GRENADA

IN THE COURT OF APPEAL

CRIM. APP. NO.7 OF 1994

BETWEEN:

BENEDICT JACOB

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Dennis Byron — Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal

Appearances:

Mr. Anselm Clouden for the Appellant
Mr. Malcolm Holdip and Mr. Christopher Nelson for the Respondent

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1997: November 24;
December 8.

Criminal Law - Murder conviction - Death sentence - Whether the judge could be said to have descended into the arena rightly belonging to the jury - Failure to allow into evidence a written psychiatric report - Whether the trial judge erred in leaving with the jury the defence of provocation, when that defence was not relied on by the defence - The burden of proof with regard to insanity & automatism - Application of 'the proviso'. Appeal dismissed.

JUDGMENT

BYRON, C.J. [AG.]

This is an appeal against conviction and death penalty entered before St.Paul J. and a jury on the 30th June 1997, for the murder of Evadney Bowen, who had been killed on the 23rd April, 1995.

The Appeal

The Appellant complained that the learned trial Judge:

- interfered with the factual development of the defence by frequent interruptions during the testimony of the psychiatrist;

- wrongly excluded the psychiatrist's report from evidence.
- failed to deal with inconsistencies in the prosecutions case adequately;
- left provocation to the jury even though there was no evidence to support it;
- failed to put the defences of insanity and automatism properly, in that he gave faulty directions on the burden and standard of proof.

The Prosecution's Case

The facts adduced by the prosecution were not contradicted. The deceased and the appellant had previously lived together, in a house belonging to the deceased at La Pastora, St. David's, for about 4-5 years and she had a child called Tough Boy for him. A few months before her death she returned to live with her mother Anastasia Bowen-Greenidge at Laura Land, in a two-storey house, the ground floor being the Spiritual Baptist Church. On the morning of 23rd April, 1995 the accused drove his van to the house about 9.00 am. The deceased went to his van where they had a conversation. He was heard asking her to go with him, and she refusing. He got out of the van and the deceased ran into the house with the appellant in hot pursuit. She was bawling that he was going to kill her. At that time the deceased's sisters, Betty-Ann and Sonia, and her mother were at the home, as well as Amos Joseph, Sonia's boyfriend. The deceased fell on the floor of the kitchen and the appellant struck her a number of times with a chisel. While he was doing so, her mother took up a cutlass to hit the accused but it fell from her hand. Sonia took a mop and lashed him with it, and when he made an attempt at her she ran downstairs into the church. Betty-Ann grabbed him and pulled him away and he came at her with the chisel in his hand, she ran and he ran after her stabbing her three times when she fell by the verandah. Sonia's boyfriend Amos took a garden fork and struck the appellant in his head with it, and the appellant went at him with the chisel. Amos took his daughter and the appellant's son Tough Boy and ran. During this distraction,

Betty-Ann ran into a bedroom and locked the door, until the appellant kicked it down and she jumped through the window and ran to a neighbour's house. She heard the appellant go into the road. He was asking where was the mother as he was going to kill her too because she is not letting her daughters have their own life. In the meantime the deceased had run outside. Two men who were there had put her in a land rover and took her and her mother to the hospital. By the time she reached there she was dead from the multiple stab wounds she had received, inflicted by the appellant with the chisel.

The appellant got hold of Tough Boy and said that he was going to kill him and then kill himself. One Joseph Bartholomew told him that the boy was innocent. After asking Bartholomew to look after the child because he was going to spend the rest of his life in jail he released the boy.

Later that day the police went to his home and saw it in flames. It burnt completely and he told the police that he had burnt his own house. He was taken into custody. When he was cautioned he asked to speak to his counsel Mr. Clouden. He was subsequently interviewed in Mr. Clouden's presence but made no answer to the questions put to him.

