SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.7 OF 1997

BETWEEN:

EVERAD NICHOLLS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Satrohan Singh Justice of Appeal
The Hon. Mr. Albert Redhead Justice of Appeal
The Hon. Mr. Albert N.J. Matthew Justice of Appeal [Ag.]

Appearances:

Mr. A. Williams and S. Williams for the Appellant
Mr. B. Cottle for the Respondent

1997: December 9;
1998: January 12.

JUDGMENT

REDHEAD, J.A.

The deceased Carlton Baptiste, died as a result of gun shot injuries inflicted on him by the appellant on the 27th August 1996 at Fanny Mountain, St. Vincent. The appellant was tried and convicted by a Jury on 11th June 1997 and was sentenced by Cenac J. to suffer death by hanging. He appeals to this Court against his conviction.

The deceased Carlton Baptiste and five other men Anthony Edwards also known as I-Pa, Dillon Edwards, the twin brother of the deceased, Glanroy Henry and Dan farmed marijuana in a part of Fanny Mountain where only but the brave and daring would venture.

The appellant also known as Float-I, along with Augustine Black also known as Southie and Buddie were also cultivating marijuana in Fanny Mountain neighbourly to

the Edwards' cultivation. Both groups of men lived in separate shacks or shantys nearby in the mountain. Both shacks were in very close proximity to one another. On the morning of 27th August 1996, Anthony Edwards who was in charge of his group sent three of the men Glanory Henry, Carlton and Brian, for water. The three men left the shanty, each carrying a bucket, the deceased was carrying a plastic bucket.

The men were going to a water hole to collect the water. In order to do so they had to walk pass the appellant's shanty. There is evidence that shortly after the men left, the voice of the appellant was heard telling the men that they could not walk back there that morning and telling them that they would see what would happen if they did.

Anthony Edwards, one of the prosecution witnesses testified that he had sent the three men to collect water. After they had left he heard the voice of Brian. He, Edwards then took up a cutlass left the shack and went towards the direction of where the men had gone for the water.

Edwards said that as he reached up the ridge he heard "hold it your mother c" the appellant had a gun stuck him up with the gun, AugustineBlack [Southie] had a cutlass behind his back. The appellant then said to him "move your mother c... .one an all you dead this morning. Edwards said, he then said to the appellant, "Dread you go have to kill me because I send the men and them for water and they didn't trouble you". Continuing his testimony Edwards said.

> "Float-I was backing back coming down and I going to Float-I facing him At that time I did not see Carlton, Brian or Sweets. We were then on the track - one track to use to go for water. Then I just see Carlton burst out the track. He had a small bucket on his head. Water was in the bucket. We still backing down. Then Float-I turned around and say "you fucker you" and I hear brap, brap, and Float-I shoot Carlton in his belly. The gun pitched him back over in the track where he was coming from and then I jumped over a little bank and then I heard Float-I say, 'Southie hand the fucking cutlass give me, either you f... dead or you cripple you mother cunt.' Then Southie hand the cutlass to him [Float-I] and Float-I chop Carlton on his hand."

Edwards testified further that the appellant ran and Augustine Black ran after the incident. He and the other men then made a stretcher from sticks and brought the injured man down from the mountain and finally to the Chateaubelair hospital. He was later transferred to the Kingstown General Hospital where he died shortly afterwards.

Dr Roslyn Bascombe-Adams performed the post mortem examination on the body of the deceased.

In her testimony the doctor testified as to her findings that there was a 4 inch long laceration to the upper left arm which had been sutured together with five stitches. She found bullet wounds as follows:

[1] an entry wound on left lower side of the abdomen; [2] an entry wound over the navel - both these wounds were angling downwards; [3] an entry wound at the left hip this angled posterior laterally; [4] an entry wound at the buttocks, anus area, grazing both sides of the buttocks. This wound angled to the front; [51 an entry wound in the mid left lower buttocks - also angled anterior.

The doctor gave as the cause of death “multiple intra abdominal injuries which demonstrated surgical intervention but were extensive enough to have contributed to the victim’s death by cardiogenic shock.”

At the trial the appellant gave evidence on oath before the jury. He relied on the defence of accident.

