SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 OF 1995

BETWEEN:

DENIS ALPHONSE

Appellant

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice

The Hon. Mr. C.M. Dennis Byron - Justice of Appeal
The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. Albertine Richelieu for the Appellant
Mr. Errol D. Walker, D.P.P. for the Respondent

[January 31, 1996]

SATROHAN SINGH, JA

On May 8th, 1992 at about 10 p.m., Wayne Cox alias Weng Weng, died from a knife wound that penetrated about 7 inches into his back, puncturing his lung and entering his heart. On February 20th, 1995, a jury before MATTHEW J convicted the appellant of the Murder of Wayne Cox contrary to SECTION 170 OF THE CRIMINAL CODE OF ST. LUCIA. MATTHEW J sentenced him to be "hung by neck until he was dead". He was jointly charged with two co-accused Vincent Polius and Bernard Andrew. They were acquitted by the Jury. The appellant appeals from his conviction.

The case for the prosecution rested on the evidence of certain eye-witnesses but primarily on statements made by the appellant to the police. The eye-witnesses saw an attack on the deceased (who was without weapon)

by the appellant (who had a stick) and the other two co-accused. They gave no evidence of a knife or of the infliction of the fatal wound.

From the several statements given to the Police by the appellant under caution, it appears that there was an incident between the appellant and the deceased on May 3, 1992 where the appellant was hit by a bottle thrown at him by the deceased. On May 8, 1992, having heard that the deceased was at a disco, the appellant got his two friends (the two co-accused) to go there with him. There the appellant told the deceased he was ready for him and he struck the deceased with a stick. The deceased ran through the gate. The appellant rushed after him. A struggle ensued between them. The appellant pulled a knife nine inches long from his waist and cut the deceased with it. The appellant then secreted the knife under a wooden cabinet at his home. He took the police there, gave them the knife and told them that was the knife with which he cut the deceased. In one of the statements the appellant said: "I did not go to kill him I go to give him a cut and had I know he would die I would never use the knife on him I know I am guilty for using the knife on him and I only know the law might forgive me. I hope the next time that will not happen to me again".

These statements form the real evidence in support of the case for the prosecution. Their admissibility, though unsuccessfully challenged in the Court below, was not challenged on appeal. The contention of the appellant before this Court, is that their contents do not disclose enough material for a jury properly directed to convict of the offence of Murder but disclose enough that may justify a conviction of the offence of Manslaughter.

In his evidence before the jury, the appellant denied stabbing the deceased. His evidence was that he asked the deceased why he had previously hit him with a bottle. The deceased spat in his face and told him to

get away from him. He lashed the deceased with a stick, they had a struggle and nothing more. He said his co-accused Vincent subsequently gave him the knife for him to give it to the other co-accused Bernard. He did so and later that night Vincent brought the knife again to him, asked him to keep it and he placed it under a cupboard.

From this evidence looked at as a whole, the options that were left open to the Jury were (1) a complete acquittal of the appellant if his evidence in Court was accepted by them (2) a conviction of Manslaughter if they accepted his statements under caution that he had no intention to kill the deceased (3) a conviction of Murder if they rejected that he had no such intention and if they rested their deliberations on the appellant using a knife nine inches long and inflicting with it a wound seven inches deep in the back of the deceased in the area of his lung (4) a conviction of Manslaughter if they found that he had an intention to kill but that such intention was caused as a result of provocation from the deceased. These issues required full and comprehensive directions from the Judge on the concepts of provocation and intent. The points argued in this appeal concern non-directions and/or misdirections on these two concepts. There was also a further argument on the issue of the mischief of excessive directions being given to the jury.

PROVOCATION

On the issue of Provocation, learned Counsel for the Appellant challenged different aspects of the learned trial Judge's Summing up. The evidence relied on by the appellant as the provocative act, was his own evidence that when he approached the deceased, the deceased spat in his face. In Saint Lucia, the law on provocation is contained in sections 171 to 175 of the Criminal Code.

The learned trial Judge, in his summation to the jury, recited these

provisions of the code without relating or accurately relating them to the facts of the case. The criticism levelled by Counsel for the appellant against this approach of the trial Judge, was that he ought to have assisted the jury by relating this law to the facts. In my view this is a justified criticism. In summing up a case to the jury, a Judge should not engage himself in only a theoretical discourse of the law. He should adequately explain how the jury should apply that law to the contesting versions of the facts that had emerged during the case. In **Baldeo Dihal v. R. (1960) 2 WIR 282** it was held by our then Federal Supreme Court that "on a trial of a person charged with murder the Judge should relate the law to the facts in the case". [See also **Julian v. R. (1969) 13 WIR 66** and **Junior Vidal et al v The Queen, Criminal Appeal No. 4 to 10 of 1992 St. Lucia** in a judgment delivered by this Court on March 20, 1995] There is therefore merit in this submission. No assistance was given to the jury by relating the evidence on provocation to the law. Without such assistance there was the possibility of some confusion being caused in the minds of the jury.

