ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 14 OF 1995

BETWEEN:

RONALD GEDERON

Appellant

v

THE QUEEN

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. T. Guerra S.C. & Ms T. Bemjamin-Henry for the Appellant
Mr. C. Cumberbatch, D.P.P. for the Respondent

1996: November 11; 12; 13;
1997: February 3.

Criminal Law - Murder conviction - Death sentence - Defence of lack of intention to kill - Whether there was sufficient evidence of malice aforethought - The requisite intent for murder - Whether adequate directions given by trial judge on the issues of foresight and probability - **R v Hancock & Shankland** (1986) H.L., **R v Nedrick** (1986) H.L. considered - **Sonny Lockhart v The Queen** St. Vincent C.A. cited - The law on implied malice - The objective vis-a-vis the subjective test - **Eustace Armstrong v The Queen** Antigua C.A., **Bertram Abraham v The Queen** St. Vincent C.A. cited - Alleged material irregularity - Alleged misdirections by trial judge - Whether appellant should be acquitted on ground of alleged misdirection to jury on manslaughter - **Leung Kam-Kwok v R** 81 Cr. App. R. P.C. considered - Whether jury had been contaminated - An issue of bias on part of jury - **R v Gough** (1993) H.L. considered - Defences of accident, self-defence and provocation - Whether application of force used by appellant was itself unlawful - Supreme Court Act. Murder conviction set aside in favour of verdict of manslaughter. Substituted sentence.

JUDGMENT

BYRON, J.A.

On 11th December 1995 the appellant was convicted by a jury for the murder of his girl-friend Monique Ramsey on 17th July 1994 and sentenced to death by the presiding trial judge Benjamin J.

The deceased had suffered a fracture to the right superior wing of the thyroid cartilage which is popularly known as the Adam's Apple. Dr. Simon, the pathologist reported that there were very small pinpoint or petechial haemorrhages on the surfaces of both lungs and on the cover of the heart which, he said, accompany asphyxia. He expressed the opinions that sustained excessive force would have caused the injury to the thyroid cartilage, and that the fracture could have been caused by pressure of the thumb or other digits. He said that after the cartilage is broken it takes a person 2-3 minutes to become unconscious and 3-4 minutes to die. He concluded that the deceased died from a classical case of strangulation.

In his evidence at the trial the Appellant admitted that he had caused the death and described an incident at his home in which he said that the deceased was hitting him and kicking him and he was pushing her off. He said

> "I was using my left hand. I lost balance and she lost balance and we both toppled over on the bed. ...I fell over her and the same time she tried kicking me. I was trying to get off. I was trying to hold her foot. I was trying to block it off. I was trying to push myself up to get up. She was not moving. It appeared she was unconscious. At first I though she was playing or something...When I held her and pushed her off I did not squeeze her neck. I did not apply any pressure to her neck. I just pushed her off.....I did not deliberately or intentionally kill Monique Ramsey"

This description of how the deceased died was somewhat different to what he had told the police in a statement he made at 12.20 a.m. on 21st July 1994.

> "Then she just started hitting me, saying I know you lied to me, Only because you know I love you that's why you do this to me. She just kept hitting me and saying I love you so much. I love you so much, and started kicking me and started scratching me. I was trying to calm her down and pushed her off saying to her I love you I love you. She just kept pelting punches and kicking me. I held on to her by her neck and trying to hold her hand at the same time and calm her down. While I was holding her and doing that we both fell on the bed. She was still kicking and hitting me and I was still holding her by her neck. I think I might have bitten her on her leg while she was still hitting me. she start using her other leg and start kicking me. Next thing I know she just stop like she passed out.....I never intended this to happen."

The appellant's story was clearly inconsistent with the medical evidence which if accepted by the jury would require the conclusion that his versions were untrue and that he had applied sustained excessive force to the deceased's throat.

The issue of motive was addressed by evidence which showed that the appellant, a national of Trinidad and a pilot with LIAT, came to live in Antigua where he met the deceased and started a romantic relationship with her. Although his wife Claudette was living in Trinidad, he arranged to marry the deceased and applied for and obtained a marriage licence falsely stating that he was divorced and presenting false divorce documents. The appellant subsequently went to the Registrar of the Supreme Court and made arrangements to marry the deceased in a Civil Ceremony on November 11th 1993 at 10.00 a.m. The ceremony was not performed on that date or at all.

