and that statement from the appellant formed part of the State's case. In our view it was an important aspect, particularly so in the light of the ground of appeal which was argued before us.

Cyrille Edwards told the police that he and Edward Corriette had broken and entered a house and stolen a number of things. His companion had taken a gun. Then, while on the way from the house, a rastafarian came out of the bush and accused them of stealing his marijuana. This rastafarian also threateneed that when he was finished with them he would bury them there. Then the statement continued thus:-

> "The rastafarian was running behind us with a long knife and we run and run. When we reach a certain place we could not run we were tired. It was bush we were beating. We don't know there. When I see him coming to me with the knife I burst a bullet. He freeze a bit. He pass at back in some bush and he was coming back behind us again. He send a couple big stones from the bush. Only one stone slightly got me on my shoulder. So I spin around and put the gun towards him. My finger touched the trigger slightly and the bullet left. All of a sudden I saw him fell down..... I run....."

Stripped of all its subtlety the statement showed clearly that the appellant admitted firing two shots, the second of which hit the rastafarian. The main differences from the eye-witness account were (i) that the appellant was not chasing but being chased and (ii) that when the appellant fired the second shot the man was not on the ground but standing or running and in the act of assaulting the appellant. In addition, according to the apellant's version to the police, he was threatened both by word and by act and when a further assault became imminent, he shot the assailant who was armed with a knife.

At his trial, the appellant exercised his right to make an unsworn statement from the dock. That represented the extent of his defence, and while there were undoubted similarities to the statement he dictated to the police, there were significant differences. It will

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assist to refer to the statement from the dock.

The appellant said that he and another man were on their way from "white man house" when they were challenged by a "dread" (rastaman) who accused them and shouted at them that they were stealing all his marijuana and goats. He charged at them with a cutlass. The appellant explained that he ran, pursued by the rastaman who was shouting in patois, or "Ba-way" - (translated: stop him!) The appellant said that he was unfamiliar with the area and he ran south, then changed direction and ran north. Threats and shouts from rastafarians continued and he changed direction yet again in an effort to escape from those who were shouting and trying to block him. When he heard the same rastafarian (who had threatened and chased him) shouting to call the others and telling them that he had them - the appellant and his friend - cornered, they could not escape again, in the words of his statement:-

> "I send a shot in the air and make a get away..... I was running. I didn't know where I was running. So when I send the shot, we (me and my partner) run..... I was a bit tired so we stop and take a little rest..... When we heard them coming we start to run again. Unknown to me the direction I was running was towards them. The same dread bareé - 'ba-way' us again and he shouting at the others come..... I was afraid. I did not want to die because them action and words was sounding like they going to finish with us. I was panicking. I was worried as I see them coming towards us..... I saw death in my eye as the one that was closer was coming to me with the cutlass in his hand. I was so afraid that when he charged at me I pulled the gun and shot left. So when shot left then this happen very quick. So I run away..... I still hear other rastaman still chasing us. We get away. When I get away I say praise God because they chasing us. I did not want to kill him..... I just want to get out alive....."

The appellant was claiming that he was threatened and chased by rastafarians at least one of whom was armed - not with a knife, but with a cutlass. Fear, panic and imminent death made him react. He did not wish to kill the man. He wished to stay alive and not die. He wished to get out alive.

So much for the essential part of the material which the jury had before them.

I turn now to the summing up insofar as it dealt with provocation, bearing in mind that the learned trial Judge also dealt with the issue of self-defence with which direction there was no quarrel. The jury clearly considered this issue of self defence and must have decided that defence had failed; or to put it another way, the prosecution must have

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satisfied them, so that they felt sure, that what the appellant did was not done in defending himself. That issue having been raised and having been determined, the jury was then left in the position where a decision was required on whether, in all the circumstances of the case, indeed the same circumstances that were analysed when considering self-defence, there was provocation which would justify a reduction of the offence of murder to that of manslaughter. Clearly the learned trial Judge was satisfied that the issue of provocation ought to be left for decision by the jury; and it was never contended otherwise.

At the outset of the summing-up, the trial Judge referred to provocation in law, and directed the jury that if Cyrille Edwards was provoked he was not to be acquitted, but rather, such a finding on their part would mean that the offence of murder would be reduced to the offence of manslaughter.

