

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 of 1987

BETWEEN:

CHARLESWORTH RICHARDS - Appellant
and
THE QUEEN

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

Appearances: Sydney Christian for the Appellant
Dunbar Cenac, Director of Public Prosecutions for the Respondent

1987: June 23
Nov. 3

JUDGMENT

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

The appellant was tried before a Judge and Jury on a two-count indictment which charged that:

- (1) On the 4th day of August, 1986, in the parish of St. John's in Antigua and Barbuda, he murdered Ian Joseph;
- (2) On the 4th day of August, 1986, in the parish of St. John's in Antigua and Barbuda, he shot at Cheryl Shaw with intent to murder her.

He was convicted of both charges but this appeal is concerned with his conviction on the first count.

On the 4th August, 1986, Ian Joseph died from a gun shot wound which he sustained in his back at the hands of the appellant. As to how the appellant came to deliver the fatal wound the prosecution relied on an account given by Cheryl Shaw and a statement given to the police by the appellant under caution.

Cheryl Shaw's account was:

"Rootsman, Bernard and I came out of the door that faces the Treasury. All three of us went down the road by the beauty salon. We were walking Cross Street. When we got to Gloria's Salon, I looked back. I saw the accused. He ~~was walking~~ behind us in the same direction we were walking. Rootsman, the half hand man and I turned back walking in the direction of the cinema. I saw the accused pull something between the waist.

/Then....

Then Rootsman ran in the direction where Baker was. Then accused turned around facing the cinema and started firing off something. He was firing off something in the direction of the cinema. Rootsman was running when accused was firing. I do not know what happened to Rootsman."

The appellant in his statement to the police said:

"After the movie done, Cheryl and Rootsman tun down the road. Me follow behind them. Cheryl must a tell Rootsman me a follow them and tun back coming towards me. After me see that, me pull out me gun, me pull back the hammer and the gun fire off. Cheryl ball murder. I was close to them. Rootsman was holding on to Cheryl. He let she go and run pass me. Me point the gun at him and fire off a shot. Me see he bend down near a car and hold his side."

In evidence at the trial the appellant gave the following account :

"While going down the road I reached by the beauty salon. I was on the west side going. I notice Bernard. I notice the one hand. I saw when the three people turn the corner. I was not following them. When I was just pass the salon I saw Rootsman pulled something out of Cheryl's yellow shoulder bag. I did not observe at the time what it was. After he pulled the thing out of Cheryl's bag the three of them turned. Rootsman started running towards me, Cheryl and Rootsman was standing at the corner. After I see Rootsman running coming towards me, he done threaten me already, knowing he done chop me with the axe, whatsoever he have in his hand I know if he get close to me he will damage me. So after I see that, I pulled the gun from my waist. He was about from about the witness box to the edge of table from me." Cheryl was about by the door. I fired two shots. Rootsman drifted to the right. The thing dropped out of his hand. I fired a third shot after he drifted to the right. Then he began to run up against the Treasury Wall. I was still watching him. Bernard picked up what dropped from Rootsman hand. While watching Rootsman I see him hold his side and go down."

Under cross-examination he said :

"I fired three shots at Rootsman. Two when he was running towards me and one after. After the third shot, I see him hold he side and went down. I don't know if the other two caught him. When I fired the third shot, Rootsman was running. He was in an angle. He was running away from me at the time. I fired the third shot to scare him off. He was running going behind the car. I do not know what his intention was. The third shot caught Rootsman. I hear them say the shot caught him in his back. I don't really know where this shot caught him.?"

The grounds of appeal against the conviction were argued under one head of complaint against the directions of the learned trial Judge

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on the issue of provocation. Counsel's submissions concentrated on directions given by the learned Judge to the jury on their request for further directions, having already retired for approximately 2 3/4 hours. The record indicates that the jury requested further directions on manslaughter and what is intention in murder. It was Counsel's submission that the jury's request implied that they were concerned with whether this was a case of manslaughter; that is, whether murder had been reduced to manslaughter by virtue of provocation, and the appeal was argued on that basis only.

The first complaint was that the definition of manslaughter provided by the Judge was not applicable to the circumstances of the case and therefore caused confusion in the minds of the jury as to the real issues in the case. In his further directions the learned Judge had said "Manslaughter is the unlawful and felonious killing of another without any malice either expressed or implied." This was conceded to be a correct definition of involuntary manslaughter but it is also accepted that when dealing with the issue whether murder (i.e. where the relevant intention is present) is reduced to manslaughter by virtue of provocation the definition is inappropriate.

