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DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 5 of 1986

BETWEEN:

ALEXANDER JOSEPH - 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. H. Dyer and Mrs. Z. Dyer for the Appellant
Mr. D. Christian, Director of Public Prosecutions for the State

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1987: Feb. 9, 10.

JUDGMENT

MOE, J.A. delivered the Judgment of the Court

The appellant was convicted of the murder of Anthony Elie and sentenced to death. On 10th February, 1987, we allowed his appeal, quashed the conviction and sentence, substituting therefor a conviction of manslaughter and sentence of 10 years imprisonment with hard labour. We now put our reasons in writing for so doing.

Around midnight of the 20th October, 1986, Anthony Elie sustained four stab wounds and died about 2.10 a.m. on the 21st October, 1986, from massive haemorrhage as a result of the wounds he received to his spleenic artery. Events and circumstances leading up to the infliction of the fatal injuries as told by prosecution witnesses were as follows:

About 10.30 p.m. on the 20th October, 1986, the appellant and the deceased became engaged in a quarrel outside the premises of the Hideout Disco. The deceased was swinging a rope at the appellant who said to the deceased "what I do you; cool out, boy, I have no trouble with you". The deceased made attempts to send the rope over the appellant's neck, and the appellant backed away, repeating cool out boy. The deceased hit the appellant around his stomach with the rope and the appellant moved back warning the deceased. One witness said that when the rope which the deceased was swinging hit the ground it did so with a sparking sound. The appellant was heard to say it's either you kill me or I kill you. He moved forward and struck the deceased in his forehead with a gin bottle which he had in his hand. The deceased fell, got up, picked up two

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bottles and threw them at the appellant. One witness said a bottle struck the appellant around his right thigh while the other went into the crowd which was looking on. According to one witness after throwing the rope at the appellant several times when the appellant said cool it, I have nothing with you, the appellant and deceased started to fight which (fight) ended about quarter to twelve.

After the deceased threw the two bottles at the appellant, he ran in the direction of the police station and the appellant ran after him. The deceased fell in a drain and the appellant stabbed him twice while he was on his stomach. The deceased got up and continued running towards the police station shouting, help, police help. The appellant ran after him. The deceased fell again about thirty yards from the station. While the deceased was lying on his back and kicking in the air, the appellant stabbed him twice again. A police Constable whom they had run past, came up and held another man who had chased the deceased along with the appellant while the appellant ran away.

The deceased was taken up and carried to the Police Station thence to the Princess Margaret Hospital where he was found to be suffering with a punctured wound on the right eye about the right eye brow, a punctured wound on the left side of the abdomen, a punctured wound on the left inguinal area and a punctured wound on the right side of the buttocks. Two of those wounds injured the arteries and caused death as stated above.

The appellant about 1.00 a.m. on 21st October was seen bleeding from his forhead and when asked about it said he was fighting with a guy and the guy burst his head with a bottle. He was examined by a doctor at the Hospital who found a lacerated wound on his forehead about 1 inch in length which he said was probably inflicted with a knife or a bottle.

In a statement from the dock the appellant said that he was outside the disco speaking with someone when he was held at the back. He turned and saw that it was the deceased who was holding him. He asked what he had done him and the deceased said "longtime I looking for you to beat you up. I will kill you." He asked the deceased to cool it. The deceased pulled a rope which had a weapon at the end of it. He swung it at him. He pleaded with the deceased to stop. The deceased kept coming at him and he continued going back. In swinging the rope, the deceased struck him in his stomach and on his forehead. When he got struck on the forehead, blood came. When the weapon, a knife, fell from the rope, both of them rushed for it but he managed to get it. The deceased picked up bottles and pelted at him. He shielded for cover.

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The deceased rushed him again and they continued fighting from there. He hit the deceased with the knife but had no intention to kill him. He was taken to the hospital to have attention to his head.

The appeal was argued under three main heads. Counsel attacked the summing up on the grounds that the learned trial Judge did not give clear, precise and full directions neither on the issue of self-defence nor on the question of provocation. There was also a ground of appeal that the verdict is against the weight of the evidence in that there was clear and abundant evidence with regard to provocation and the verdict ought to have been one of manslaughter.

As to self-defence the learned trial Judge explained the defence in very general terms but did say to them "you must recognize that the person defending himself cannot be expected to weigh precisely the exact amount of defensive action which is necessary. Therefore if you conclude that the accused did no more than what he thought was instinctively necessary you should regard that as very strong evidence that the amount of force used was reasonable and necessary."

While the accounts of the incident from the prosecution and the appellant show a fight between the deceased and the appellant the evidence is that at a certain point in time the deceased ran away from the appellant and that while running away from the appellant, the deceased fell twice. On each occasion while the deceased was on the ground, the appellant struck him twice with a knife, all the while the deceased was shouting, "help, Police". There was no challenge to this evidence.