The learned trial Judge then gave the jury the following direction:-

> "Provocation is some act or some series of acts done or words spoken which causes in the accused a sudden and temporary loss of self-control and which would cause a reasonable person to lose self-control and to behave as the accused did. So you should consider two questions: Did the deceased's conduct cause the accused to lose his self-control? Second question: Would that conduct have caused a reasonable person to lose his self-control? In considering the question whether a reasonable person would lose his self-control you should take into account everything said and done according to the effect which in your opinion would have on a reasonable man. A reasonable man is a person having the powers of control to be expected of an ordinary person of the sex and age of the accused sharing such characteristics of the accused as you think would affect the gravity of the provocation to him."

Then the trial Judge directed the jury on the burden and standard of proof required when the issue of provocation was raised. She also explained to the jury the concept of "cooling time". There was no complaint with any of these directions and it is unnecessary to refer further to them.

Turning to the facts at that stage of the summing-up, the trial Judge referred to and cited, in detail, passages from the testimony including that of the doctor and of the eye-witnesses Anthony and Carmel Agar. She also directed attention to the evidence of the investigations carried out by the police and to what took place as related by Sergeant Martin. However, the learned Judge did not also assist the jury with the facts that emerged from the cross-examination of these eye-witnesses

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and Sergeant Martin. The case for the appellant was to be found not only in the statement that he made from the dock but also in the cross-examinatioin of the prosecution's witnesses.

The learned trial Judge then assisted the jury with the issue of self- defence before directing them in the following words, just before she concluded her summing-up:-

> "If you find that he was provoked because he was just accused of stealing goats and marijuana, and if you find that it was reasonable for a reasonable person to be provoked, then he is entitled to a verdict of manslaughter; because if the defence of provocation succeeds, the offence is reduced from murder to manslaughter..... Here, if you find for example, that the accusation of stealing constitutes provocation then it is open for you to find the accused not guilty of murder but guilty of manslaughter.
>
> If you find that the accusation of stealing constitutes provocation, then it is open for you to find the accused not guilty of murder but guilty of manslaughter.
>
> I do not think I can assist you any further.
>
> I invite you to retire to consider your verdict."

The passages quoted above represented the extent of the directions on the issue of provocation.

It was inaccurate to direct the jury that provocation could be the result of "words spoken" as an alternative to "acts or series of acts done".

The law of provocation, in Dominica, like that in other territories served by this Court, is not the same as the law in the United Kingdom, or in Trinidad and Tobago or Jamaica or Barbados. The state of the law in the territories served by this Court was mentioned as recently as 1984 in St. Vincent and the Grenadines and 1986 in Antigua and Barbuda. In the hope that it will be helpful we recall those occasions.

In April 1984 in the case HAMILTON v REGINA (Criminal Appeal No. 6 of 1983, in St. Vincent), Bernard Hamilton was convicted of the murder of Marilyn George who had been his "common law wife" for seven years. The evidence disclosed only the use of words by her to him. At the trial, the jury was directed that the law was that: "No words or gestures however opprobrious or provoking will be considered in law to be provocation sufficient to reduce homicide to manslaughter if the

/killing...

killing is effected with a deadly weapon or an intention to do the deceased some grievous bodily harm be otherwise manifested".

The Judgment of the Court of Appeal was delivered by Robotham J.A. (as he was at that time) and among other things he stated:-

> "This is an accurate statement of the law and despite its consequences, is the law applicable to the State of St. Vincent. It can be found in all editions of Archbold's down to the 33rd edition in 1954, para 1644 page 938;"

and later in the Judgment:

> ".....it should be noted that although the general rule that mere words can never amount to provocation has been modified in the United Kingdom, this was done, not by judicial pronouncements but by Parliament in the passage of the Homicide Act 1957. Judges and Courts of Justice are enjoined to interpret and enforce the law irrespective of consequences, and no doubt the United Kingdom Parliament had this in mind when that Act was passed, which had the effect of modifying what was up to then a well entrenched principle of the common law."

Robotham J.A. (now C.J.) pointed out that all the law on provocation by words was to be found in HOLMES v D.P.P. (1946) 2 All E.R. 124 and that that was still the law to be applied in "territories which have not, for whatever reason enacted legislation similar to section 3 of the Homicide Act 1957". Then, the territories served by this Court were seriously urged to consider the passage of such legislation "not so much that uniformity can be achieved in the region, but that the interests of justice in appropriate cases may be better served".