Specific reference was made by Mr. Richelieu to the learned Judge's directions on **S172(a) of the Code:** S172(a) reads as follows:

> "The following matters may amount to extreme provocation to one person to cause the death of another person; namely an unlawful assault and battery committed upon the Accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind, either in respect of its violence or by reason of accompanying words, gestures or other circumstance of insult or aggravation, as to be likely to deprive a person being of ordinary character and being in the circumstances in which the Accused person was of the power of self control".

Learned Counsel submitted that at no stage in the summing up did the Judge explain to the jury the import of the words "a person being of ordinary character and being in the circumstances in which the accused person was". I agree. The law as I understand it, is that it is essential for a Judge in giving

directions to the jury on the law of provocation, to explain to them the meaning of these words. He should first state what the question is, using the very term of the section. This was done by the learned Judge. He should then direct the jury that in relating the facts of the provocation to this law, they should first apply the objective test and determine, whether such acts, were capable of causing a person, having the power of self-control to be expected of an ordinary person of the sex and age of the appellant, but in other respects sharing such of the appellant's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but would also react to the provocation as the appellant did. Having done that, he should then go on to direct them on the subjective test whether those acts did in fact cause the appellant to lose his self-control and react in the way he did. The learned Judge did not do this.

In **DPP v. Camplin (1978) A.C. 705** Lord Diplock at P. 716 - 718 expressed this opinion:

> "Although it is now for the jury to apply the 'reasonable man' test, it still remains for the judge to direct them what, in the new context of the section is the meaning of this apparently inapt expression, since powers of ratiocination bear no obvious relationship to powers of self-control. Apart from this the judge is entitled, if he thinks it helpful, to suggest considerations which may influence the jury in forming their own opinion as to whether the test is satisfied; but he should make it clear that these are not instructions which they are required to follow; it is for them and no one else to decide what weight, if any, ought to be given to them."
>
> He then suggested this form of direction to the Jury:-
>
> "A proper direction to a jury on the question left to their exclusive determination by **section 3 of the Homicide Act 1957** would be on the following lines. The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they

> think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but would also react to the provocation as the accused did".

These directions were not given by the Judge. I consider this a serious omission amounting to a misdirection.

On the issue of reaction to the provocation, the learned Judge gave this direction to the jury:

> "In considering whether provocation has or has not been made out, you must consider the retaliation in provocation. That is to say whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists ought to be answered with fists, but not with a deadly weapon. And that is a factor you have to bear in mind when you are considering the question of provocation."

The words "fists ought to be answered with fists, but not with a deadly weapon" in this direction are unfortunate and served only to destroy what could otherwise have been regarded as a fair direction. These words are an obvious misdirection bearing in mind the objective and subjective tests already mentioned in this judgment.

In directing the jury on **S175(1)(B) of the Code** the learned Judge told them:-

> "The second one is where there was premeditation, that is found in Section 175 (1)(b). That he acted wholly or partly from a previous purpose to cause death or harm or to engage in an unlawful fight, whether or not he would have acted on that purpose at the time or in the manner in which he did act but for the provocation. That's very important here Members of the Jury, they are saying in effect that if there is premeditation the defence of provocation will not hold".

The last line of this direction is again an obvious misdirection. The learned Judge was here interpreting a rebuttable presumption as an irrebuttable one. If there was an original premeditated intention to kill and the accused person kills the victim, there is a presumption that the accused person killed with that original intent. But, that is a rebuttable presumption. If with that intent and

before he actually killed, the victim provoked him to cause him to lose his self-control and then he killed his victim, provided his reaction was proportionate to the provocation, it would be open to a jury to say that the presumption was rebutted and that the fatal blow was struck as a direct consequence and under the stress of the provocative act. The jury should be directed that for there to be a conviction for Murder, they had to be satisfied beyond a reasonable doubt that the original intent must still have been operative in the mind of the accused notwithstanding the intervening provocative act.

In **Lett v R (1963) 6 WIR 92** Wooding C.J. in the Court of Appeal Trinidad and Tobago said at **p.96:**

> "In other words, the jury did not have to find that there was a fight as a *sine qua non* to arriving at a verdict of manslaughter rather than murder: it was sufficient if the fatal blows were struck under the stress of a provocative act occasioning loss of self-control, both actual and reasonable, provided, however, that the retaliation was not disproportionate to the provocation. Further, we think it also not quite accurate to say that if the appellant had set out with the piece of guava wood intending to wound the deceased, or that if the jury thought that the use of that weapon was intended from the first, the verdict must be guilty of murder. In our judgment, the original intent must still have been operative in her mind for that result necessarily to follow. Thus, if a fatal blow is struck as a direct consequence and under the stress of a provocative act, it is wholly immaterial that there had been some previous intent to kill or do serious bodily harm unless that intent continued to be operative so that the fatal blow may fairly be attributed thereto notwithstanding the intervening provocative act."

