SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO: 25 OF 1997

BETWEEN:

MICHAEL WILLIAMS APELLANT

AND

THE QUEEN RESPONDENT

Before: The Hon. Mr. Justice Satrohan Singh
Justice of Appeal
The Hon. Mr. Justice Albert Redhead
Justice of Appeal
The Hon. Mr Justice Odel Adams Justice of Appeal [Ag.]

Appearances: Dr Ralph Gonsalves for the appellant
Mr Brian Cottle, D.P.P. Ag. and
Mrs Bollers with him for the respondent

1998: July 27, 29.

JUDGMENT

SATROHAN SINGH, J.A.

On October 31, 1997, a mixed jury of twelve convicted the appellant of the Murder of one Othneil Bradshaw and Cenac J sentenced him to "suffer death in the manner authorised by law." The appellant appeals from this conviction and sentence.

The case for the prosecution was that Othneil Bradshaw was riding his motor cycle on Tuesday January 2, 1996 on the Questelles road. One Francesco De Santos was his pillion rider. Bradshaw saw the appellant on the road and greeted him "ya Fire". The appellant is also known as "Fire". There was no argument. The appellant pulled a gun from inside his shirt and shot Bradshaw by his throat.

The pillion rider ran into some bushes up hill after the appellant pointed the gun at him which apparently had no more bullets. Bradshaw got off his bike and ran towards a disco. He fell into the yard of one Orsel Williams. He died about 2 p.m. that day. After the appellant shot Bradshaw, he went towards Jennifer Davis, an eyewitness to the alleged crime and said "I sure where you going dey now you dead. You should ah done dead long time before now". He was then holding the gun by the handle spinning it. He also asked the owner of a nearby parlour for a bullet.

Dr Rao gave the cause of death as "left side haemothorax due to gun shot wound". According to the doctor, the path of the bullet was through the anterior aspect of the neck. It penetrated the pleural cavity and went right through the lung. It fractured the ribs in the back and lodged itself behind the subcutaneous tissue at the back.

Before the jury the appellant elected to say nothing. However, the statement he made apparently on oath at the preliminary enquiry before the Magistrate was incorporated in the evidence before the jury. In that statement, the appellant complained that a gang of guys "who plant weed" penned him up and beat him. He escaped. He met up with Bradshaw who told him if he was there he (Bradshaw) would have killed him. He attempted to run away but Bradshaw grabbed his shirt and pointed a gun at him. He said he "pelted" his hand at the gun and he heard the gun go off. He then grabbed at and got the gun. Bradshaw then ran down by the bayside. The appellant then pointed the gun at the person who was there (presumably the pillion rider), whom he said was attacking him with cutlass. This person ran away. It was the appellant who retrieved the gun for the police from where he hid

it. On this statement the learned judge left the issue of self defence and to a lesser extent "accident" with the jury. The judge did not leave provocation for the consideration of the jury.

The issues raised in the appeal concern -

1. the directions given by the trial judge to the jury on self defence; and

2. the non direction by the trial judge on the issue of provocation.

Self Defence

The short submission of Dr Gonsalves on self defence was that the trial judge, when he dealt with the fact of the appellant saying nothing before the jury and with the sworn evidence given by the appellant before the Magistrate which was introduced as part of the Crown's case at the trial gave confusing directions to the jury. We have perused that aspect of the judge's summing up. We do not share this view of learned counsel. We have to presume at all times that jurors are people of reasonable intelligence. The submission is without merit.

Provocation

It is accepted that the issue of provocation was not left for the jury's consideration. It is also accepted that once such an issue is disclosed in the evidence, the trial judge is duty bound to leave it for the consideration of the jury, regardless of whether or not it formed an active part of the appellant's defence.

It is our considered opinion that in the evidence given by the appellant before the Magistrate, there was disclosed enough material to warrant a direction by the trial judge on the issue of provocation. In our judgment, therefore, this was a non direction which amounted to a misdirection. We also consider it fatal to the conviction.

We therefore now have to address the question of

what should be the result of the appeal. We have to answer the questions (1) whether we should acquit the appellant (2) or whether we should apply the proviso and preserve the conviction of murder or (3) whether we should quash the conviction of murder and substitute a conviction of manslaughter or (4) whether we should order a retrial.

Addressing question (1) above, we are of the view that this omission by the trial judge was a non direction which would not have entitled the appellant to a complete acquittal. The least the appellant could have gotten was a verdict of manslaughter. We therefore answer that question in the negative. With respect to questions (2) and (3), it is obvious from the verdict of the jury that they had rejected the version of the appellant in which the material for provocation was disclosed, and accepted the version of the prosecution's witnesses which evidenced a very strong case of murder. The real question therefore is, given these circumstances, can we be certain that had they been given the direction on provocation, they would inevitably have returned the same verdict.

In my judgment, because of the strength of the case for the prosecution, I may have been tempted to answer that real question in the positive had there been a misdirection within directions to the jury on the issue of provocation. But, where, as in this case, the issue was not left at all with the jury, I do not think we can delve into the minds of the jury to determine what their verdict may have been, if the issue was left with them for their determination.

Bullard v. R (1957) AC 635 a decision from Her Majesty's Privy Council, was a case in which the prisoner on a charge of murder had relied on the defences of self-defence and provocation based on his evidence of an assault on him by the deceased man, but the judge withdrew the issue of provocation from the jury on the ground that on the evidence it was not open to them; and the jury rejected the defence of self-defence. The Court of Criminal Appeal in Trinidad and Tobago held that as the prisoner's story had been rejected by the jury on the issue of

self-defence, there was no evidence on which the issue of provocation could be based. The Privy Council nevertheless allowed the appeal, saying at p. 642.

> "Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. As was said by HUMPHREYS, J., in R. v. Roberts (6) (28 Cr. App. Rep. at p. 110):
>
> 'As for the question whether it was open to them on the facts, counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them.' Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

I adopt this learning and apply same to the instant appeal and I answer this real question in the negative.

Addressing the issue of a retrial, my considered opinion is that such a course appears to be the one most attractive to the interests of justice. Let a fresh jury decide the matter de novo with all the relevant issues before them.

The appeal is therefore allowed. The conviction is quashed. The sentence of death is set aside.

It is ordered that the appellant be retried on the same indictment.

.....

SATROHAN SINGH
JUSTICE OF APPEAL

.....

ALBERT REDHEAD
JUSTICE OF APPEAL

.....

ODEL ADAMS
JUSTICE OF APPEAL (AG.)