

1901
(14)

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 6 of 1987

BETWEEN:

CANICE LIONEL - Appellant

and

THE QUEEN - Respondent

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

Appearances: Mr. K. Foster for the Accused
Miss S. d'Auvergne, Director of Public Prosecutions for the State

1988; Jan. 26
May 9

JUDGMENT

BISHOP, J.A.

On the afternoon of 4th March 1987, around 4 o'clock, Charles Francis, also called "Crucian", was taken to the Casualty Department of the Victoria Hospital, where he was examined by a surgeon specialist. He had multiple wounds to his head, his left shoulder, and left hand. Those to his head were regarded as extremely serious and in the opinion of the specialist they were caused by the use of considerable force.

There was no doubt that the wounds were inflicted by Canice Lionel, also called "Busaul", with a cutlass.

On the 7th March 1987 Charles Francis died.

A post mortem examination was performed and the pathologist concluded that death was due to "(i) extra-dural and sub-dural haemorrhage of the brain, (ii) laceration of the brain and (iii) fracture of the skull".

On the 10th March 1987 Canice Lionel was charged with the murder of Charles Francis and on the 4th November 1987 he was convicted and sentenced under the law.

Two differing versions of the circumstances were put before the Jury for consideration.

THE CROWN'S CASE

The Carnival Season ended at midnight on Tuesday 3rd March 1987.

/Between.....

Between 8.00 p.m. and 9.00 p.m. that night Charles Francis and his sister Jacinta Hunte, went to the headquarters (camp) of the Carnival band called Mas Creations. Canice Lionel was there and he accused Francis of bouncing him and his girlfriend when they were jumping in the band. He then hit Francis on the head three times, with a stick. His head began to bleed and his sister took him home. Before they left, Canice Lionel remarked that he was going and get two "rock" (cocaine), make a report, and return for Francis.

Canice Lionel's 16 year old girl friend - Patricia Dalson - gave evidence to the effect that at the camp she accidentally touched Crucian and he became very annoyed and quarrelsome. Canice Lionel spoke to him and Crucian replied saying that if Abousack was there he would slap Busaul. Shortly after, Abousack arrived and Crucian hit Busaul with a piece of wood. Busaul ran and Abousack threw a bottle at him. It struck him on his right arm. According to Dalson, she saw Crucian with a knife but he did not do anything with it. She said too that Busaul did not hit Crucian with a stick, nor did he say that he was going for two "rock", make a report, and return for Crucian. Abousack and Crucian were put out of the camp and to avoid meeting them outside Busaul sent for a taxi. The taxi arrived and took them to Chaussee. She then went to Busaul's home where she slept.

On some aspects the testimony of the Crown's witnesses Jacinta Hunte and Patricia Dalson, conflicted.

On the 4th March 1987, around 10.45 a.m. Canice Lionel went to Port Police Station and made a report to Corporal Catherine Agdoma, to the effect that "one Abousack and one Crucian" assaulted and beat him on Tuesday 3rd March 1987 at Barnard Hill, Castries, at 8.00 p.m.". Among other questions, the corporal asked him where did he receive the blows. He showed his back and upper right arm and though she looked she did not see any sign of bodily harm. She then advised him to instruct a lawyer to file a complaint against the men. He assured her that he understood her advice and would follow it. He then left the station.

Around 11.00 a.m. the accused bought a cutlass, took it to the workshop of McDonald Edwin, and asked to have it sharpened on both sides. Indeed he agreed to pay extra for such sharpening.

At about noon, the accused was walking through Leslie Land. Martin Sampson, also known as Rambo, was sitting on a house step and the accused stopped. He told Rambo that his (Rambo's) friends Abousack and Crucian had beaten him and he hoped that when he did what he did, Rambo would not get involved. Tony John, known as Jim, was sitting with Rambo and overheard what was said. Rambo did not answer the accused who then continued on his way.

/P.C. Gaspard.....

