GRENADA

IN THE COURT OF APPEAL

CRIM. APP. NO.3 OF 1997

BETWEEN:

DEVON SMITH

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 Redhead Justice of Appeal

Appearances:

Mr. L. Noel and Mr. N. Noel for the Appellant
Mr. M. Holdip, Director of Public Prosecutions and
Mr. John with him for the Respondent

1997: November 25;
1998: January 11.

JUDGMENT

REDHEAD, J.A.

The appellant on 26th day of March 1997, at the age of 19 years, was convicted of the offence of manslaughter and was sentenced on the 7th day of April 1997 by the trial Judge to 9 years imprisonment.

The evidence adduced at the trial against the appellant was contained mainly in the testimony of Beryl Worme and Joseph Nelson who were both eye witnesses to the incident.

Beryl Worme, the common law wife of the deceased, testified that the deceased Dennis Dowe on 28th September 1995 arrived at their home at about

5.00pm and discovered that four of his rabbits were missing. He left in search of them. Shortly thereafter she heard a screaming. She took up a garden fork, and ran down the road towards the direction from which she had heard the screaming.

Continuing her testimony she said:

"I saw Joe [Joseph Nelson] with a cutlass in his hand and a gang of men surrounding Dennis [the deceased].....Dennis took the fork from me and ran towards Francis. Francis back back and fell on his face. He got up. Dennis was facing him. I could not tell if Dennis still had the fork in his hand… they were facing each other.

I then saw Devon Smith [the appellant] running coming with a cutlass in his hand. He chop Dennis with the cutlass in his back. Dennis run to the main road. Devon, accused ran after him. I ran after Devon, my son after me. Devon start chopping Dennis in his head with the cutlass. Dennis had nothing in his hand. Devon came at Dennis from the back. After Devon chopped Dennis on his head, Dennis ran again.

I take my two hands held the cutlass and wrestled it out of Devon's hand. I got it away from him and I got a cut on my right middle finger. I gave the cutlass to Mr. Joe Nelson. Dennis was in the drain bleeding, not talking with blood all over him."

Joseph Nelson in his testimony before the jury said at about 6.15 pm he saw the deceased Dennis Dowe coming up the road with a fork in his hand. The deceased went and peeped in Viola Smith's rabbit coop. The deceased then opened his, Joseph Nelson's gate and then later the deceased made a threat to him in the presence of and hearing of the appellant.

Continuing this witness testified:

"He [the deceased] ran down the road. He had a fork in his hand I had my cutlass with me. Dennis appeared. He had something in his waist.

When he pulled it out I saw it was a cutlass. The crowd of people had come down behind me.....Accused was among them and near enough to hear what was said. Dennis [the deceased] said, "Down here I want you. We are going to have it out here now." I stood still. His girlfriend came up. She is Beryl Worme. She had a fork in her hand in a bag. She told Dennis "let's go home". Dennis said to her "no he hit me".....At the same time Francis Modeste came from behind and said to Dennis the gentleman did not interfere with you why don't you let him go for his sheep? The same time he turned to Beryl Worme, spoke very harsh to Beryl Worme that is. Francis Modeste. "It's you who bring up the fork here for Freeze" [the deceased]. In that space of time Freeze had already grabbed the fork from Beryl Worme. Dennis leave with a speed pelting the fork behind a little boy, the accused friend. At the same time, Dennis bounced up with Francis Modeste who fell on the ground.....The accused pulled a cutlass

with full force, chopped Dennis Dowe in his head. Dennis turned his back and jumped into the road. Accused jumped on him with the cutlass and give him about 6 chops at about waist heigh. Beryl Worme and Sherry Ann Smith, Roslyn Smith and other people were holding on to each other wrestling. They fell to the ground. I walked back to them meeting Beryl Worme on the ground first holding on to a very sharp cutlass. She watched me very carefully and before giving me the cutlass. She gave me the cutlass. It bounced on my left leg and gave me a small gash.

The appellant now appeals to this court against his conviction and sentence .

Three grounds of appeal were filed on behalf of the appellant. They were as follows:

[1] The decision of the jury cannot be supported by the evidence adduced at the trial and is therefore unsafe and unsatisfactory and should be set aside.

[2] The prosecution's evidence from the main witnesses Beryl Worme and Joseph Nelson was so weak and contradictory that no reasonable jury properly directed could have come to the decision the said jury came to in this case.

[3] [a] The sentence of nine [9] years on a nineteen [19] year old for his first offence, was excessive in this case and in particular, in the light of the Probation Officer's Report which the Court had ordered.