On Friday 15th July 1994 the deceased took Vivian Cephas a girlfriend and her brother Wydie to Web's Disco. Next morning 16th July 1994 between 7.00 a.m. and 8.00 a.m. the appellant came to Vivian's home. He said that the deceased had told him that she had finished with the relationship because there were too many lies and he wanted her to enlighten him. He said he still loved her and did not want to lose her. Vivian told him she could not breach the deceased's confidence and that he should give the deceased time. In his evidence at the trial the appellant admitted the deception and that the deceased had been accusing him of lying but denied that she had told him that their relationship was ended.

At 4.00 p.m. on that day the appellant worked as first officer to Capt. Gilkes on a Liat flight Antigua to Trinidad with intermediate stops which arrived there about 8.00 p.m.

On Sunday 17th July 1994 the appellant worked as first officer to Capt. Gilkes on the Liat flight scheduled to go from Trinidad to Antigua to San Juan Puerto Rico and back to Antigua with intermediate stops. The flight got to Antigua from Trinidad between 10.45 a.m. and 11.00 a.m. and was scheduled to depart on the other legs about 11.15 a.m. to 11.20 a.m. There was evidence that the appellant telephoned Vivian Cephas and asked her about her conversations with the deceased. Vivian told him that she said that she had finished with the relationship. At the trial the appellant denied making that call and having this conversation.

The theory that the appellant planned to kill the deceased was addressed by evidence which showed that he telephoned the deceased at her parents home and spoke to her. That he told Capt. Gilkes that he had received information that his house had been broken into and he wanted to go and check on it. About 10.50 a.m. the Operations office received a call from the appellant

that he had to go to check his home which had been broken into.
About 11.00 a.m. the same Operations officer received another call from the appellant that things were missing from his home and he would have to call the police, and as he did not know how long it would take a reserve should be called out. That was done and the flight continued without the appellant. There was evidence to show, and the appellant admitted at the trial, that it was not true that the appellant had suffered any robbery nor called the police to investigate.

About 11.15 a.m. to 11.30 a.m. the appellant went to the deceased's home and spoke to her sister Nornette, but the deceased had gone to Church with her mother. Shortly after, the appellant was seen entering the Church in his pilot's uniform speaking to the deceased and then leaving the church. The deceased's father James Ramsey saw the appellant walking up and down their front porch in an agitated manner and asked him if he has a problem. He said no, he was waiting for the deceased to come because he was tired and wants to go home to rest.

After 1.00 p.m. the deceased and her mother returned from Church. The deceased's mother testified that the appellant was standing at the gate with a lug wrench and the hub cap for his car in his hand. An issue was made of this at the trial because the appellant denied that he had the lug wrench but insisted that he had asked the deceased to carry him to his home to get a lug wrench because the lugs on his car wheel were not tight enough. He offered the explanation that he had removed the lug wrench from his car at Capt. Wilkinson's home. In any event the appellant spoke to the deceased and they left in her jeep for his home. She was dressed in a long black dress and high heel clog shoes.

About 2.00 p.m. the appellant returned to the home of the deceased' parents. From the totality of the evidence and the admissions of the appellant the inference that the deceased was already dead was inescapable. The appellant explained that although he wanted to tell the truth he did not say anything to her parents because he was afraid of their reaction. He returned the jeep and took his own car. There was no evidence to indicate that he effected any repairs to his car before driving it off. It would have been open to the jury to conclude that he had concocted a false reason to get the deceased to go to his home, and that he had already decided to kill her, at that time.

The evidence of the appellant's attempts to conceal the death of the deceased and the part he played in it was addressed by evidence which showed that the deceased's family immediately suspected foul play. Her mother called

the appellant on the telephone and asked for the deceased. He said she went for a walk to her cousin Pauline at New Winthropes. The mother recognised the falsehood and said Pauline does not live at New Winthropes and why would she go for a walk like that? Why she did not take the jeep? He said that the deceased left the jeep for him. She told him she was going to call the police. At the trial the appellant admitted the falsehood but said that although he wanted to tell the truth he was afraid that her family would kill him.