He said on oath before the jury that on the morning in question he was weeding his land when three men came over to his land. He, the appellant, had a cutlass and one of his men had a cutlass. One of the men who came unto his land had a gun. Continuing his testimony the appellant told the jury:

> “The one who had the gun is called Carlton, I-Pa was one of them. Carlton came over to me and push the gun in my face. He said Along time I want to take you

Float." I was so frightened I waived a chop after him the chop caught him on his left hand. I then grab on to the gun and started to wrestle with him. We stand up wrestled and then we fall on the ground. Then I heard the gun fire off. We still hold on, on the ground. Then I let go the gun and turn and search myself. I search myself to see if I got shot. Then my two brethern run and search me too. I didn't get shot. The gun was on the ground. Then me and Southie and Buddie left an go to the Shanty....Me and Southie move from the Shanty and go the back and hide. I-Pa said "you stupid to shoot yourself, move there shoot the man."

Nine grounds of appeal were filed on behalf of the appellant and an additional ground filed on the hearing of the appeal.

Learned Counsel, Mr Williams argued the additional ground - ground 10 first i.e. the learned trial judge failed and/or refused to put the issues of self defence and or provocation to the jury. He argued that even if the defence did not raise the issues, the judge was duty bound to leave the Defence of provocation and/or self defence to the jury. I would state the proposition thus, the judge is duty bound to leave every defence to the jury for their consideration, once it is not a fanciful defence. That is to say as long as the evidence coming from whatever source, prosecution or defence, is capable of being raised by the evidence.

[See **Mancini v Director of Public Prosecutions** 1941 A.C.]

[Stephen Mongroo v The Queen, Criminal Appeal no 3 of 1994, St. Lucia].

The fact that defending counsel did not raise the issue does not relieve the trial judge to consider the alternative issues if there is material to consider the alternative defences. Was there any evidence which was capable of raising the issue of self defence and/or provocation?

In my view from the evidence of the prosecution witness [as I have outlined above in Edwards= testimony and all the prosecution=s eye witnesses supported Edwards' testimony] I have no doubt that the defence of provocation and self defence did not arise.

Learned Counsel Mr. Williams, argued strenuously that on the caution statement of the appellant given to the police the issue of self defence and or provocation arises.

In his caution statement the appellant said inter alia:

> "The boy I don't know his name come over to my ground, three of them. As he reach me he push the shine gun right in my face and say a long time I want to kill you. I so frighten I got me cutlass in me hand I wave a chop after him and we began to wrestle. While we were wrestling I hear the gun go off and I run, me and me two brethrens."

In my view there is nothing which shows a deliberate act on the part of the appellant which caused the death of the deceased. Rather I understand from that statement that he is saying that while wrestling with the deceased the gun accidently went off. This understanding is fortified by what the appellant said in his sworn testimony before the jury; which was, but for his elaboration, almost identical to the statement to the police. In his evidence before the jury which I have referred to above and which I said was identical to his statement he gave to the police but for what he added. He said before the jury:

> "Me and Southie go to the bush and hide I-Pa then said [to the deceased] 'You stupid to shoot yourself, move there shoot the man".

This is to my mind clearly shows that the appellant is maintaining a position that no action from him caused the death of the deceased, that is he did not shoot the deceased but rather the deceased shot himself in a struggle for the gun.

This in my opinion is borne out in cross examination of the appellant when he said:

> "We stood up wrestling. Blood was coming from him onto my shirt. We stood wrestling for about three minutes. My two brethren were there. They could see what was happening. They didn't come and help me to take away the gun from him. . . I was holding on the gun mouth when it went off'.

Obviously if the appellant was holding unto the gun mouth when it went off, he could not have, from his evidence shot the deceased. In other words the deceased met his death accidentally while a struggle was taking place between the appellant and the deceased to

gain control of the gun. The appellant admitted to chopping the deceased on his left arm when the deceased first approached him. The injury to the arm was not the cause of death. Therefore there would have been no killing as a result of provocation or in self defence. In my view, on the evidence, the issue of self defence and or provocation did not arise. For this reason ground 10 is dismissed.