[b] The learned trial Judge had no authority to sentence the accused on a date [7th April] after his February Assizes had been officially terminated on 27th March 1997.

[c] The learned trial Judge was wrong in law to sentence the accused after he rejected the Probation Officer's Report without giving the accused through his Counsel the opportunity to make a plea in mitigation.

Learned Counsel for the appellant Mr. Lloyd Noel argued grounds 1 and 2 together. Under these two grounds Mr. Noel argued that the learned trial Judge ought to have upheld his submission that the appellant had no case to answer because the evidence of the two main witnesses for the prosecution was so contradictory and conflicting that it was unsafe to allow the case to go to the jury. In support of this argument learned Counsel relied on R v Galbraith [1981] 2 All E.R. 1060 where the

Court gave the following guidelines on how a Judge should approach a submission of no case to answer.

[1] If there is no evidence .....

In the instant case the allegation is not that there is no evidence. So I begin from:

> "2. If there is some evidence but it is of a tenuous character ie. because of inherent weakness or vagueness or because it is inconsistent with other evidence [a] when the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is the duty of the judge upon a submission being made, to stop the case [b] where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability as other matters which are generally speaking within the province of the jury and where on one possible view, of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

I have referred above to the testimony given by these two vitally important witnesses for the prosecution.

Beryl Worme said:

> "I then saw accused Devon Smith running coming with a cutlass in his hand…..He chop Dennis with the cutlass in his back. Dennis run to the main road. Devon accused ran after him…..Devon start chopping Dennis in his head with the cutlass. Dennis had nothing in his hand. Devon came at Dennis from the back. After Devon chopped Dennis on his head, Dennis ran again. Devon ran after him. Dennis fell in the drain. Accused started chopping Dennis again. I take my two hands, wrestled it out of Devon's hand. I gave the cutlass to Mr. Joe Nelson."

In cross-examination, this witness said inter alia:

> "Dennis did not have a cutlass…..When Dennis turned around Devon gave him two chops in his head. Devon was using his right hand…..It cut him on the left side of the head. Both chops cut him there. Devon again chopped Dennis on his head and keep chopping him after he fell in the drain."

Joseph Nelson's testimony is to the effect:

"Dennis no longer had the cutlass in his hands. After pelting the fork he had nothing his hand.....The acussed pulled a cutlass with full force, chopped Dennis

Dowe in his head. Dennis turned his back and jumped in the road. Accused jumped on him with the cutlass and gave him about 6 chops at about waist high."

In cross-examination this witness said:

> "Dennis got one chop to the right side of his head on the bank. He then jumped down in the road.... Devon was chopping Dennis from in front of him. I saw him make about 6 chops, but I do not know how many made contact Beryl was wrestling with Devon to get away the cutlass. She got it away."

Earlier this witness had said Beryl had given him the cutlass.

When one analyses the salient aspects of the testimony of these two witnesses and to a great extent the evidence as a whole, I fail to see the contradictions or the inconsistencies in Worme's evidence when compared with Nelson's testimony which would make the evidence of a tenuous nature or inherently weak or vague. Both witnesses emphasised in examination in chief and cross examination that they saw the appellant chop the deceased in the head with a cutlass. As I had said earlier, Nelson testified that the appellant pulled a cutlass with full force and chopped Dennis in his head. In cross-examination, he said when Dennis got the first chop Dennis and Devon were facing each other.

Worme said in cross examination:

> "When Dennis turned around Devon gave him two chops in his head.
>
> Devon was using his right hand. It caught him on the left side of his head. Both chops caught him there."

Mr. Noel's contention was that Worme said that the appellant chopped Dowe with a cutlass on the back and Devon ran after him. Devon started chopping Dennis in his head with the cutlass. Whereas Nelson said in cross-examination Devon was chopping from in front of him. Dowe was facing Devon. He was chopping Dowe to the belly.

In my view, the inconsistencies which go to the real issue pointed out by learned Counsel are more imaginary than real. It is also my view that when the injuries as found on the body of the deceased and detailed by Dr. Jayaram lend credibility to the testimony of both Worme and Nelson.

Dr.Jayaram, the pathologist testified that:

"External examination revealed multiple lacerated wounds over the

body. Major one was in the head. It was an irregular lacerated wound on the left 6 side measuring 7 2 inches. It extended from the superior portion [top] of the head on the left side, extended downwards on the left, onto the chest..... The underlying coverings over the brain were also defective. This extended over an area of 6 x 6 cm into the brain.....The fracture extended from the top of the skull to the eye socket.