There was evidence of telephone calls he made to a Pilot Amory one of his friends about 2.00 p.m. He said that while he was in transit at the airport he called the deceased and she reported to him that his house had been broken into but when he investigated he found that nothing was missing as it turned out that the deceased had taken some of her things. He also called Vivian and told her that he had a conversation with the deceased and she got upset and went for walk. He called later and asked if she had seen or heard from the deceased as he was worried because the last thing she said was that she felt like dying.

Around 4.00 p.m. to 4.30 p.m. the deceased's father was driven in the deceased's jeep by Wydie to the appellant's home. The father noticed that the appellant's car was wet and had dust between the water bubbles. He asked for the deceased. The appellant maintained his story that she went for a walk and said that she had said that when she got where she is going she would call. The father and brother entered and searched the house. They did not find her. The father admitted that he was vexed. The appellant said that he would make a report to the police. They went to the police station where the appellant reported that she was missing. The police began to investigate the matter. The appellant maintained his story. He was taken into police custody during that evening. In the meantime there was a massive search for the deceased and the police pursued their investigations. On 20th July Sgt. Anthony arrested and charged the appellant for the murder of the deceased. It was not until 12.20 a.m. on 21st July that he made a statement containing the admissions about the death of the deceased and the location of the place where he had concealed her body. As a result, about 6.30 a.m. Supt. Airall led a team of investigators to Boggy Peak where the body was found in a thickly wooded area lying on her back clothed in a black dress with no underwear, no shoes and no hat. Although the body was partly decomposed Dr. Simon was able to identify about five marks on her body that were presumably bite marks and numerous abrasions on the legs, the front and the back, the right knee, the thighs, the left and right groins the lower

abdomen and the anterior chest. The doctor did not express any opinions about the cause of these injuries. In my view, however, it would be open to a jury to have concluded that the condition of the body was intended to give the false impression of some violent assault leading to death. The appellant explained that he had taken her body there in the trunk of his car because after her death he wanted to tell the truth but he panicked and was afraid to tell her family or the police and even contemplated taking his own life.

Their was forensic evidence which confirmed that the deceased body had been in the trunk of the appellant's car and that there was no evidence of sexual intercourse. The learned trial judge directed the jury to consider whether the appellant intended to kill the deceased or to cause her serous bodily harm and to consider the defences of accident, self-defence and provocation, and he addressed them on the effect of the lies told by the appellant.

The Appeal

Learned counsel for the appellant argued

1 that the judge was wrong in refusing to withdraw murder from the jury on the ground that there was no or insufficient evidence of malice aforethought.

2 that the judge misdirected the jury on the intent required for murder.

3 that the judge misdirected the jury on manslaughter and the appellant should be acquitted.

4 that there was a material irregularity in that the jury were put in charge of police officers giving the impression of bias.

No Case To Answer

Learned Counsel for the appellant contended that the judge should have withdrawn Murder from the jury at the close of the prosecution's case because the prosecution failed to adduce any or any sufficient evidence from which any inference could be drawn that the appellant intended to kill or cause grievous harm to the deceased. He argued that the only evidence of the events leading up to the death was contained in the statement of the appellant and that there was nothing in the explanation he gave which could support a conclusion that he intended to kill or to cause grievous harm, and that the case should have gone to

the jury as one for manslaughter.

The submission requires an examination of the evidential status of the unsworn statement made by the appellant. This was explained by Lord Roskill in the Privy Council case of **Leung Kam-Kwok v R** 81 Cr. App. R. 83. At 91 he said:

> "If an accused person in a statement not made on oath in Court denies his guilt, saying for example "I am not guilty: I was not there" and no more, that statement is not evidence of the truth of his absence from the scene of the crime and thus of the truth of his alibi. But if such a statement consists partly of an admission and partly of an explanation for example "I shot him: I was provoked" the admission is plainly admissible and common fairness requires that the entirety of the statement should be admitted so as to show the precise context in which the admission was made, even though what is said by way of explanation or excuse is not evidence of its truth. Where the accused goes into the witness-box and repeats the explanation or excuse on oath there is no problem. Where he does not go into the witness-box it behoves the trial judge, when dealing in his summing up with the admission, in common fairness to the accused also to refer to the accompanying explanation or excuse, adding if he thinks fit to do so that that explanation or excuse has not been supported by evidence on oath before the jury. It is then for the jury to evaluate the admission and the unsworn explanation or excuse as they think fit."