On ground 7 it was argued on behalf of the appellant that the learned trial judge allowed inadmissible evidence to be heard by the jury and in his summing up highlighted the inadmissible evidence.

The evidence that is complained about is that Edwards after he had gone to the ridge and had witnessed the shooting called out to Dillon the brother of the deceased and had said that Float-I had shot his brother. The evidence is that Dillon had an injured foot that morning. He was watching the marijuana slips. He had heard the voice of the appellant saying that the three men who had gone for the water could not walk back there and at the same time using threats to the man. Shortly thereafter he heard five shots. He went to the scene after the witness Edwards had spoken the inadmissible words to him. He had seen his brother, he observed that his left hand was almost chopped off and that his two testicles had a hole in each of them and a hole below his navel.

Although I agree that strictly speaking the evidence given by Edwards is hearsay, yet on the evidence as a whole and in the context in which was given by Dillon I am of the view that there was no prejudice to the appellant.

This ground of appeal also fails.

The next ground of appeal argued by learned counsel was ground 8, that is the learned trial judge failed to properly direct the jury on the burden and standard of proof.

It is settled law that in a criminal case the judge must always direct the jury upon the

burden and standard of proof in relation to the charge or charges upon which the accused is being tried. No formula has to be followed slavishly, but two points must be made and made clearly. [I] the burden of proof is on the prosecution and it is for the prosecution to establish the guilt of the accused, [ii] before the jury can convict they must be satisfied to the extent that they feel sure [or satisfied beyond a reasonable doubt] of the guilt of the accused.

> The learned trial judge told the jury in his summation at page 2. of the record:
> "The burden is on the prosecution to prove the accused guilt. He does not have to prove his innocence. Before you can convict the accused therefore, you must be sure of his guilt."

Unfortunately the learned trial judge did not tell the jury that they must be satisfied to the extent that they feel sure.

In my view there is a higher degree of "Sureness" when one says you must be satisfied to the extent that you feel sure as opposed to saying you must feel sure. In that regard therefore, I hold that there was a technical misdirection.

Learned Counsel for the appellant then argued ground 6 - that is the learned trial judge failed and/or refused to highlight important evidence for the defence in the way that he highlighted the evidence for the prosecution .

On a reading of the record it shows that the learned trial judge had reviewed all the evidence of the prosecution witnesses. A complaint made by defence Counsel is that the learned trial judge did not treat the defence case the same way. Counsel referred particularly to Augustine Black's evidence who gave evidence on behalf of the appellant. Augustine Black's evidence was identical to the appellant's testimony.

How did the learned trial judge treat Black's evidence? He referred to the appellant's testimony in full then he went on to say:

> "Buddy's right name is Gideon Lewis, and Southie's correct name is Augustine Black, and you will remember you heard from Augustine Black yesterday who gave evidence on his own behalf."

The learned trial judge should have gone on to say that this

evidence supports the testimony of the appellant.

I agree with learned counsel that the learned trial judge in only reminding the jury of Black's evidence without more having regard to the fact that he highlighted all the prosecution witnesses' evidence had failed to do the same for the defence.

Learned Counsel then argued ground 4, that is the learned trial judge misdirected the jury on the issue of powder burns.

In my view powder burns were a very relevant issue in this case having regard to the defence evidence as to how the incident occurred.

The doctor said in evidence in chief:

"I have not noted if I had observed around entry wounds signs of burning and scorching." Certainly I will consider scorching or burning around entry wound be a significant factor.

From the record on page 6 this answer is attributed to the doctor in cross examination by Mr Williams.

> "When I examined accused" [I suppose this must have meant the deceased because there is no evidence that the doctor examined the accused] "I was not looking for powder burns."

Morris Ryan Inspector of Police said in his testimony that he saw the deceased at Chateaubelair hospital. He looked at the wounds closely. He saw no signs of burning or scorching around the wounds. In cross examination this witness said that when he examined the deceased he was not looking for powder burns. I am of the view that if powder burns were found on the body of the deceased that would have supported defence version of the incident.