An essential element of self-defence is that the person attacked have used no more force than was reasonably necessary in all the circumstances. The degree of force used by the appellant in stabbing at the deceased four times while he was supine thereby inflicting four stab wounds was not action reasonably necessary in defence. On the unchallenged evidence there was really no proper evidence of self-defence to the jury. We think therefore that the question of the learned Judge's failings in directions on this issue are of no import.

With regard to the issue of provocation, one complaint was that the learned trial Judge failed to relate the directions on the law to the facts of the case specifically to the appellant. The second complaint was that the learned trial Judge failed to direct the jury that if after reviewing the whole evidence they were left in reasonable doubt as to

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whether the act was provoked then the appellant was entitled to be acquitted. This head of appeal may be conveniently considered with the ground that the verdict is against the weight of the evidence.

When the learned Judge was giving general directions at the commencement of the summation there was a clear and correct direction as to where the burden of proof lay during a criminal trial. Then turning to the issue of provocation the learned Judge defined provocation and reminded the jury that on this issue "the burden of proof is on the prosecution, so it is not for the accused to prove that he was provoked. It is for the prosecution to satisfy you beyond a reasonable doubt that the accused was not so provoked. If you think that he may have been provoked, then you can only convict him of manslaughter....." Having considered the summation as a whole we feel that the directions would have left it clear in the Judge's mind what their duty was in this regard.

Turning to the facts the learned Judge said:

> "....so you will have to determine if there was provocation.
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> There was evidence that there were some words used by the deceased. The words of the deceased were 'long time I looking for you to beat you, I will kill you'.
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> Now, words do not amount to provocation, so you don't look to words to determine whether there has been provocation. Put that out of your minds. What you have to look for is the act of the deceased person and the act we have here in evidence is that the deceased Anthony Elie was swinging a rope. The prosecution said the rope had no weapon. The defence said that the rope contained a weapon tied to the end. You will have to determine that, whether there was a weapon or not. So this is the act that you will have to look at to determine whether there was provocation, the swinging of the rope by the deceased."

The learned Director submitted that the above passage provided a sufficient correlation of law and facts on the issue. At a later stage in the summation, the learned Judge also reminded the jury of what the appellant said in his statement from the dock. The submission on behalf of the State then was that on a consideration of the summation as a whole the jury was not misled as to the appellant's position as regards provocation and that except for an omission of the specific reference to the incident when the accused was struck with a bottle, the learned Judge's directions were otherwise ample.

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The learned Judge commenced the summation with the traditional general directions and then gave directions on law applicable to the case. Whilst giving directions in the early part of the summation there was some reference to the evidence on the issue of provocation as already set out abvoe. Thereafter having reviewed the evidence from the various witnesses for the prosecution, the learned Judge went on to remind the jury of what the appellant said in his statement from the dock. At the end of the dock statement the learned Judge directed "what he (appellant) was saying is that he was defending himself; that he didn't have the knife, it was Anthony who had the knife and he dashed and got that knife when the knife fell from the rope and he turned around and defended himself. ".....and gave directions on self-defence, relating the law to the material the appellant had put for consideration. At this point when the Judge directed the minds of the jury to what the appellant was urging she stressed self-defence. There was no reference to provocation. By the Judge dealing with the material in this manner one likely result was that the jury may have got the impression that the Judge was indicating that on what the appellant urged only the issue of self-defence arose or could succeed. Further than that the Judge evidently overlooked the point that if self-defence was eliminated by the prosecution establishing that the appellant was not so acting, then an issue remained as to whether the appellant acted under provocation on which issue the same evidence considered on the matter of self-defence was also material fit for cosnideration. See Palmer v R (1971) 55 Cr. App. Rep. 223.

In this case a strong line of defence which emerged during the trial was that the appellant was provoked into chasing and striking out at the deceased. While, as indicated earlier, the learned Judge did refer to some extent to the issue of provocation, we do not feel that the jury received an adequate reminder of and assistance on the appellant's defence in this regard. The evidence is that there was the swinging of the rope at the appellant as the learned Judge mentioned; but it was the deceased who picked a fight with the appellant and the appellant several times asked the deceased to cool it. Although the appellant indicated that he did not want to fight, the deceased, attempted to get the rope over the appellant's neck; struck the appellant in his stomach with the rope; struck the appellant on his right thigh with a bottle; struck him in his forehead either with a bottle or a knife and wounded him. In our view there was abundant evidence on which the jury could have found that the appellant was provoked into behaving as he did and all these matters ought properly to have been left with the jury for consideration.

It follows from what has been said that there was an unfortunate

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oversight in the summation by the learned trial Judge such as to make the verdict of murder unsatisfactory. In the circumstances the appeal was allowed and the verdict and sentence substituted accordingly.

G.C.R. MOE.
Justice of Appeal

L.L. ROBOTHAM
Chief Justice

E.H.A. BISHOP
Justice of Appeal