In this case therefore it would have been wrong for the learned trial Judge to conclude that at the close of the case for the prosecution there was evidence contained in the appellant's statement to the police that he did not intend to kill or cause grievous harm to the deceased. The evidential import of the statement made by the appellant to the police was that it contained admissions that he had killed the deceased and that he offered an explanation or excuse for his conduct. The explanation or excuse did not amount to evidence, although if the matter was before the jury common fairness would require that it be considered. The judge could not rely on that explanation as a basis for deciding that there was proof that the appellant did not have the required mental state to constitute the crime of murder. In my view, however, the matter went much further because I did not think that this was a borderline case or a case where the evidence was tenuous. The prosecution had adduced evidence from which the inference could be drawn that the appellant desired and planned the death of the deceased, lured her to his home where he killed her and then tried to cover up his crime. This was a case where if that inference was drawn it tended to show that the killing was premeditated.

This, therefore, became a matter for the jury to determine whether they could have inferred that the appellant had desired the death of the deceased and executed a plan to accomplish his objective and conceal the crime. I would reject the submission that there was no case to answer for the offence of murder.

Direction To The Jury On Intent

A number of criticisms were levelled at the learned trial Judge's directions on *mens rea*. He explained:

> "Malice aforethought. Yes malice may be either expressed[sic] or implied. Aforethought does not necessarily mean premeditation. Expressed[sic] malice means that prior to or at the time of the act which caused the death, there existed in the mind of the Accused either an intention to cause the death or grievous harm to the deceased, or that he had knowledge that the act which caused the death would probably cause death or grievous harm to some person, and it does not matter that he was indifferent as to whether death or grievous bodily harm is caused. By grievous bodily harm we mean serious bodily harm. As long as the Accused is of sound mind and discretion, this is the question we have to answer. Whether the unlawful and voluntary act which he did was of such a kind that death or grievous bodily harm was the natural and probable result. Put another way, you can ask yourselves, what would an ordinary and responsible person in the circumstances of this case have contemplated as the natural and probable result of the acts alleged to have been performed by the Accused.
>
> Now in cases where there is no malice expressed or openly indicated, the law will imply from a deliberate and cruel act, committed by the Accused against the deceased implied malice. Implied malice may be found where the death occurs as a result of the voluntary act of the Accused which was intentional or unprovoked. If you are in doubt as to whether the act was intentional or unprovoked, then you must acquit the Accused."

Foresight and Probability

Learned counsel for the appellant complained that the judge did not give adequate directions on the issues of foresight and probability.

Unfortunately, the description of the learned judge, by the use of "either...or..." improperly mixed up the concepts of foresight and probability and elevated them to an equivalence with that of intention. Although it is not always necessary for a judge to direct the jury on these issues, when he does they should be told that foresight of consequences is no more than evidence of the existence of intention, to be considered, and its weight assessed, together with all the other evidence in the case; and that the probability of the result of an act is an important matter for the jury to consider in their determining whether the result

was intended.

The golden rule when a judge is directing a jury upon the mental element necessary in a crime of specific intent is that he should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent. Further elaboration becomes necessary only if the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation is strictly necessary to avoid misunderstanding. See: **R v Moloney** (1985) A.C. 905.

In **R v Hancock and Shankland** (1986) 1 All ER 641 Lord Scarman, who delivered the leading judgment in the House of Lords, made it clear that a direction on foresight and probability is not necessary in every case. He considered **Moloney** (*supra*). After expressing the view that its guidelines clarified the law to the extent that it stated that the mental element in murder is a specific intent to kill or to inflict serious bodily harm, and nothing less suffices, he went on and said at 649:

> "Second, the House made it clear that foresight of consequences is no more than evidence of the existence of the intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply the existence of intention, though it may be a factor from which when considered with all the other evidence a jury may think it right to infer the necessary intent. Lord Hailsham LC put the point succinctly and powerfully in his speech in *Moloney's* case..
>
> > "I conclude with the pious hope that your Lordships will not again have to decide that foresight and foreseeability are not the same thing as intention although either may give rise to an irrestible inference of such, and that matters which are essentially to be treated as matters of inference for a jury as to a subjective state of mind will not once again be erected into a legal presumption. They should remain what they always should have been, part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not a part of the substantive law."