On this issue of provocation therefore I consider all the criticisms of the learned Judge's Summing up by learned Counsel for the appellant to be justified. They are the nondirections and the misdirections earlier mentioned.

INTENT

The evidence relied on by the prosecution to prove "intent to cause death" can be seen only from an inference to be drawn from the silent testimony of a knife 9 inches long being plunged into the back of the deceased 7 inches deep puncturing his lung and heart. As against that there

is the evidence from the appellant's statement under caution when he said "I did not go to kill him, I go to give him a cut and had I know he would die I would never use the knife on him".

Learned Counsel for the appellant does not challenge the Judge's directions on the law of intent as set out in sections 71 and 75 of the Code but again criticizes the summing up for not relating the provisions of **S71 and 75** to the evidence on intent. For reasons already mentioned when I dealt earlier with a similar submission on the issue of provocation, I consider this criticism justified and the omission a misdirection especially when there was this conflicting evidence on the issue. There was no proper or adequate direction to the jury that the concept of intent was subjective to the appellant. In my view, it was not enough when the trial Judge at the end of his summation, in dealing with the different verdicts open to the jury told them:

> "Guilty of manslaughter, if you find the Accused had not the necessary intention looked at subjectively to cause death, but that all the other elements of manslaughter as distinguished from murder are satisfied".

In **Hazel Emanuel v. The Queen, Criminal Appeal No. 5 of 1989 St. Lucia, *Sir Vincent Floissac C.J.***, in dealing with the concept of intent as set out In S 71 - 75 of the St. Lucia Criminal Code said at P 5:-

> "An accused's criminal intent or intention in relation to his voluntary act or a consequence thereof is basically subjective to the accused. The accused's intent or intention is an inference drawn from his act and its relevant surrounding circumstances viewed collectively. Those surrounding circumstances include (1) the emotion or emotional motive (e.g. hatred, jealousy or greed) which prompted the accused to commit the act (2) the accused's reason or purposive motive for committing the act or the ultimate purpose (object or consequence) which the accused sought to achieve by committing the act (3) the accused's desire for the consequence of the act (4) the accused's subjective foresight or foreseeability of or subjective belief in the degree of probability of the consequence - which degree may range from a bare possibility to a certainty or near certainty and (5) the accused's subjective honest or actual belief in the existence of certain circumstances (e.g. consent or danger) which motivated the act."

These are words that Judges would do well to use in directing juries on the law of intent as it pertains to St. Lucia.

S72 of The Criminal Code reads as follows:-

> "If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event".

This provision of the Code dealing with Intent was never put to the Jury. In my view this omission was a misdirection having regard to the statement of the appellant that had he known that the victim would die he would never had used the knife on him.

My conclusion on the directions on intent is that there is again merit in all the points taken by learned Counsel for the appellant.

EXCESSIVE DIRECTIONS

At the trial of this appellant and his two co-accused, self-defence was not disclosed from the evidence and was not made an issue. However, the learned Judge, possibly ex abundante cautela, gave the jury full directions on the law as it related to this issue and left it for their consideration. Mr. Richlieu's submission is that these were unnecessary and excessive directions and they could have distracted the jury. I do not disagree. My view is that self-defence should have been withdrawn from the jury's consideration. However, I do not feel any injustice was done to the appellant's cause by these directions, because any distraction that may have been caused by them could only have been for the benefit of the appellant.

THE PROVISO

The main points raised in this appeal have all been decided in favour of the appellant. The final issue to be determined is whether this Court should apply the proviso to **S35(1) of The West Indies Associated States Supreme Court (St. Lucia) Act 1969** and dismiss the appeal on the ground that despite the misdirections we consider that no miscarriage of justice had actually occurred. In deciding this question, it is necessary first to answer the question whether I can with certainty say that had the jury been properly directed they would inevitably still have convicted the appellant of the offence of Murder.

This was not a case where evidence to prove Murder was over-whelming. The evidence of the eye-witnesses was of no great assistance to the case for the prosecution. The statements and the testimony of the appellant disclosed evidence of provocation or of an attack on the deceased with no intent to kill. As mentioned earlier, the only evidence upon which a conviction of Murder could have been founded was inferential from the silent testimony of the stab wound being 7 inches deep having been inflicted during a struggle.

Given these circumstances, I cannot say with any certitude that had the jury been properly directed they would inevitably have returned the same verdict. What I am certain about is that they would not have acquitted the appellant and in all probability would have returned a verdict of guilty of manslaughter.

In the result, in accordance with powers given to this Court by S36(2) of the aforementioned Act, without allowing or dismissing this appeal, I would quash the conviction of the offence of Murder and set aside the sentence of death and would substitute therefor a conviction of the offence of Manslaughter and sentence the appellant to imprisonment for 15 years.

.....
SATROHAN SINGH
Justice of Appeal

.....
SIR VINCENT FLOISSAC
Chief Justice

.....
C. M. DENNIS BYRON
Justice of Appeal