P.C. Gaspard Blaize, dressed in plain clothes, joined Rambo and Jim; and within about 10 minutes or so, the accused was walking in the opposite direction, away from Wilton's yard (or the Grave yard). He was carrying a bloodstained cutlass and he said "Rambo go and pick up his neck in the grave-yard" - or words to that effect. Martin Sampson thereupon drew P.C. Blaize's attention to what was said; and Blaize went towards Wilton's Yard some 200 feet away. There he saw Charles Francis with bleeding wounds. He contacted another policeman and they set out in search of Canice Lionel.

Later that same day, Canice Lionel was informed that investigations were underway in a report that he wounded Charles Francis. He was cautioned and he dictated a statement which was recorded.

On the 10th March 1987, Canice Lionel ~~was~~ charged with murder, and cautioned. He said: "What I have to say, I have already said it on the statement I gave you Wednesday 4th March, 1987".

Briefly then, the Crown's case was based upon circumstances preceding the infliction of the wounds and upon the statement of the accused to the police.

I wish to refer now to that statement of 4th March.

Canice Lionel explained that around 7.00 p.m. on the 3rd March 1987, he followed Mas Creations band to its camp at Conway. He sat on an old car smoking and his girl friend Patricia Dalson joined him there. Crucian was nearby and he pulled a knife from beneath the rubbish. Patricia stood up and Crucian pushed her. When he asked Crucian - jokingly - why he did so, Crucian challenged him and "played" the knife in his face. Crucian also threatened that he would call Abousack to take away Lionel's chains and to beat him. Lionel left and went to change his costume. While doing so he heard a voice asking for him and adding "I want to kill him". He changed and came out of the room. He told his girl friend he would take her home. When they were going through the door, Crucian pushed her and remarked "We killing you first". At the time Crucian was armed with a knife. Lionel went to him and asked him to "cool out himself". Then, in the words of the statement:-

".....he was coming towards me with the knife. His friend Abousack told him to finish with that; he was pushing him outside..... So I tell him: 'just so you come and look for trouble with me'? He tell me he wants to kill me, he wants to hurt me. He was pushing the knife towards my belly. I went back to the Mas camp to get something to defend myself. So I got a piece of stick. I

/came.....

came towards them with the piece of stick. When I reach close to him I strike him with the stick. He ran outside. Abousack had a bottle of whisky in his hand. He threw it at me and the bottle knock me on my right arm. When I was about to run after them the members of the Mass Camp hold me and told me to finish with that. So I listen to them....."

The accused explained further that his attackers were waiting outside armed with a cutlass and a gun. He did not go outside but asked someone to get a taxi. A taxi came and it took him home.

This statement, given before Charles Francis died, also dealt with events on the 4th March 1987.

Canice Lionel said that he went to the police station in the morning and he made a report to Corporal Agdoma. She advised him to instruct a lawyer. He said alright and left the station to go home. I now quote:-

"On my way home a few friends told me that they have some guys looking for me, which is Crucian, Abousack, Rambo and two others. I told them alright. So I went to Valmont. I bought a 4-nail cutlass..... on my way home I went to sharpen the cutlass to defend myself..... I put it in my waist. On the way I met with Crucian. He pull out a knife from his waist. He stop me and he told me, look him, I hit him with the stick last night he will jookme now. I told him to behave himself. He strike the knife at me. I step back, pull out the cutlass from my waist. When he saw the cutlass he ran and pick up a stone. I ran towards him. He ran to a yard. I ran after him. I strike the cutlass at him on his body, twice. I was blood coming from his head..... I rant to my home..... The police came to my home. I hand over the cutlass."

The Crown's case was that upon the facts and circumstances along with the statement given to the police, it had been proved that Canice Lionel premeditated and intentionally caused the death of Charles Francis by unlawful harm.

THE ACCUSED'S CASE

With Charles Francis dead, only Canice Lionel could tell what happened between them at Wilton's Yard on the 4th March 1987. However, he described in evidence on oath, not only the incident on that date but also what occurred over the three previous days. In addition, through the cross-examination of the Crown's witnesses, his Counsel sought to show that Rambo was a close friend of Crucian and for that reason he gave a fabricated story in the hope that Busaul would be convicted. Tony John and P.C. Blaize were untruthful.