In R v Nedrick (1986) 3 All ER 1 the point was further emphasised and clarified by Lord Lane C.J. at 3:

> "What then do a jury have to decide so far as the mental element in murder is concerned? They simply have to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision the jury must pay regard to all the relevant circumstances, including what the defendant himself said and did.

> In the great majority of cases a direction to that effect will be enough, particularly where the defendant's actions amounted to a direct attack on his victim, because in such cases the evidence relating to the defendant's desire or motive will be clear and his intent will have been the same as his desire or motive. But in some cases, which this is one, the defendant does an act which is manifestly dangerous and as a result someone dies. The primary desire or motive of the defendant may not have been to harm that person, or indeed anyone. In that situation what further directions should a jury be given as to the mental state which the must find to exist in the defendant if murder is to be proved? "

In my view this is a case in which prosecution's case was that the appellant had express malice based on the evidence adduced to show that he had a motive and a plan to kill the deceased and conceal the crime, as well as the medical evidence which led to the inference that the death was intended by the sustained and excessive force necessary to break the thyroid cartilage, cause unconsciousness and eventually death. The explanations given by the appellant in the witness box and in his statement to the police, amounted to alleging that he did not want to kill her, that he did not squeeze the deceased's throat and that the force he applied was minimal and either for the purpose of calming her down or pushing her off, and raised questions of fact for the jury. The issues of foresight and probability were relevant to this aspect of the case, in the event that the jury rejected or were in doubt about premeditation and had to consider the circumstances under which the deceased died having regard to the explanations offered by the appellant. The jury could have been helped by being asked to consider whether the appellant foresaw that death would have resulted from the use of pressure on her throat, or whether he appreciated that there was a high degree of probability that death would have resulted from his action. These would be factors which the jury should consider together with all the other evidence in the case in determining the intention of the appellant. **Sonny Lockhart v The Queen** [St.Vincent] Crim. App. No.5 of 1994.

Implied Malice

In Antigua and Barbuda the specific intention for the offence of murder is malice aforethought, express or implied. In defining its meaning the learned trial judge should have told the jury that malice aforethought means the intention, held by the person accused, to kill (express malice) or to cause serious bodily harm (implied malice).

The definition given in **R v Vickers** (1957) 2 All ER 741 by Lord Goddard,

C.J. at 743 is still regarded as good law:

> "Malice aforethought has always been defined in English law as either an express intention to kill, such as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on him, or an implied intention to kill, as where the prisoner inflicted grievous harm, that is to say, harmed the victim by a voluntary act intended to harm him and the victim died as the result of that grievous bodily harm."

In his definition the learned trial Judge omitted to explain that when malice is being implied from the commission of a deliberate and cruel act there must be an intention to cause serious harm by the act. In other words a jury should not be invited to imply that an accused person had the specific *mens rea* for murder where death results from his voluntary act unless that act was intended to cause serious harm to the deceased.

The Objective Test

The objective test was improperly introduced by directing the jury to ask themselves what would an ordinary and responsible person have contemplated as the natural and probable result of the acts alleged to have been performed by the accused. There would have been no ground for criticism if the subjective test was not introduced in any technical sense once the learned trial Judge had made it clear as he recounted the facts to the jury that they had to determine the actual intention of the appellant himself. [See **Rudolph Baptiste v The Queen** [Grenada] Crim. App. No.9 of 1995]. The egregious factor in this case is that the directions gave the erroneous impression that the jury had to apply the objective test in determining the requisite intention for murder. In our jurisdiction the case law on the *mens rea* for murder is replete with the proposition that the proper test is subjective. We have frequently emphasised that an accused person is to be judged by what he himself contemplated as the natural and probable result of his acts [eg. **Sonny Lockhart v The Queen** [St.Vincent] Crim. App. No.5 of 1994; **Eustace Armstrong v The Queen** [Antigua] Crim. App. No.4 of 1995; **Bertram Abraham v The Queen** [St.Vincent] Crim. App. No.12 of 1995].

