TORTOLA

IN THE COURT OF APPEAL

CRIM. APP. NO.1 OF 1996

BETWEEN:

BASSANO HENDRICKS

Appellant

and

THE QUEEN

Respondent

Before: The Hon. Mr. G.M. Dennis Byron Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh Justice of Appeal
The Hon. Mr. Albert J. Redhead Justice of Appeal

Appearances:
Mr. Joseph S. Archibald Q.C. & Mr. Anthony L. Johnson for the Appellant
Mr. Francis Belle, Senior Crown Counsel, for the Respondent

1997: June 24;
July 7.

Criminal Law - Murder conviction - Sentence of life imprisonment - Shooting following a quarrel - Defence of self-defence and provocation - Alleged misdirections on the issue of self-defence, and inadequate directions on the issue of intention - **R v Johnson** [1989] 2 All E.R. 839 cited - Submission of additional evidence not disclosed on the deposition - **R v Berry** 42 WIR 244 cited in support - Whether the issue of provocation was properly left with the jury, and they given proper direction - Whether the 'proviso' ought to be applied to uphold the conviction regardless. Murder conviction set aside in favour of verdict of manslaughter.

JUDGMENT

REDHEAD, J.A.

On 29th March, 1996 the appellant was convicted for the murder of Harris Jones, which occurred on 17th July, 1995. He was given the mandatory sentence of life imprisonment. He now appeals to this Court against his conviction.

The appellant and the deceased lived neighbourly on the island of Jost Van Dyke in the British Virgin Islands. In fact, the appellant and the deceased were cousins. At the time of the incident the appellant was about 28 years old and the deceased was about 66 years.

There was a history of bad blood between the appellant and the deceased. The deceased had a business. He was also a fisherman. The appellant is a fisherman. He also worked in his father✉s business. It appears that the once friendly relationship between the parties deteriorated when the deceased set up a business in Jost Van Dyke which was in competition with the appellant✉s father✉s business.

The appellant had made several complaints to the police prior to 17th July, 1995 of threats made by the deceased to kill him. The deceased had also made reports to the police of threats made by the appellant against him. There was evidence in that, when the appellant and the deceased, who was an ex-soldier

were on friendly terms that the deceased had told him the appellant, that he, [the deceased] could kill a man with his bare hands.

On the morning of 17th July, 1995 matters came to a head between the appellant and the deceased. They had a quarrel. Apparently, the appellant that morning, was moving fish-traps belonging to the deceased. The deceased said to the appellant “why don✉t you leave my fucking fish pots alone?✉ The appellant replied, “You ain✉t see your fucking fish pots mashing up my boat?”

The appellant then left and went to a hut nearby and closed the door of the hut. The (deceased walked up to the hut and was shouting, “come out here and end what you started. Come out here and finish it.” He pulled on the door and according to the appellant manage(l to get the door open. The appellant shot the deceased in the chest with a spear-gun, which he said he usually kept set for the purpose of shooting mangoose.

After shooting the deceased, the appellant jumped through a window arid left the building. The appellant gave a statement to the police, and he maintained in evidence at us trial, that lie shot the deceased when he realized that the deceased was serious, that he was coming into the hut to kill him. He pulled the trigger and the spear went into him. The appellant also said that he did not want to take any chance to go through the door after he had shot the deceased because lie was still breathing and he did not want the deceased to hold him and kill him.

At the trial of the appellant the issues of self defence and provocation were raised by the defence.

Six grounds of appeal were filed on behalf of the appellant. At the hearing of the appeal, grounds 4, 5 arid 6 of the appeal were abandoned

On ground 1[i] of the appeal, Learned Queen✉s Counsel argued that the judge was wrong to direct the jury, that the question of self-defence should be judged on an objective and subjective test and he referred to.

Beckford v R [1987] 36 W.I.R. at 300.

Vasquez v R [1994J 45 W.I.R. at 103.

At page 1198 of the record the learned trial Judge said:

“First, you have to put yourself in his shoes. If you really genuinely think that he has an honest belief, he honestly believed that Harris was going to kill him that morning, and what, and he did only what he did to save his life, then you would have to acquit him. But at the same time, you have to look at all the surrounding circumstances, and if having regard to all the surrounding circumstances, such a belief could not honestly have been held, even if it was unreasonable. So there is the subjective test, and the objective test. Subjective in the sense that it is of him in that room on that morning hearing Harris out there telling him to come out. If you honestly

believe that when he saw Harris coming there to kill him he was afraid, if you think that is the case, then he might be justified in self-defence."

If the learned trial Judge had stopped at, "to acquit him," there could have been no objection to this part of the summing up. The summing up should have read:

"You have to put yourself in his shoes. If you really genuinely think that he had an honest belief, he honestly believed that Harris was going to kill him that morning and what he did to save his life [instinctively] did to save his life was [to shoot the deceased] then you have to acquit him."

The summing up therefore, although not impeccable cannot in my view, be regarded as a misdirection.