/The accounts... ..

The accounts of events over the first four days of March 1987 must be recalled particularly in the light of the attack on the directions to the Jury on the issue of provocation.

(a) The night of 1st March.

According to the accused he attended the King and Queen show at Mindoo Phillip Park. He was celebrating the success of his friend "Easy" and he went to buy a case of beer. Abousack, Crucian and others encircled him. Abousack had a gun and he told Crucian and Rambo to search Busaul and take away his money. Rambo declined and when Abousack directed Crucian again, Easy came up and spoke to them. They left. In the words of the accused "They did not take anything from me. That was the end of the night".

Clearly the accused suffered no bodily harm at the hand of Charles Francis.

(b) The morning of 2nd March.

It was jour ouvert and around 4.00 a.m. Crucian, Abousack and Rambo were "firing elbows" at the accused, who also stated:-

"I did not take them on because I was enjoying myself. I did not want to get into any confusion with them. When the band reach the Boulevard I went to my home and take a rest."

The nature of Crucian's conduct was clear.

(c) The 3rd March.

About 9.00 a.m. the accused went to the Mas camp. While sitting, Crucian came and sat beside him. Then Crucian armed himself with a knife from nearby rubbish. Patricia Dalson had joined the accused and when she moved to go and get two malts at his request, she accidentally touched Crucian. He pushed her and there was a verbal exchange between Crucian and the accused. The accused moved away to the changing room and while there he heard someone asking for him and saying "we want to kill him". Five minutes or so later he left the room. He saw Abousack, Crucian, Rambo, Conk and another man. Crucian accused Patricia Dalson of telling him (the accused) that they were coming and threatened they would kill her first. He intervened and Crucian approached with a knife calling on him to hand over his gold chains and money, without trouble. Crucian was "playing" the knife in his face. He moved back and he received blows to his body from the other men. He was saved from further beating by his friends. His attackers ran outside and when he looked out Abousack threw a bottle at him. He ran inside and he was advised not to go out as they were awaiting him. The accused said that he was afraid and did not wish to be beaten further. He was able to get home by using a taxi "for rescue".

/(e The 4th.....

(d) The 4th March.

The accused stated on oath that upon awaking he escorted his girl friend to Mindoo Phillip Park and returned home. He locked his house and passed through Leslie Land. Then, quoting him:-

"When I reach by the Freeness I saw three guys sitting, Jim, Rambo..... P.C. Blaize who was in plain clothes. I told P.C. Blaize that I had been beaten by Rambo, Abousack, Crucian and two other guys. I told him if he wants to take my statement he can take my statement but I am going to the station to make a report..... I then went to the station. There I met Cpl. Agdoma."

What occurred at the station is significant since the accused was urging for consideration, the frame of mind he was in by the time he injured Crucian. He explained that he told Corporal Agdoma that he was beaten by five guys - Abousack, Crucian, Rambo and two others. He told her that he wanted police protection - to go to their homes; he knew where three of them lived. She replied to the effect that she did not have any policemen at the station for the time being. He told her that they have been menacing his life; and she asked on what part of his body was he beaten. He showed her his left shoulder which was swollen and his back. While there was no blood to be seen his body was hurting.

His evidence on oath continued thus:

"so I told her if it was she, she would do the same thing. She told me why I did not come the same night. I told her if it was she, she would not come to the station the same night. She would do what I have done. She told me the only advice she can give me is to go to a lawyer's office to press a charge against the guys. I told her I do not want to go to a lawyer I want protection from the police. When she told me the same thing I left the station when I see she was not willing to give me police protection."