Learned counsel for the appellant referred to **R v Wallett** (1968) 2 All E R 296 to support his criticism that the judge wrongly introduced an element of the objective test in assessing the intention of the appellant. In that case the conviction of a sixteen year old boy for the murder of a girl of similar age based on pressure on the throat during a sexual assault was reduced to manslaughter

because the judge misdirected the jury on the *mens rea* for murder.

After retiring the jury requested further directions on murder and manslaughter. The directions the judge gave ended in such a way that Winn L.J. said:

> "As I have made, I trust, clear, the learned judge in those last words, which are the last words that he spoke to the jury, was still at least within their mental contemplation the idea that one applied the test of what an ordinary person of sane mind would foresee or know was likely to be the result of an action, when approaching, for final decision, the vital question: what did this particular man at the time in fact intend?"

The matter was compounded by the fact the judge eventually had to accept a majority verdict of murder. The court set aside the conviction and substituted manslaughter.

Although there is a distinguishing factor, in that in **R v Wallet** there was the circumstance that the appellant's primary intention was shown to be to have sexual relations with the deceased and the injury inflicted on her was incidental to that other purpose and there was no such circumstance in the instant case, the question of the objective test is, nonetheless, fundamental. The appellant is entitled to be judged by what he himself intended at the time he did the acts which led to the death of the deceased.

Failure To Relate The Evidence To The Law Of Intention

Learned counsel for the appellant also pointed out that the learned trial judge did not at any time relate the facts to the law. One result of his omission was that the jury did not receive any assistance in their determination of the question of the mental state of the appellant. The prosecution adduced evidence of intention on the basis that the appellant had a motive and a plan to kill, that is to say premeditation. They also adduced evidence from which the intention to kill could have been inferred from the nature of the injury inflicted by the appellant. At no stage in his summation to the jury did the judge give them any directions on how to apply the evidence to the issue of intention.

We have to consider the duty of the court where there has been such misdirection on the *mens rea* of the crime. The main issue on the question of premeditation was whether the appellant formed the intention to kill before he got the deceased to his home. There was ample evidence to support the conclusion that he did. However can this court say that the jury answered, or would

inevitably have answered, this question in the affirmative when it was not put to them as a factual issue that they should determine? Similarly the crucial question to be answered if the answer to the former was in the negative, was whether having regard to the explanations given by the appellant, he held her throat, knowing that his action would cause her death, or, appreciating that it was highly probable that death would result from what he was doing to her? Again, in my view there was ample evidence to support affirmative answers. Yet can this court venture to rule out the possibility that the jury would inevitably have concluded otherwise if the question had been put to them?

We did not receive any arguments on the application of the provisions of the Supreme Court Act which entitle the court to dismiss an appeal notwithstanding that the court is of the opinion that the point raised is to be decided in favour of the appellant if we consider that no substantial miscarriage of justice has occurred. In order for us to apply these provisions we would have to be satisfied that, on the whole of the facts and with a proper direction, the only reasonable and proper verdict would have been one of guilty of murder. We have to concede that it was possible for a reasonable jury to reject the inference that the appellant had decided to kill the deceased before he got her to his home and to conclude that his actions which led to the fatal injury were not intended to result in her death and therefore return a verdict of manslaughter. The presumption of innocence requires us to give the benefit of that slim chance to the appellant.

Manslaughter

The learned trial Judge after dealing with the defences to the crime of murder namely accident, self-defence and provocation, told the jury that there was an alternative verdict of manslaughter. In his explanations of these defences he told the jury that if they accepted or were in doubt as to the defences of accident or self-defense they must acquit the appellant of any offence and if they accepted or were in doubt as to the defence of provocation the verdict should be manslaughter. Thus this alternative of manslaughter could only come to be considered if those defences were rejected.

Learned counsel for the appellant submitted that the directions on manslaughter were defective because the judge failed to tell the jury that where death is caused by the application of force, no crime is committed unless the application of force was itself unlawful. He referred to **R v Scarlett** (1993) 4 All

E R 629 where a conviction for manslaughter was set aside because the learned trial Judge failed to address the issue of the *mens rea* required for manslaughter. The facts were that, the appellant, landlord of a Public House ejected the deceased by pinning his arms and bundling him out of the door and placing him against a wall in the lobby. The deceased fell down the steps and died from the injuries he sustained. In that case Bedlam L.J. said at 636:

> "Where as in the present case, an accused is justified in using some force and can only be guilty of an assault if the force is excessive, the jury ought to directed that he cannot be guilty of an assault unless the prosecution prove that he acted with the mental element necessary to constitute his action an assault, that is 'that the defendant intentionally or recklessly applied force to the person of another' (see **R v Venna** [1975] 3 All E R 788 at 793, [1976] 1 Q.B. 421 at 429 per James L.J.)