The learned trial judge in his summation to the jury, on page 41 of the record said:

> "On the issue of the scorching or the burning the witness Inspector Ryan told you when he saw the deceased at Chateaubelair hospital, he looked at the wounds closely and he saw no scorching or burning around the wounds. . . . In answer to a question in cross examination by Mr Williams, Inspector Ryan told him 'When I examined the deceased I was not looking for powder burns on him.' From the answers given by both witnesses [sic] they conclude that neither of them can with certainty say whether or not there were scorching or burning around the wounds."

Having regard to the issue in this case which I refer to above and the evidence which was led, the learned trial judge in my view was duty bound to deal with this issue and he did so in a very fair way.

There is no merit in this ground of appeal. This ground of appeal therefore fails.

I now turn to the first ground of appeal, that is that the case for the appellant as put by the learned trial judge to the jury omitted the vital and uncontroverted evidence that blood was on the clothing of the appellant.

The appellant had said in cross examination before the jury that the clothes he was wearing had plenty of blood. He went to the sea with his clothes and washed off his skin. He then went to the boat, took off the clothes and threw them in the water.

The record shows that the learned trial judge did mention the evidence at page 38 of the record when he said:

> "He [the appellant] said I held on to the gun with two hands, I dropped my cutlass. We stood up wrestling blood was coming from him unto my shirt. We wrestled for about three minutes."

Moreover this is evidence in the case. The jury heard all the evidence. The learned judge told them at the beginning of his summation:-

> "If I do not mention evidence that you regard as important follow your own view and take that evidence into account, because you are the sole judges of the facts."

Although the learned trial judge did not comment on the evidence and remind them that the appellant had said there was plentv of blood on his shirt, the jury are intelligent people. He had reminded them that the appellant had said that he and the deceased was wrestling for about three minutes blood was coming on the appellant's shirt, even without reminding the jury that the appellant had said in evidence plenty of blood was on his shirt which the jury would have heard, the jury would have drawn the conclusion from the evidence which he reminded them of that plenty of blood was on the appellant's shirt.

In any event it is not correct to say as counsel for the appellant said that the learned trial judge omitted the vital and uncontroverted evidence that blood was on the clothing of the appellant.

This ground of appeal therefore fails.

The final ground - ground 8 - advanced on behalf of the appellant was that the verdict is unsafe and unsatisfactory. Under this ground learned counsel again referred to the trial judge's failure to refer to Black's evidence in summation to the jury.

The Learned Assistant Director of Public Prosecutions pointed to the fact that Black's evidence was identical to the appellant's evidence. Mr Cottle argued that the judge referred to the appellant's evidence in full and in effect referred to Black's evidence. As I have said above in my view the proper thing for the learned trial judge to have done was to have reminded the jury of Black's evidence and tell the jury that Black's evidence supports the appellant's evidence. This he failed to do.

Mr. Williams, learned counsel for the appellant referred to **Andrew Hirst** on **Criminal Evidence - 2nd Edition at** paragraph 2-662 which says as follows:

> "Over and beyond any individual issues on which specific directions are needed, it is important that the summing up accurately reflects the issues which the jury are called upon to decide and give a fair, unbiased and accurate summary of the evidence and arguments which have been put forward. The responsibility of the trial judge was summed up by **Lord Hailsham L.C. in R v Lawrence** [1962 A.C.510 to 519]. Emphasizing that a direction to the jury should be Acustom built in each particular case..."

Under this ground the question that must be asked is:

"…..Whether we are content to let the matter stand as it is or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done.

This is a reason which may not be based strictly on the evidence as such, it is a reaction which can be produced by a general feel of case as the court experiences it."

[Per Lord Widgery in **R v Cooper** 53 C.A.R. 82]

In this regard there cannot in my view be any lurking doubt that justice was done. When the summing up is looked at as a whole, apart from the admission of the inadmissible evidence which I have pointed out, I am of the view that the summation was fair and adequate. This admission of this evidence did not cause any injustice or prejudice to the appellant.

I would therefore dismiss the appeal and confirm the conviction and sentence.

ALBERT J. REDHEAD
Justice of Appeal

SATROHAN SINGH
Justice of Appeal

ALBERT N.J.MATTHEW
Justice of Appeal [Ag.]