In the Judgment of this Court in NICHOLAS v REGINA which I had the privilege to deliver in Antigua and Barbuda, in November 1986, I reminded that the territories served by this Court have not enacted law similar to that contained in section 3 of the Homicide Act 1957 of England, under which evidence of things said or things done or things said and done could be analysed to decide whether or not a person charged was sufficiently provoked to lose self-control.

I also referred to the case DIRECTOR OF PUBLIC PROSECUTIONS v CAMPLIN (1978) 64 Cr. App. R. 14 in which Lord Diplock gave a brief survey of the development of the doctrine of provocation at common law and pointed out that "with two exceptions actual violence offered by the deceased to the accused remained the badge of provocation right up to the passing of the Homicide Act 1957".

/Thus the.....

Thus the use of words unaccompanied by an act or series of acts by the deceased to the accused would not be suffient in law to amount to provocation. When therefore the learned trial Judge left the jury to retire with the final direction that the accusation of stealing should be used by them to determine whether there was provocation, it was an incorrect direction. It referred them only to the words used by the deceased to the accused and his friends to the effect that they were stealing his goats and his marijuana.

The statement of the appellant to the police (part of the State's case) and the statement from the dock, disclosed clearly that the appellant was urging that he was subjected to a series of acts done by the deceased and others and by the deceased alone. Above are quoted passages from each of the statements which, despite differences, formed part of the material which should have been left with the jury. Quite apart from the accusations of stealing and threats to kill the appellant and his friend, he said that they were chased by the deceased (armed with a long knife or a cutlass) and his rastafarian friends, through an area thick with bushes and with which he (the appellant) was unfamiliar. He, as it were, ran around in a circle until he was exhausted. When he saw the deceased approaching him, still armed, he fired a warning shot in the air but this did not deter the deceased. So he and his friend had to run again. The deceased pursued him and threw stones at him one of which struck him on his shoulder. According to his statement from the dock, as a result of all of the chasing, shouting of threats and his not knowing the area, as well as the fact that the deceased was armed with a cutlass or long knife, he was afraid and panicked. Death stared him in the eye when the deceased charged at him with the cutlass and he "pulled the gun and shot left".

The above does not necessarily reflect all of the acts alleged by the appellant in his statement. It is intended to indicate that the jury ought to have been assisted with the picture which developed from the accusation of stealing to the pulling of the gun. To tell the jury "if you find that he was provoked because he was just accused of stealing goats and marijuanna" was inadequate; and that being, in effect, the only part of the summing-up where the learned trial Judge related any facts to this particular aspect of the law, we were in agreement with counsel for the appellant that the trial Judge failed to direct the jury adequately on the issue of provocation. As was stated earlier, the same facts which were considered in respect of self-defence ought to have been left with the jury.

In PALMER v REGINA (1971) 1 All E.R. 1076 it was pointed out by

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Lord Morris of Borth-y-Gest, at page 1084:-

> "If the jury are satisfied by the prosecution beyond doubt that an accused did not act in self-defence, then it may be that in some cases (of homicide) they will have to consider whether the accused acted under the stress of provocation."

The case before us was such a case.

Then Lord Morris of Borth-y-Gest continued:-

> "If the jury are satisfied by the prosecution that the accused did not act in self-defence and was not provoked then the jury will have to decide whether the accused had the intent that is necessary if the crime of murder is to be proved."

The consequence of the direction as given by the learned trial Judge was that the appellant was deprived of a chance of the jury returning a verdict of guilty of manslaughter.

For these reasons the Court was satisfied that the conviction of murder should be quashed. We also gave careful consideration to all of the relevant circumstances and were convinced that this was not a case in which it would be proper to invoke the statutory proviso, but rather that a verdict of guilty of manslaughter should be substituted.

On the question of sentence we observed that the maximum term of imprisonment for the offence of manslaughter is ten years - a period which we regarded as in need of review, especially when there are lesser offences for which greater terms of incarceration can be imposed and that in other territories served by the Court the maximum term is life imprisonment.

We were of the view that the maximum sentence of 10 years imprisonment with hard labour was justified.

E.H.A. BISHOP,
Justice of Appeal

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L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE
Justice of Appeal