Ground 1 [ii]

Learned counsel argued that the learned trial Judge did not give adequate direction on intention. The direction given by the learned trial Judge at pages 1170 - 1112 of the record in my view, is adequate. Thus ground of appeal also fails.

I now turn to ground 2 of appeal which in my view is the one that has some merit. I shall encapsulate learned counsel✉s ground 2 in this way. The learned trial Judge misdirected the jury in failing to tell them if they found that the appellant "provoked" the deceased that it was still open to them to consider evidence which might lead them to find provocation which led to the appellant✉s shooting of the deceased, and that the direction of the Judge constituted a withdrawal of provocation from the jury✉s consideration.

R v Johnson 11989] 2 All ER. at 839.

It was held inter alia if there was evidence which might lead the jury to find provocation, whether self-induced or not, such a defence, ought to be left to the jury by the learned trial Judge.

There was evidence from Grecha Law an eye witness to the incident, who testified that it was the appellant that morning who was "provoking" the deceased. The learned trial Judge seemed to have placed a lot of emphasis on Law✉s testimony.

I therefore agree with learned counsel's submission that in light of that evidence it was incumbent on the learned trial Judge to give a direction as referred above in **Johnson**.

In his summation to the jury the learned trial Judge said:

"Mr. Archibald in his summation, in his address to you yesterday, referred to a number of instances which he said was evidence of provocation."

The learned trial Judge then went on to list the instances of provocation as outlined by Mr. Archibald, then the learned trial Judge went on to say:

> “But provocation, members of the jury, consist of mainly three elements, as I was saying earlier, the act of provocation, thee loss of self control, both actual and reasonable, and the retaliation proportionate to the provocation.....
>
> If there is evidence of an act of provocation that of itself does not raise the issue of provocation.
>
> The accused testimony is that lie was not angered by the deceased. He gave no evidence of, or to suggest loss of self control. The main thrust of his statement to the police and of his evidence to the court was a reliance on the justification for the killing of the deceased on the ground of self-defence.....”
>
> “The whole tenor of his evidence was of a reaction on his part to save himself, and that is inconsistent with loss of temper.”
>
> [1213]
> “All we have is a quarrel on that morning: And I do not think the incident which took place, 92 or 93 goes back over the years, can be prayed in aid to bolster up the defence of provocation, but I am leaving it up to you to decide.”

Learned Queen✉s Counsel argued that the incident on the morning of 17th July, was the last straw. And the words to the appellant to come out arid finish what you have started, were fighting words and when taken in that context of the history of the bad-blood which prevailed over the years could have finally provoked the loss of self-control by the appellant.

He argued therefore, to have directed the jury in the manner as above was a misdirection and in addition, was a withdrawal of the issue of provocation from the jury.

I agree.

Learned Queen✉s Counsel referred to many authorities including **Luc Thiet Thuan** v R [1996] 2 AER. at 1033.

R v Johnson [1989] 2 A.E.R. at 689.

R **v Rossiter** [1994] 2 A.E.R. at 752.
In **Luc Thiet Thuan** it was said at page 1034:

> “It may be opened to a defendant to establish provocation in circumstances in which the act of the deceased, though relatively unprovocative taken in insolation, was the last of a series of acts which finally provoked the loss of self-control by the defendant and so precipitated his extreme reaction, which led to the death of the deceased.”

Mr. Belle argued that even if this court finds that there was a misdirection~ that we should apply the proviso arid uphold the conviction because even if a proper direction was given to the jury, they would have found the appellant guilty of the offence of murder having regard to the mode of retaliation. He referred to **Stephen Alphonse v** R [Criminal Appeal No.22 of 1993 - Dominica].

Mr. Archibald on the other hand argued that the Proviso ought not to be applied, having regard to the misdirection and the withdrawal of the issue of provocation from the jury arid an irregularity which occurred at the trial.

The irregularity which he referred to was the giving of additional evidence which was not disclosed on the deposition, of which no notice was given to the defence arid which was prejudicial to the appellant.

The evidence was to the effect that Stephen Hendricks a brother of the appellant testified that he saw the appellant strike the deceased in the water during the quarrel.

The evidence not disclosed on the depositing, the Prosecution in the interest of fairness ought to have given the defence notice of it before the trial. [**R v Berry** 42 W.I.R. at 244].

As outlined above the issue of provocation does arise in this case. The appellant therefore had the right to have that issue left with the jury. As Lord Widgery C.J. said in **R v Haynes** 64 G.A.R. 82 the failure of the Judge to leave to the jury an issue that ought to have been left to them “is a factor tending to make the ultimate conviction unsatisfactory." We are riot satisfied, notwithstanding the mode of retaliation which we agonized long and hard about as thus was indeed a brutal slaying, that if the issue of provocation was left with the jury arid on a proper direction that they would not have returned a verdict of manslaughter.

In the circumstances therefore, we substitute a verdict of manslaughter for that of murder and impose the maximum sentence for manslaughter under the Laws of the British Virgin Islands being ten [10] years imprisonment.

ALBERT J. REDHEAD
Justice of Appeal

I Concur

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

SATROHAN SINGH
Justice of Appeal