The second complaint which really follows closely on and ties in with the above was that having given a definition of manslaughter inapplicable to the circumstances of the case the learned Judge proceeded to give to the jury directions on the intention to kill or do grievous bodily harm - the intention necessary in murder. Here Counsel contended that all this had the effect of impressing upon the jury that once they find that the appellant formed the requisite intention their only course was to find him guilty of murder. Again the observation may be made here that in considering whether provocation has reduced murder to manslaughter, the accused's intention is not then in question. It has been established. Murder has been proved and the issue then is whether murder is reduced to manslaughter by virtue of a certain set of circumstances. In *Lee Chun-Chuen v R* (1963) 1 All E.R. 73 Lord Devlin delivering the opinion of the Privy Council reaffirmed the position stated by Lord Goddard C.J. in *A.G. of Ceylon v Perera* (1953) A.C. 200 that "the defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."

We cannot hold however that the directions given on intention had the effect contended for by Counsel. For it appears that having given the definition against which there is complaint, and the directions on intention, the learned Judge exhorted the jury in relation to their verdict. Thereupon Counsel for the appellant asked the learned Judge to assist the jury further on the issue of provocation and the Judge

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gave directions on the issue. The directions which the Judge then gave from the basis of the appellant's third complaint. Counsel's submission was that the learned trial Judge merely repeated the format of what was told to them earlier in the summation. It is convenient to set out what the learned Judge said. He stated:

"The question of provocation

If you find provocation, it reduces the charge of murder to manslaughter. I have already told you that the accused, once you find that he was provoked, he would still be entitled to the verdict of manslaughter.

Provocation is some act or series of acts done by the deceased to the accused which would cause in any reasonable person and actually cause in the accused a sudden and temporary loss of self control, rendering the accused so subject to passion as to cause him to retaliate.

I have also analysed what the accused said got into him, that he saw the deceased put his hand in Cheryl's bag and pulled out something and rushed towards him. That is what he said and that is what the defence is relying on as to provocation.

You have to ask yourselves as I told you, would that have caused him to lose his self control notwithstanding the fact that he said he did not know what that was? Would that have caused any reasonable person to lose his self control and shoot the deceased? Is that clear Mr. Foreman, Members of the Jury?

Counsel contended that the learned Judge ought to have told the Jury that he made a mistake in speaking about involuntary manslaughter; that he ought to have properly related the facts upon which the defence had raised the issue of provocation and that he ought to have told them that even although the intention to murder was present, the charge of murder may still be reduced to manslaughter.

Our first observation is a restatement of what is stated in these Courts ad nauseam. A summation must be considered as a whole. The further directions must be considered along with and in the light of the directions given in the other part of the Judge's summation where the Judge said: "On the question of provocation, if you find provocation, it reduces the charge of murder to manslaughter. Even if you find that the accused intended to kill the deceased, if you find that he was provoked, he would still be entitled to the verdict of manslaughter."

In his further directions although some words appear to be missing on the record he evidently refers to this clear direction about which there was no complaint when he said: "I have already told you

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thatyou find that he was provoked, he would still be entitled to the verdict of manslaughter."

The learned Judge in the earlier part of his summation drew the jury's attention to the facts on which the defence sought to raise the issue of provocation and in his further directions he told the jury to remember his analysis of those facts. We do not agree it was necessary to recount in detail the facts already analysed.

The evidence on which the defence sought to raise the issue of provocation was tenuous in the extreme but the learned Judge benevolently left the issue with the jury. Such evidence as could possibly be regarded as forming the basis for consideration of the issue was put to the jury and correct directions on the relevant law were given. The appellant's complaint about the learned Judge's directions on the issue of provocation must fail.

We are not satisfied that the jury's request for further directions as indicated on the record is to be interpreted as narrowly as urged by Counsel for the appellant. Counsel's submission that the jury were concerned only with whether murder was reduced to manslaughter by virtue of provocation was evidently prompted by drawing the inference that the jury wanted further directions on which there may be a verdict of manslaughter even if there was an intention to murder. It may be asked why twelve ordinary persons seeking directions on provocation did not say we want further directions on provocation. The jury could very well not have been concerned with provocation at all. It is unfortunate therefore that the request of the jury was not received in clear terms. It seems to us that as stated on the record the request was for further directions on two matters one of which was "intention to murder". The learned Judge appears to have understood one of the purposes of the jury's request was to be able to decide whether the intention to murder had been established. For when Counsel for the accused asked him to assist the jury further on provocation his first remarks to the jury were "I have directed you on the question of provocation fully and I do (did) not think it was necessary to do so again because of your enquiry - what is manslaughter?"

In his directions on the question of intention both in the earlier summation and further directions the learned Judge gave the standard and customary direction that a person's intention not being capable of positive proof may be inferred from what the person says or does or from what the person says or does viewed in the light of all the surrounding circumstances. He correctly told the

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jury where the burden of proof on the issue lay and he explained how they should consider the evidence put before them in order to determine the issue. It is therefore not surprising that Counsel did not question the learned Judge's directions on the elements establishing murder.

In the result we do not fault the learned Judge's directions on the question whether murder was established and the appellant's complaint against the learned Judge's directions on the issue of provocation also failed. The appeal is therefore dismissed and the conviction affirmed.

G.C.R. MOE,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of Appeal