The Defence

At the trial the appellant said nothing. The version of the facts given by the prosecution was, therefore, totally unchallenged. At the close of the case for the prosecution, the matter was adjourned at the request of counsel for the appellant to allow the appellant to be evaluated by a psychiatrist, Dr. Obikaya, who subsequently gave evidence, as the only witness called by the appellant. On the basis of his evidence counsel for the appellant addressed the jury only on the issues of insanity and automatism.

The doctor testified that the appellant had told him that he believed that the deceased had cast a spell on him and that some danger would come to him. He said that the appellant said that the deceased wanted him back but her mother

did not like the relationship. He said that the last thing the appellant remembered was that the deceased said to him that he was going to die. His opinion was that something flicked in the appellant's mental status, possibly an abnormal electrical brain discharge, and that it is possible that the appellant could have been in a fused state that morning. In cross-examination the witness said:

> "At the time I examined the accused his mental state was normal. By that I mean no psychiatric illness. His level of insightfullness was normal. His demeanour was remorseful. At one point he was actually crying. I don't know if that was to win some favour or sympathy with me."

The witness did not at any time express an opinion that the appellant was suffering, or might have been suffering from any disease of the mind. Although the opinion that something flicked in the appellant's mental status, could have been an indication of a malfunction of the mind, there was no attempt to describe it, for example, was it hallucinatory? The witness did not address the crucial issues of whether the appellant knew what he was doing at the time he killed the deceased, or whether he knew it was wrong to do so. An allegation of lack of memory is not the same thing as lack of consciousness at the relevant time, but no attempt was made to do more than report the conversation on that issue.

The Interruptions

Counsel for the appellant submitted that the learned trial Judge committed errors with regard to the evidence of the psychiatrist. by frequent interruptions of his testimony. The record did not demonstrate the alleged interruptions, and no evidence was adduced to support this allegation. In the rather detailed ground of appeal the allegation was:

> "The learned trial Judge, literally cross-examined the Doctor, for instance asking him if he was the accused doctor and whether he had treated the accused previously. Questions of this nature could have led the jury to make an adverse inference of the doctor's credibility and thereby depreciated his expert advice to the Court."

Counsel for the appellant referred to the cases of **R v Hulusi and Purvis** 58 Crim. App. Rep. 378; **R v Matthews** 78 Crim. App. Rep. 23; and **R v**

Whybrow and Saunders NLJ 28th January 1994. The well-established principles expressed in these cases demonstrate that a learned trial Judge in a criminal trial should not descend into the arena and give the impression that he is acting as an advocate. This conduct is not only wrong but a Judge can often do more harm than by leaving it to experienced Counsel. When a Court of Appeal is considering whether to quash a conviction for the interventions of a Judge, the essential question is whether there may have been a denial of justice. Answering the question involves an evaluation not only of the degree of the interventions but also of their quality, as well as an assessment of their purpose and their possible effect on the trial.

The type of interventions that may operate to cause a verdict to be quashed would include:

- Those which invite the jury to disbelieve the evidence for the defence in, such strong terms that the mischief, cannot be cured by telling jury that the facts are for them, and they are entitled to disagree with what the judge has said.
- Those which make it impossible or extremely difficult for counsel for the defence to develop the case for the defence in a proper and lucid manner.
- Those which have the effect of preventing the prisoner from doing himself justice and telling his story in his own way.

Interventions would however be appropriate where they are necessary to curb prolixity, repetition and irrelevance. More importantly intervention would be justified where it is aimed at clearing up ambiguities, or enabling the learned trial Judge to be sure that he is making an accurate note.

In this case the alleged interruptions were aimed at clarifying the competence of the witness to give expert opinion evidence on the mental state of the appellant. This was compounded by the chronology of events, and the failure of the appellant to adduce any evidence. The legal principle is set out in 14th edition of Phipson on Evidence at 32-14

> "an expert may give his opinion upon facts which are either admitted, or proved by himself, or other witnesses in his hearing, at the trial, or are matters of common knowledge; as well as upon an hypothesis based thereon.
> An expert's opinion is therefore inadmissible as to material which is not before the or which have merely been reported to him by hearsay."

