

**ANTIGUA AND BARBUDA**

**IN THE COURT OF APPEAL**

**CRIMINAL APPEAL NO. 3 OF 1997**

**BETWEEN:**

**CONFESOR VALDEZ FRANCO  
APPELLANT**

**and**

**THE QUEEN  
RESPONDENT**

Before: The Honourable Mr. C. M. Dennis Byron                      Chief Justice (Ag.)  
The Honourable Mr. Satrohan Singh                                  Justice of Appeal  
The Honourable Mr. Albert Redhead                                  Justice of Appeal

Aparances: Mr. Dane Hamilton for the Appellant  
Mr. Cosbert Cumberbatch DPP, for the Respondent

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1997: Nov. 11, 24  
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*Criminal Law - Murder conviction - Death sentence - Previous attack by deceased on appellant in the appellant's home and threats by deceased reported to the police with no result - Defence of self-defence - Whether the judge ought to have directed the jury on provocation, even if provocation was not specifically pleaded by the defence - **Mancini v DPP** (1941) H.L.; **Stephen Mongroo v The Queen** Crim. App. No. 3 of 1994 St. Lucia (unreported) considered - Application of proviso to S. 39(1) of the Supreme Court Act.      Appeal dismissed. Conviction and sentence affirmed.*

**JUDGMENT**

**SATROHAN SINGH JA**

Lisa Cabral, is the live-in girlfriend of the appellant Confesor Valdez Franco, for whom she has one child. Before that, she had two children for Ishmael Zorella (the deceased). These people who were all from Santo Domingo, live in Antigua. On October 3, 1995, Zorella armed with a knife, invaded the home of the appellant and Lisa, and launched an attack on them as a result of which they were injured. The appellant received a cut on his head. One Carlos intervened and disarmed Zorella, who left with

the threat that he would return to kill both the appellant and Lisa. The appellant and Lisa reported the matter to the police but apparently the police took no action. On October 12, 1995, the appellant and Zorella met by a place called Bruces'. There the appellant stabbed Zorella to death.

On February 17th, 1997, a mixed jury of nine, unanimously convicted the appellant of the offence of the murder of Zorella and **Benjamin J** sentenced him to death by hanging. At this trial, there was no dispute that the appellant inflicted the wounds on Zorella that caused his death. He however sought to exclude criminality from his actions with a plea of self-defence. He did not plead provocation and the judge did not leave the issue of provocation for the consideration of the jury.

The primary issues in this appeal are (1) whether the judge erred when he did not direct the jury on provocation and (2) if he so erred, whether this court, given the circumstances disclosed in the evidence, should apply the proviso to **S39(1) of the West Indies Associated States Supreme Court Act No. 26 of 1969** and dismiss the appeal. This law states that this court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

### **PROVOCATION**

On the first issue, the learned Director of Public Prosecutions quite properly conceded that on the evidence of the appellant, the issue of provocation did arise and ought to have been left for the jury's consideration despite the fact that it was not relied on by the appellant. I agree. The law is settled that on a trial of a person charged with Murder, it is the duty of the judge in his summing up, to deal adequately with any view of the evidence given which will reduce the crime to manslaughter or afford the accused the chance of a complete acquittal. The fact that the defending counsel may not have stressed the possibility of such an alternative case, does not relieve the judge from directing the jury to consider it if there is material which justifies such a direction [See **Stephen Mongroo v The Queen, Criminal Appeal 3 of 1994 St. Lucia unreported: Regina v. Sharmpaul Singh (1962) AC 188: Mancini v. Director of Public Prosecutions (1941) AC 1 HL: Rex v Hopper (1915)**

**2 KB 431.** In my judgment, the learned trial judge erred by omission when he failed to direct the jury to consider the issue of provocation. I would therefore now address the application of the proviso.<sup>3</sup>

### THE PROVISO

This Court is powered to apply the aforementioned proviso and dismiss the appeal, if, having considered all the evidence and circumstances of the case, we are certain that had the jury been properly directed, they would inevitably have returned the same verdict. This involves a consideration of the strength of the case for the prosecution when pitted against the evidence of the appellant.