Then the accused described to the Jury what occurred on his way home. He was advised by friends that there were ~~some~~ guys looking for him to beat him, and so he went back to A.F. Valmont and bought a cutlass. He had it sharpened on one side only. He went home and was listening to music. Then, according to him:

"I had to go on an errand. I took the cutlass and put it in my waist. I walked down the street..... I bounce up with one Crucian He then pulled a knife from his waist. He told me look him..... I burst his head last night he is going to stab me and kill me. He then fired the knife at me. I had a big green coat on me. The knife passed on the coat. I went back. I told him behave himself. He did not want to hear. When I saw he was molesting me I pulled out the cutlass from my waist."

/The accused.....

The accused explained that Charles Francis ran away, picked up a stone and threw it at him. The stone hit him on his left leg. Then, in the words of the accused:

"When I saw he did not want to behave himself I ran after him with the cutlass. He ran into the Grave yard. I ran after him and when I reached close to him he had the knife in his hands. He reach by a line with clothes on it whilst he was running. The line got his neck and sent him back towards me. He still had the knife pointing at me so I stroke the cutlass at him. I fired the cutlass to hit the hand with the knife. He shifted himself and his head went under the cutlass while the cutlass was coming down. I fired at his hands to prevent him from coming to stab me with the knife. I stroke him at least two times with the cutlass....."

This account, given at his trial on 3rd November 1987, clearly differed in some material aspects from that given on the 4th March 1987. Indeed it contained more facts and was more explicit than the earlier statement - even to the extent that it mentioned facts on which there was no cross-examination of the appropriate prosecution witnesses.

In addition to what I stated earlier, it was the case for Canice Lionel that he did not intend to cause death by unlawful harm and that he acted only to protect himself from attackers including Charles Francis who had been persistently molesting him and against whom he was not provided with protection by the police.

On the 12th November 1987, Canice Lionel appealed against his conviction on three grounds, two of which were not pursued. The remaining ground was that

"the directions on self defence, provocation and 'cooling off time' were inadequate and would have confused the Jury, particularly so in relation to the facts of the case."

When the appeal came on for hearing on 25th January 1988, learned Counsel for the appellant drew our attention to a Motion filed four days earlier, seeking an order for "leave to adduce fresh evidence relative to the issue of insanity of the appellant, unknown to Counsel and the Court at the time of the hearing". There was an affidavit in support not only from the appellant but also from Dr. Raju. Counsel told the Court that the evidence sought to be adduced concerned the mental condition of the appellant at the time of his trial and not at the time when he inflicted the wounds on Charles Francis.

Learned Counsel conceded - properly so - that the affidavits relied upon did not render assistance with the Motion, and as it stood it could not succeed. Consequently he did not pursue it.

/A Notice.... .

A Notice of application for leave to argue an additional ground of appeal was also filed on 20th January 1988. The application was granted there being no objection. The additional ground of appeal was:

"That the learned trial Judge in error generally misdirected the Jury on the "law of intent" in relation to the facts of the case in particular in directing the jury to interpret section 72 as he did at pages 39 and 40."

A particular part of the summing up, at those pages, was quoted.

Insofar as those directions on the law of intent were concerned learned Counsel submitted that (a) when he was explaining what was meant the learned Judge was under a duty to direct the Jury that the intent would be negated if they were satisfied that the accused was defending himself and (b) by not giving them directions on self-defence AT THAT PARTICULAR PLACE in his summing up the Judge fell into an error which deprived the accused of an opportunity of an acquittal. Counsel contended that the learned Judge unwittingly invited the Jury to find that when the accused struck at the hand of his attacker Charles Francis, he intended to kill him; and he failed to explain AT THE SAME TIME that the accused was saying that he acted to defend himself.

Mr. Foster urged further that section 72 of the Criminal Code of St. Lucia was accurately read to the Jury, but, like the criminal law of England it demanded a subjective test; consequently, the learned Judge erred in law when he explained it to the jury as "the objective test of the ordinary or reasonable man, and the probable consequence".

After the learned Director of Public Prosecutions drew attention to the case *James Jaganath v R.* (1968) 11 W.I.R. 315 (followed in *Hall v R.* 24 W.I.R. 547), Mr. Foster invited us to find that *Jaganath's case* was wrongly decided and should not stand or be followed by this Court of Appeal.