In addition there must have been confusion as to whether the defence would rely on a doctor who had never seen the appellant before. I would have thought that was a matter which required clarification.

It is well settled that the learned trial Judge must determine whether the witness can give expert testimony as to his opinions. The matters on which the judge was alleged to have questioned the witness did not go to his creditworthiness. They went to the admissibility of the opinions. On this issue the learned trial Judge ruled in favour of the defence. In my judgment this was unduly favourable to the appellant. The doctor gave evidence about what the appellant had told him the deceased had said, and about his own memory. These were facts in issue at the trial but they were not admitted nor proved in any way at the trial.

In addition to the question of admissibility, the extent of the doctor's knowledge of the appellant, and of his researches into his mental state was important for any realistic assessment of the weight to be attached to his evidence. The facts as they emerged from these enquiries were that the doctor was relying on a two-hour session with the appellant, after the case for the prosecution had been closed. This was more than two years after the incident. I agree that this circumstance would tend to make the jury wary of the weight that could be put on his opinions, but I do not think that a witness is entitled to a higher degree of acceptability than he deserves.

These alleged interventions did not have the character of an invitation to disbelieve the witness, nor did they make it difficult for Counsel to develop his defence, nor did they prevent the prisoner from telling his story. In my view these interruptions did not have an unfair impact on the trial.

Admissibility of the written report

Counsel complained that the learned trial Judge did not allow the written psychiatric report made by the witness to be put into evidence. The issue of the written report has little merit. When the witness was giving his evidence he was allowed to refresh his memory from his notes. It is a rule of practice that he be permitted to do this provided that he made the document while the facts were fresh in his memory. His oral testimony is primary evidence and he could have said what was written. Theoretically therefore, the written report was inadmissible. A witness may be cross-examined by reference to a document he made to show that the evidence he gave in court is inconsistent with it. This would go to diminish the reliance that could be placed on his testimony. If it contained information that was different to his oral testimony, its effect would have been to diminish the reliability of his oral testimony to the extent that it was inconsistent with it.

Inconsistencies

The appellant contended that the learned trial Judge erred in law in failing to warn the jury that no credence should be given to witnesses who contradict themselves. I do not consider it necessary to deal with this in detail, because the learned trial Judge specifically drew the jury's attention to the inconsistencies in the evidence which were minimal, and directed them "…if the contradiction is trivial you can ignore it, but if it is serious then you should treat the evidence as unreliable." I do not find any merit in this ground.

Failure to put the Defence Adequately

The main thrust of the appellant's argument was that the learned trial Judge put the defences of insanity, automatism and provocation when the defence had not relied on provocation. The difficulty in this case was that there was no evidence of the facts apart from the prosecution's case. He submitted

that there was no evidence of provocation and it was inevitable that the jury would have rejected it and therefore it served only to confuse. It was clear however that the appellant had addressed the jury on the basis that they should find that the appellant had acted involuntarily because he had received blows to his head. This same allegation of fact could support the defence of provocation. The problem was that the only evidence was clearly indicative that these blows were received after the appellant had stabbed the deceased. I agree with Counsel that a jury would inevitably reject provocation, on the ground that the provocative acts occurred after the fatal injury had been inflicted, and could not have influenced the actions of the appellant. Once however that the learned trial Judge had left the jury to determine the facts as relied on by counsel for the defence he had as a matter of logic to leave provocation as well, because injury to the head which could cause involuntariness, could also cause a loss of self control by way of provocation.

Insanity and Automatism

The only defences on which the appellant relied at the trial were insanity and automatism, and the learned trial Judge left them to the jury.

Counsel submitted that the learned trial Judge gave the jury wrong directions on the burden and standard of proof with regard to the defences of insanity and automatism.