I commence from the premise that there was bad blood between the deceased and the appellant before this incident. That the deceased had previously injured the appellant and that the police took no action despite a threat by the deceased to the appellant and Lisa that he would return to kill them. Against this backdrop, the appellant's evidence was that on that fatal day, as he arrived at Bruce's, Zorella, without any ado, pushed him and sprayed mace in his face temporarily blinding him. And, in his effort at warding off an attack on him by the deceased, as a result of which he received two wounds on his fingers, he slashed at the deceased with a knife. He said he felt "the knife got stuck" and Zorella fell. His evidence showed that Zorella was attacking him with a large piece of iron. He tried to relieve Zorella of the iron but Zorella cut him. Whereupon, after he had received the two wounds on his fingers, he "took a knife" and began to slash at Zorella. He later said he took the knife from the deceased.

The learned judge gave impeccable directions to the jury on the concept of self-defence. It is my view that had the jury accepted this evidence of the appellant they were duty bound to acquit the appellant. This evidence showed complete legal justification for his alleged attack on the deceased. However, the jury convicted. The inevitable conclusion is that they rejected the appellant's version of the incident.

The case for the prosecution was that this was a vengeful attack on Zorella by the appellant for what Zorella did to him on October 3, 1995. Eye-witnesses for the prosecution testified that on the night of October 12, 1995 about 9 o'clock, the deceased emerged from a car driven by Carl Gomes by Bruce's. He walked towards the gate of Bruce's. The appellant, who was hidden behind some rubbish drums by the entrance of Bruce's,

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rushed out and ambushed the deceased. He ran behind Zorella with a cutlass. Zorella ran into Bruce's with the appellant in hot pursuit. Zorella then sprayed mace over his shoulder at the appellant. The chase continued and they came back outside, the appellant still chasing Zorella with the cutlass. Zorella had nothing in his hands. They reached the parking lot close to Gomes' car. Gomes got between them. The appellant faced Gomes. Zorella was behind Gomes. The appellant continued waving the cutlass. Zorella ran into a yard. The appellant ran after him. They again ran into Bruce's. The appellant fired a chop at the back of Zorella and the cutlass fell to the ground. The chase continued and Zorella fell face down by a gutter. The appellant jumped on top of him and gave him three stabbing blows in his back with a thin bladed black handled knife about 8 inches long. At the last blow, the knife became stuck in Zorella's backbone and despite efforts to remove it by rocking it, the appellant did not succeed. The appellant left him there lying face down bleeding. The evidence was that having dropped the cutlass, the appellant went to his bicycle, returned with the knife and continued his attack on Zorella. The evidence also disclosed that the appellant was never seen by the eye-witnesses at Bruce's before that night.

I have perused the evidence very carefully and it is my opinion that these eye-witnesses were not shaken in cross-examination. Their evidence was more consistent than the appellant's with the injuries found by doctor. I therefore understand why the jury would have rejected the appellant's version. It is my considered opinion that the prosecution, with credible evidence that remained unassailed, established a powerful case of Murder against the appellant. Their case showed no evidence of self-defence or provocation. It showed premeditation. It showed the appellant deliberately waylaying the deceased and then indulging in a persistent and relentless vengeful chase of him with a cutlass. This chase ended with a vicious and merciless stabbing attack with the 8" thin bladed knife on the back of the deceased by the appellant as the deceased lay face down by the gutter. The knife was eventually left stuck in the backbone of the deceased.

Given these facts and circumstances, the justice of the case demands the application of the proviso. I am certain, that had provocation been left with the jury for their consideration, they would inevitably have

returned the same verdict of guilty of Murder.<sup>5</sup> Except for the non direction on the issue of provocation, I consider the judge's summation to the jury to be unimpeachable on all the other aspects of the case. The jury in their deliberations, would have assessed credibility and, by their verdict, must have rejected the evidence of the appellant. In my judgment, the non-direction on provocation could not have affected their assessment of credibility. Given these circumstances, the inescapable conclusion is that had they been properly directed, they still would have accepted the case for the prosecution which did not disclose self-defence or provocation. They therefore still would have returned the verdict of guilty of Murder.

For these reasons, I would hold that despite this non direction, no miscarriage of justice has actually occurred and I would order that this appeal do stand dismissed. The conviction and sentence are affirmed.

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Satohan Singh  
Justice of Appeal

I concur

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C M Dennis Byron  
Chief Justice (Ag.)

I concur

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Albert Redhead  
Justice of Appeal