It was clear from the summing up that Matthew J. was aware of *Jaganath v. R.* (supra); indeed he quoted passages from the judgment of A.M. Lewis C.J. of the Court of Appeal of the West Indies Associated States.

With respect we do not agree with Counsel for the appellant that *Jaganath v. R.* was wrongly decided as he would have us say, or that it should not be followed.

In the view of this Court, Counsel lifted a particular part from the summing up and criticised the Judge for the way in which he dealt, in that passage only, with the meaning and application of the law on intent. It was not for us to conclude what impression would be created in the minds of jurors at a particular stage in the summing up and before it was completed.

/A careful.....

A careful analysis of the directions on intent revealed that, taken as a whole, though the learned Judge was careful to the point that he went further than was necessary, nevertheless the impact was such that the Jurors would have appreciated what they had to decide on this aspect of the law as it affected the issues in the case.

We find no such misdirection as the appellant complained of, in the summing up.

The directions on self-defence were complained of as being conflicting, out of context in relation to the facts and such as would have inevitably confused the Jury and leave them without an alternative verdict to that of guilty of murder.

It was true to say - as Counsel for the appellant said - that in the instant case there was no necessity for directions on section 48 of the Criminal Code; but it was equally true that directions on sections 49 and 55, which were admittedly relevant, were given. Counsel urged that it was only because directions were given on section 48 that there would have been confusion created in the minds of the Jurors.

We have read carefully the directions on self-defence. We are convinced that when looked at in their entirety, such directions would have been clear in the minds of the members of the Jury and they would have been in no doubt that if they found that on the 4th March 1987 the accused was faced with either serious or grievous harm or with dangerous harm, then he could justify the use of necessary force or harm, extending in the case of extreme necessity, to killing Charles Francis.

We find no merit in the appeal against the directions of the learned trial Judge, on self defence.

The attack on the directions with respect to provocation demanded long and anxious analysis. Learned Counsel for the appellant submitted that the directions on "cooling off" were irrelevant and confusing and that since the incidents which took place on 1st, 2nd and 3rd March could not amount, in law, to provocation, the learned Judge ought to have confined his directions to the acts which occurred on the 4th March. Counsel contended that if the Jury found, on the basis of the directions given them, that the events of 1st, 2nd and 3rd March did not amount to provocation, then they may have been led to find that there was no provocation on the 4th March, sufficient to reduce murder to manslaughter.

The learned Director of Public Prosecutions submitted that the effect of the summing up was favourable to the accused and he could not successfully complain. By leaving provocation to be considered when it did not arise,

/the trial....

the trial Judge put the accused in a more advantageous position than if the directions had been confined, as contended on his behalf, to the 4th March.

There was no doubt or dispute that the learned Judge correctly explained what was meant, in the law of St. Lucia, by provocation; and also that murder may be reduced to manslaughter by reason of extreme provocation given by the deceased to the accused. He also explained, following the Criminal Code, the matters which may amount to extreme provocation.

The learned Judge also directed the Jury on "cooling time", and referred to the incidents of March 1st, 2nd and 3rd. He told the members of the Jury:-

"So cooling off time relates to those three incidents. It is for you to say whether you think that at that time such a time had elapsed or such circumstances occurred that a person of ordinary character might have recovered his self control. Of course you will remain with the fourth incident which I will describe later in more detail because it is possible that that fourth incident on the day of the fatal cutting could be evidence of provocation as well....."

When the learned Judge dealt with the evidence in detail he described what he termed provocation No. 1 as the occasion when the accused was surrounded at the Mindoo Phillip Park. He told the Jury:-

".....Somebody had a gun, somebody had a knife. It's an assault although they didn't touch him. It's for you to say whether it was provocation in law as I have defined. Whether it was sufficient provocation..... Was that provocation to cause what happened on the 4th?"