The other injuries were mainly on the posterior aspect of the trunk i.e. the back of the body. There were three lacerations on the left side, one on the right side. The larger one measured 5 inches long by 2 2 inches deep. There were one in the right and one on the left scapular on the back. There were two smaller incisions in the same area, slightly about 2 1/ inches long. There was an irregular similar laceration on the left forearm. It was very irregular and covered about 9 2 inches in length extending from the inner to the outer aspect of the forearm.... There were other very superficial wounds one on the lower left side of the back and another on the arm of on the left side."

Finally, Dr. Yearwood who performed surgery on the deceased testified inter alia:

> "The position of the person who inflicted the injury [to the head] would depend on whether he was right-handed or left-handed. A right handed person would have been standing in front of the victim. A left handed person would have been standing behind him."

I understand from Mr. Noel's argument that from the evidence Worme was saying that the injury to the head was inflicted from behind. I am unable to read this from Worme's evidence. She did say in cross-examination that the deceased received two injuries to his head inflicted by the appellant when the deceased "turned around". Her evidence was that the appellant was chasing the deceased and if he turned around he must have been facing the appellant.

In any event the fatal injury was the injury to the head according to the pathologist. Even if one witness testifies that the appellant was standing at the back of the victim and the other witness testified that he was standing in front of the victim when the fatal injury was inflicted would that cause their testimony to be of a tenuous nature, so that it calls for intervention by the Judge to prevent the case going to the jury?

Similarly, one witness says that the victim was chopped in the back, the victim fell and the appellant kept chopping him in the drain. Whereas another witness says that this appellant was chopping the victim from in front. The appellant made about 6 chops but the witness did not see how many made contact. But the witness then says

the appellant was chopping the victim to the belly.

Is that the kind of inconsistency which causes the evidence to be of a tenuous character and therefore calls for the intervention of the Judge to stop the case? I hope not.

For the foregoing reasons, grounds 1 and 2 have no merit. I would therefore dismiss them.

I now turn to ground 3 [b] that is the learned trial Judge had no authority to sentence the accused on 7th April after the February Assizes had been officially terminated on 27th March 1997].

The record shows that after the jury returned a verdict of guilty of manslaughter against the appellant on 26th March 1997, Counsel for the appellant suggested to the Court that a report from the Probation Service be obtained because when the offence was committed the appellant was 18 years and 3 months.

It is quite obvious that the learned trial Judge acting on that suggestion, postponed the sentencing to 27th March pending the obtaining of the report and remanded the appellant to custody.

When the Court reconvened on 27th March 1997, the Director of Public Prosecutions announced to the Court that the Probation Officer had not yet been able to compile his reports, whereupon the trial Judge adjourned the sentencing to 7th April 1997 and remanded the appellant in custody until then. At that time Counsel for the appellant, so far as the record shows, took no objection.

When the appellant was called up on 7th April 1997 for sentence his Counsel Mr. Lloyd Noel raised the objection. He argued before the Court that the provisions of section 172 of the Criminal Procedure Code must be read within the context of the Rules of the Supreme Court Order 48 relating to Sittings and Vacations of the Court particularly Assizes.

Learned Counsel argued that once the assizes are declared officially closed by the Judge, he cannot pass sentence on anyone in those assizes. He contended what the trial Judge ought to have properly done was to remand the appellant on bail or in custody and call him up for sentence during the next Assizes. Mr. Noel placed great emphasis on Order 48 Rule 3.

I first refer to 2[1] [a]

"The court shall sit for the trial of criminal causes...

[a] in Grenada on the first Tuesday of the months of February, June and October;"

[3] "The Chief Justice may at any time direct a special Sitting of the Court to be heard for the trial of criminal causes. Notice of such direction shall be published in the Gazette and in a local newspaper if any, not less than fourteen days before the date fixed for the sitting.''

Mr. Noel's argument is that if the learned trial Judge wished to sentence the appellant on 7th April, he ought to have availed himself of the provisions of Rule 3. I do not agree.

In my opinion, Rule 3 was not designed for that purpose. Rule 3 in my view would be invoked when it is necessary, for whatever reason to hold criminal trial outside of the statutory dates above-mentioned. But where, as in the instant case, the learned trial Judge had begun and completed within the sitting of February Assizes, I cannot see anything in logic or reason which would prevent the Judge from adjourning the matter at any date for sentence, even after he has closed the Assizes.