In this case however, the evidence adduced by the prosecution and the appellant did not raise the issue of what constituted an assault. The learned trial Judge clearly explained to the jury that proof of manslaughter required proof of the intentional use of unlawful force and in my view there was abundant evidence to support a conclusion that the appellant intentionally used unlawful force on the deceased.

In **R v Lamb** (1967) 51 Cr. App Rep. 417 the appellant had pointed a revolver at the deceased, his best friend, in jest, with no intention to do him harm. The defence was that he was unaware that pulling the trigger would bring a bullet into the firing position and that the killing was an accident. The conviction was set aside. Sachs L.J explained at 421:

> "Unfortunately, however, (the judge) fell into error with regard to the meaning of the word "unlawful" in that passage and pressed upon the jury a definition with which experienced counsel for the Crown had disagreed during the trial and which he found himself unable to support on the appeal. The trial judge took the view that the pointing of the revolver and the pulling of the trigger was something which could of itself be unlawful even if there was no attempt to alarm or intent to injure."

This case is distinguishable on the facts. It is clear that the criticisms of learned counsel did not apply to the summing up in this case as the judge did ensure that the jury were instructed that manslaughter required proof of the intentional unlawful application of force.

I would reject the contention that a manslaughter verdict was not open to the jury on the basis of the summing up and evidence in this case. The fact that the jury did not return a verdict of manslaughter makes consideration of the

Judge's directions on manslaughter somewhat irrelevant but I wanted to demonstrate that the submissions contending that a manslaughter verdict was not open to the jury should be rejected.

Irregularity

The record shows that the jury retired at 10:44 a.m. At 11:50 a.m. the Deputy Registrar informed the Court that on account of a bomb threat the jury had been moved to a neighbouring building. At 1:50 p.m. the jury returned with their verdict. When the jury retired they were in the custody of two police officers who were sworn to keep the jury.

Counsel for the appellant challenged the practice of using Police officers as Court Bailiffs in this way. He submitted that as criminal cases are brought by the police putting the jury in the care of police officers gives the appearance that justice is not done and in this particular case there was the appearance of contamination when the jury was moved otherwise than on the order of the trial Judge. The long established practice of the courts in this jurisdiction has been to employ the services of police officers as Court bailiffs in the Criminal Assizes. These officers do not retire with the jury nor do they take any part in their deliberations.

Learned counsel for the appellant referred to the case of **R v Gough** (1993) 2 All ER 724 where Lord Goff considered the question of bias. Lord Goff identified two differing criteria that have been applied in considering the question of bias as being (i) whether there was a real danger of bias on the part of the person concerned or (ii) whether a reasonable person might reasonably suspect bias on his part. He considered a number of cases. In each case however the issues related to the decision making authority. He concluded that at page 735:

> "In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal justice requires that the decision should not be allowed to stand."

The main distinction between this situation and those discussed in **R v Gough** is that they dealt with judicial officers and judicial tribunals. The police officers who discharge the duties of court bailiffs are not judicial officers and do not form part of any judicial tribunal. In reality their duty, as evidenced by the oath that they take each time the jury is put in their charge, is not to communicate

with them and not to suffer any one to communicate with them except the Provost-Marshall. In my view there is no rational basis for concluding either that there was a real danger of bias on the part of the jury or that a reasonable person might reasonably suspect the jury of bias because they were put in the charge of police officers who were discharging the duties of court bailiffs. I would therefore reject this submission.

Result

I would therefore order, that pursuant to the provisions of the Eastern Caribbean Supreme Court Act Cap.143 of the laws of Antigua and Barbuda, a verdict of guilty of manslaughter be substituted for the verdict of murder.

Sentence

I can find no mitigating factors. I would impose a sentence of 25 years imprisonment.

DENNIS BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT MATTHEW
Justice of Appeal [Ag.]