Then the Judge went on to what he called provocation No. 2 - the events on jour ouvert when Crucian and others were "firing elbows" at the accused. The learned Judge said to the Jury:-

"Members of the Jury is that provocation to the extent as would reduce the crime of murder to manslaughter in respect of what occurred on Ash Wednesday,about midday or thereabouts. Was there a cooling off period?"

The summing up continued thus:-

"Provocation No. 3 was on March 3rd.....Members of the Jury as I said it's another series of evidence which goes to provocation....."

The learned Judge reminded the Jury of the evidence given by the accused and pointed out that there were a number of facts given which were not given in his earlier statement to the Police. He directed the

/Jury.....

Jury how to deal with the statements. Then he said:-

".....you will weigh all the facts, what he says, what Patricia says, what Jacinta says, and see whether there was evidence which would amount to provocation."

Now the learned Judge correctly directed the Jury that if they came to the conclusion that the accused was not defending himself on March 4th, nevertheless the same evidence ought to be considered when determining whether or not the accused was provoked to such an extent as to reduce the charge of murder.

The learned Judge dealt with the evidence of each of the witnesses for the prosecution and with that of the accused; and he then repeated to them that they should:-

"consider whether the assault which occurred on March 1st was sufficient to cause provocation to reduce that murder which was committed on the 4th, to manslaughter."

And again,

"were the events of jour ouvert, the elbowing, of such nature to amount to provocation to cause what happened on the 4th? Was the event of the 3rd enough to cause provocation to reduce murder to manslaughter having regard to cooling off period? Or were they all three together, jointly, enough having regard to the cooling period? But on the aspect of provocation you must also consider the events of March 4th."

After repeating the explanation of "cooling off" as it applied to provocation, the Judge continued-

"So if you come to the conclusion that as far as the events of March 1st to 3rd either singly or jointly do not amount to provocation then you consider the events of March 4th as well; and you can consider the events of March 4th together with the other events from March 1st to 3rd having regard to the cooling off period..... If you think the accused was provoked to such an extent as I have described, either by the events of March 1st, 2nd, 3rd, 4th singly or together, then you must return a verdict of guilty of manslaughter....."

We agree with Counsel for the appellant that there was no question of provocation as known to the law of St. Lucia, on either of the first three days of March 1987. Undoubtedly there were incidents which may or may not have been regarded as provocative, but not every provocative incident will (or may) amount to provocation.

/In the....

In the case before us, it was for the Jury to decide whether, on the 4th March 1987, when he inflicted the fatal wounds on Charles Francis, the accused Canice Lionel was acting under such extreme provocation from Charles Francis as would reduce the offence from murder to manslaughter. The events of the previous days would, at best, have provided the back-drop for the evaluation of the facts on the 4th March 1987; the Jury would take notice of the events of the previous days so as to be assisted with their deliberation.

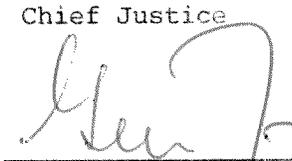
This Court is of the view that the directions given to the Jury on provocation as it related to the facts of this case were confusing; and we are unable to say what the Jury would have done or did in the light of those directions. It would be, in our view, no more than speculation to say that throughout their deliberation they would have applied them in a manner favourable to the appellant. For example, they were directed to consider the events of the 1st, 2nd, 3rd and 4th March singly or together and it cannot be concluded in what combination or combinations - if any - they used the events in reaching a verdict; and certainly there was no direction that they ought to consider the events of the first three days of March, not as provocation but as affording evidence of the background for the conduct of Canice Lionel throughout the 4th March.

In the circumstances this Court feels that the appellant was not properly afforded an opportunity of a verdict of guilty of manslaughter and we would substitute for the verdict of guilty of murder a verdict of guilty of manslaughter.

The Court is of the view that a sentence of ten years imprisonment with hard labour meets the justice of the case.


 E.H.A. BISHOP,
 Justice of Appeal


 L.L. ROBOTHAM,
 Chief Justice


 G.C.R. MOË,
 Justice of Appeal.