It is well settled law that the defence of insanity arises where it is proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong. Automatism arises where a criminal act is done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleep walking. In my view there was no evidential foundation for either of these defences. The appellant himself offered no evidence. The doctor did not express an opinion that the appellant was

suffering from a defect of reason, or from a disease of the mind, nor did he suggest that the appellant did not know the nature or quality of his act or that he did not know that it was wrong. In fact there was absolutely no evidence on which one could find insanity. The doctor spoke of a fused mind caused by belief that a spell had been cast on him, and the statement that he would die causing an electrical discharge in his brain. There was no evidence that the belief that he was under a spell or that his mind was fused could have caused either a defect of reason or was a diseased state of mind. There was no evidence that either or both of these circumstances caused the accused not to know what he was doing. The prosecution witnesses testified that the appellant had received blows to his head. There was no evidence that these caused a concussion or any other disorder. Counsel for the appellant relied on these blows as being a foundation for automatism. From a purely factual perspective this contention was untenable because the evidence was that these blows were received after he had been stabbing the decease with the chisel. The act for which he was accused preceded the blows, and could not have been done in a state induced by them.

The existence of either insanity or automatism implies an absence *mens rea*. But the prosecution case indicated that the appellant had a motive for the killing and a desire to cause the death of the deceased. In my view there was abundant evidence that the appellant evinced an intention to kill the deceased.

I agree that Counsel correctly stated the position to be that where there is evidence on which the jury could find automatism not due to a disease of the mind the onus is on the prosecution to disprove such automatism. And that where the issue on both insanity and non-insane automatism arose in the same case the learned trial Judge should distinguish between them in his summing up, and explain that whereas it is for the defence to prove insanity it is not for them to prove automatism; it is for the prosecutors to negative it once the defence lay a foundation for it.

The concept of laying a foundation for the defence of automatism must be considered in the context that the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes, and that if the defence wish to displace that presumption they must give some evidence from which it may reasonably be inferred that the act was involuntary. **Bratty v Attorney–General for Northern Ireland (1963) A.C. 386**.

The learned trial Judge addressed the issue of the burden of proof in this manner:

> "The burden of proving insanity in such cases rests on the accused. However, the task now falls on the prosecution to rebut this defence. In other words, the prosecution must prove beyond a reasonable doubt so that you feel sure that the accused did the acts with which he was charged consciously and voluntarily. If you are left with any doubt so that you did not feel sure on the question of insanity you should acquit the accused."

It is possible that the third sentence of that quotation referred to automatism. However the learned trial Judge did not specifically tell the jury, at any stage, that there was a significant difference in the legal burden of proving these defences. It was highly probable that this omission would lead them to believe that the same rules applied to automatism as to insanity, namely that the appellant had to prove his defence.

The learned trial Judge did attempt to distinguish between insanity and automatism. He said:

> "The essential difference is that insanity exists where there is a failure of the mind due to disease and automatism where it is due to some external factor for a example a blow on the head or the use of drugs….The essential question to be answered is whether the alleged mental condition of the accused, if you believe that he had a mental condition, was caused by disease or the alleged violence committed on him, that is the alleged chopping on the forehead by the deceased. If you come to the conclusion that the cause is an external factor such as the alleged violence on him by the deceased the verdict should be not guilty, an automatism, not guilty. And if you believe as I said before that he was entirely insane the verdict should be guilty but insane."

The prosecution conceded that these directions were inadequate because the learned trial Judge did not direct the jury on the burden of proof for automatism and in particular that the burden lay on the prosecution to negative it.

The Proviso

As I have already pointed out I am of the view that there was no evidence capable of raising the defences of insanity or automatism, or provocation. Further the prosecution evidence indicated that the appellant was acting voluntarily and consciously, and that he had a motive for killing the deceased and her mother. In my view the evidence did not disclose any rebuttals to these facts. The consequence is that no reasonable jury properly directed could have come to any other conclusion. There being no miscarriage of justice I would apply the proviso and dismiss the appeal.

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

I Concur.

SATROHAN SINGH
Justice of Appeal

I Concur.

ALBERT REDHEAD
Justice of Appeal