There are fixed statutory dates for the opening of Assizes but none for the closing. In my view there could be none. As the closing date would depend upon the completion of the pending cases or when the trial Judge in his deliberate judgment thinks it is practical so to do. If that is so, what legal consequences flow from the closing of the Assizes so as to prevent the sentencing of the appellant when the Judge has, during the course of the assizes adjourned the sentence beyond the date of the closing of the assizes? I think none. The closest authority I can find on the point is Rex v James Thomas Hales (1924] 1 K.B. 602 Cap.606 Lord Hewart C.J. said:

> "In this case the defendant was tried for stealing a motor cycle and side car. The first part of the proceedings took place on October 19, 1923 at Oxford Assizes where he was convicted for the offence charged. At the time an application by the defendant in respect of another case was pending before this court, and the learned Judge out of consideration for the interest of the defendant, postponed sentence until the result of the application should be known.
>
> Afterwards on October 25 at Worcester assizes during the same circuit, sentence was passed upon the defendant in his absence. In the opinion of this court that could not properly be. The charge against the defendant was one of felony and the court has no jurisdiction to pass sentence in respect of a charge

of that nature in the absence of the prisoner."

Reading this short judgment of the Lord Chief Justice, the assizes for Oxford at which that appellant was convicted had been closed. The Judges in England then operated on a Commission of Oyez and Terminer. The judges went on circuit to different assize towns. From my understanding the assizes at Oxford were terminated. However the appellant was sentenced at Worcester circuit which was the same circuit as the Oxford circuit.

The discussion of the Lord Chief Justice centered around the fact that it was done in his absence.

Having regard to Mr. Noel's argument the assizes having been closed at Oxford the Judge would not have had any authority to pass sentence on Hales until the next assizes at Oxford but this never entered the discussion of the Lord Chief Justice because in my view there could be no legal basis for this. This ground of appeal also fails.

Learned Counsel next argued that the learned trial Judge was wrong to ask the jury to consider and return a verdict based on provocation amounted to a misdirection.

Further that the learned trial Judge confused the jury by directing them to relate provocation with self defence so that if the accused went beyond what was reasonable than self defence would not be justifiable and would amount to provocation. At page 39 of the record the learned trial Judge in his summation to the jury said:

> "Remember that it is for the prosecution to prove guilt. It is for the prosecution to negative self-defence but it is for the defence on the case is as a whole to prove provocation".

This is a misdirection by the learned trial Judge.

> "Once there is evidence from any source, sufficient to be left to the jury on the issue of provocation the onus remains throughout upon the Crown to prove absence of provocation, and then, if the jury are left in doubt whether the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner."

[See R v McPherson 41 C.A.R. 213].

At page 43 of the record the learned trial Judge said in his summation to the jury:

". . . .where the circumstances appears to lead to a verdict of guilty of murder

but it appears to the jury that certain extenuating matters are proven to the effect that the accused was justified in causing some harm. Although not the defence of harm which was caused by the circumstances but that he acted from such terror of immediate death or grievous harm as in fact deprived him of the power of self control. What this means is that if the circumstances led him to believe that he was under the power of immediate threat of death or very grievous harm and in those circumstances he was justified in defending himself went beyond the reasonable extent of self-defence you may find him not guilty for murder but guilty of manslaughter. There is one clear category."

This is yet another misdirection.

There is no principle of law that where one uses greater force in self-defence than was necessary that reduces the crime from murder to manslaughter.

Then at page 44 of the record the learned Judge said:

"There is also the question of self-defence which probably arises from this and the self-defence and provocation defences may be related in the sense that if you find that there was self-defence but that he went beyond what will be reasonable in the circumstances then the self-defence would not be justification but may amount to provocation so you should look very carefully at the statement of the accused which he adopted in this court as the truth and as what he wanted to say to you."

This too was a misdirection.

[See R v Clegg 2 W.L.R. 88 and Palmer v R [1971] 1 A.E.R. 1077]

In Palmer Lord Morris said at page 1088:

"…..if the prosecution have shown that what was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to that then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected."

I am of the opinion that the learned trial Judge was justified in leaving the issue of self-defence to the jury having regard to the statement of the appellant he gave to the police under caution and which said statement he adopted in court as the truth of what occurred.

In essence what he said in that statement was that the deceased struck Francis Modeste, his uncle, with a garden fork. Modest fell to the ground. He the appellant was some distance away when he saw the deceased attempting to "juke" his uncle on the ground with the fork. The appellant said he ran across the road with his cutlass and grabbed the garden fork from the deceased a struggle ensued and that the accused

sustained a cut on his left hand from the appellant's cutlass.

Although the appellant denied that he inflicted the fatal injury to the deceased's head and said that it was Joe Nelson who did. Yet having regard to the evidence as a whole, the evidence of the two eye witnesses who said the appellant did inflict the fatal injury to the head. There was also evidence from the eye witnesses that the deceased was threatening Joe Modeste in a menacing manner with the garden fork and then Joe was knocked unconscious by the action of the deceased, although not with the garden fork. And at the time the deceased was chopped on the head by the appellant he no longer had the garden fork in his hand. In my opinion, it was incumbent upon the leamed trial Judge to leave the issue of self-defence to the jury, as the learned trial Judge put it quite succinctly at page 7 of the record when he told the jury:

> "self-defence includes the necessity for prevention of or defence against certain crimes including murder, manslaughter or dangerous or grievous harm, a person may use any necessary force or harm in the case of extreme necessity."

Was there any basis for leaving the issue of provocation to the jury? In my view, on the statement of the appellant, there was none. In that regard, the Judge gave the proper direction in my opinion, when at page 7 he said:

> "So that, for you to find provocation in this case you must find that the accused, not another person, who being attached or that he reasonably believed that he was being attacked or threatened and that the attack was of such a nature as to cause him to lose his self control."

The Criminal Code of Grenada S.239 defines murder thus:

> "A person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of extreme provocation."

S.240 defines extreme provocation:

"The following matters may amount to extreme provocation to one person to cause his death for another person namely

So far as is ,,,,,,,,,,,,,'

[a] -

[b] -

[c] -

[d] a violent assault and battery committed in the view or presence of the accused person upon his or her wife, husband, child or parent or upon another person being in the presence and in the care or charge of the accused person."

The important question is, could it be said that in the circumstances of this case that the uncle could have been in the care or charge of the appellant so as to interpret the section to say that because of the action of the deceased, with a garden fork over the appellant's uncle in whose charge the appellant was because of the violent assault and battery upon the uncle that may amount to extreme provocation.

I have looked diligently at all the aids of construction in the hope that I would have been able to find a Canon of Construction which permits of such an interpretation but without any success. I therefore have great doubt that the law as outlined above would avail the appellant the defence of provocation.

It is quite clear from the summing-up at pages 43 and 44 of the record when the Judge directed the jury on the issue of provocation he was not considering the provisions of 240[d] of the Criminal Code. At page 43 he said:

"if the circumstances led him to believe that he was under immediate threat of death or very grievous harm and in those circumstances he was justified in defending himself but went beyond the reasonable extent of self-defence you may find him not guilty of murder but guilty of manslaughter."

And at page 24:

". . . .self-defence and provocation defences may be related in the sense that if you find that there was self-defence but that he went beyond what will be reasonable in the circumstances but the self-defence would not be justification but may amount to provocation....."

These two bits of direction on provocation, as I said above were wrong in law. Apart from that there was no evidence from any of the eye witnesses not even from the appellant in his caution statement to the police that he was being attacked by the deceased. The issue of self-defence arose as a result of the violent attack by the deceased on his uncle.

In my view, the direction to the jury on self-defence was proper and adequate. It was not assailed by learned Counsel for the appellant. By their verdict the jury had rejected the issue of self-defence.

The Judge had made an obvious error, in my judgment in leaving provocation to the jury. The appellant has benefited by the error. The testimony of two eye-witnesses is that they saw the appellant inflict the fatal injury on the deceased, the jury having rejected self-defence and in my view the issue of provocation could not have arisen the verdict then should have been guilty of murder.

Learned Counsel for the appellant has urged this court to allow the appeal because the verdict of manslaughter is patently wrong. He argued that this court could not apply the proviso because it is a verdict which the jury ought not to have returned.

In my judgment to do what learned Counsel has urged us to do would amount to a traversity of justice.

Before I leave this appeal there is one other matter raised in this appeal that is the learned trial Judge was wrong to have proceeded to sentence the appellant without giving the accused through his Counsel the opportunity to make a plea in mitigation of sentence.

Although learned Counsel did not press this point a great deal.

The answer lies in section 172(1] of the Criminal Procedure Code:

"1 . If the jury find the accused guilty or if the accused pleads guilty, it shall be the duty of the Registrar to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask should have no effect on the validity of the proceedings."

It follows that if the Registrar did not ask the accused no plea in mitigation could he made. There is no merit therefore in that ground.

Notwithstanding the behaviour of the deceased on the day of the incident, having regard to the severity of and the number of injuries inflicted on him by the appellant. Taking also the appellant's age into consideration, I am of the view that the term of 9 nine years imprisonment is not too severe a sentence.

For the foregoing reasons, I hold that despite the learned trial Judge's misdirection, no miscarriage of justice has occurred. I would therefore apply the proviso, order that this appeal do stand dismissed. The conviction and sentence are affirmed.

ALBERT REDHEAD
Justice of Appeal

I concur

DENNIS BYRON
Chief Justice

I concur

SATROHAN SINGH
Justice of Appeal