COMMONWEALTH OF DOMINICA

IN THE EASTERN CARIBBEAN COURT OF APPEAL

HIGH COURT CRIMINAL
APPEAL NO. 6 OF 1998

BETWEEN:

BALLY SHENG BALSON

Appellant

VS

THE STATE

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

Appearances: Mr. B. Mc.Donald Christopher for the Appellant
Mr. D. Pestaina D.P.P. for the Respondent

[September 14; Oct. 26 1998]

JUDGMENT

SATROHAN SINGH JA:

On March 17, 1998, the appellant, 35 years old Bally Sheng Balson, was convicted by a jury before Cenac J of the Murder of Deidre Raphael (the deceased) age 29 years. He was sentenced to Death by Hanging. He appeals from this conviction.

The case for the prosecution was that Deirdre Raphael who was 7 months pregnant at the time of her death, lived with the appellant at her (deceased') home at Bellevue Chopin. Dominica with two of the deceased three children, Marshall and Russell, aged 13 and 10 years respectively. The deceased during her lifetime indulged in

the trade of selling flowers in Guadeloupe. Because of her pregnancy, the appellant would sometimes travel to Guadeloupe and do the sales for her.

On the fatal day of December 12, 1996, around 7pm, the deceased, the appellant, Marshall and Russell were in the deceased' home. The deceased asked the appellant for the bills for the flowers he had sold. He did not give them to her. The deceased went into her bedroom mumbling leaving the appellant in the "drawing room". Around 11.15pm, Marshall who had gone to sleep, was awakened. He come out of his bedroom, saw the appellant watching television in the drawing room, said good night to him and went back to sleep. Later that night, both Marshall and Russell were awakened by screams from the deceased "Bally behave", about 8 to 10 times. Marshall then heard sounds of movement in the "drawing room" and of the front door being unbolted as if someone was heaving.

Around 6am, on December 13, 1996, the deceased' sons Marshall and Russel found the dead body of their mother on the floor of her bedroom. Pathologist Dr. Peter Bellot who performed an autopsy on the dead body, found inter alia, multiple facial swelling and haemorrahage and multiple lip abrasions. The deceased' neck was broken. The pathologist gave the cause of death as asphyxiation. He opined that there was a violent twisting of the neck by human arm with enough pressure being applied to shut off the deceased airway and at the same time fracture the neck. He concluded that the breaking of the neck was instantaneous.

The appellant, who testified that he had studied the science of Homeopathy and who said he does osteopathy (the study of bones and muscles), martial arts and kung-fu, by way of defence, denied that he killed Deidre Raphael. His evidence was that at the material time he was asleep in his car which was downstairs of the

deceased home, that he went there just about 11pm and left about 5am without returning upstairs. However, Sergeant Daniel Carbon testified that when he confronted the appellant with the allegation, the appellant told him under caution that he slept in the "drawing room".

The case presented by prosecution therefore was purely circumstantial, Mr. Christopher did not seriously challenge the evidential strength of the Crown's case. His arguments were centred primarily on procedural matters. His first submission addressed the order of speeches allowed by the judge at the trial.

Counsel first submitted that the trial judge deprived him of his right to open the case for the defence after the prosecution was closed. In support of the submission, he referred to S2 of the United Kingdom Criminal Procedure Act 1865 which he said was the relevant law at the time. S2 says:

> " It shall be the duty of the presiding Judge at the close for the prosecution to ask the Counsel for each prisoner or defendant so defended by Counsel whether he intended to adduce evidence and every such prisoner or defendant or their Counsel respectively shall be allowed if he or they shall think fit to open his or their case."

Having discussed with the Court the interpretation of the last three lines of this provision, Counsel conceded no merit in this submission. He admitted that the trial judge complied with the first of S2 when he informed the appellant of his rights of defence. He then conceded that the onus was then on him (Counsel) to inform the judge that he thought it fit to open his case but that he failed to do so and instead proceeded to lead the evidence of the appellant. He then abandoned this ground of appeal.

Counsel next submitted that the trial judge erred when he allowed Counsel for the prosecution a right of reply after the Counsel for the appellant had addressed the jury. Mr. Christopher read to us S32 (2) of the Dominica Criminal Law and Procedure Act Chapter 12.01 which provides that a right of reply "shall always be allowed to the Director of Public Prosecutions".

Despite the simplicity of this phraseology, had to it undergo an extremely slow digestive process by Counsel before he could have indicated that he may have grasped its true meaning and thereby concede no merit in this argument.

Sergeant of Police Daniel Carbon testified on behalf of the prosecution. His evidence was that he cautioned the appellant and in a question and answer interview with him which he recorded in his note book, the appellant told him that on the fatal night he "slept in the drawing room, it is a thing I normally do". In giving evidence of this interview, he was permitted with no objection from Mr. Christopher to refresh his memory from his note book. As his third ground of appeal, Counsel argued that the trial judge erred when he did not permit the jury to see the note book. We see no merit in this submission. The police officer read what was in the note book. There was no challenge in cross-examination to show how any conflict between what was written therein and what was testified to by the officer. In fact the accuracy of the content of the note book was not challenged. We can therefore, discern no useful purpose in allowing the jury to see the note book moreso, when defence Counsel did not even seek to have it put in evidence. We therefore conclude no miscarriage of justice in the jury not seeing the note book. This ground fails.

As his fourth ground of appeal, Mr. Christopher submitted that the words "Bally behave' heard by the sons of the deceased as screams coming from their mother, needed a "Turnbull' direction to the jury. Except to advise Counsel to re-read "Turnbull" and this time try to understand it, I would dismiss this ground without more. The voice heard was that of the deceased, not that of the assailant.

Finally Counsel argued that the trial judge erred when he did not treat "Bally behave" as a dying declaration. Again, Counsel demonstrated a sluggish grasp of the law when he hesitated for a

long time before accepting that there was no evidence of reasonable expectation of death when these words were uttered, that the screams were made during the struggle and that they were admitted in evidence as part of the *resgestae.* This ground fails.

For all these reasons, our judgment is that the appeal is devoid of merit and we order that it stands dismissed. The conviction and sentence are affirmed.

SATROHAN SINGH
Justice of Appeal

I concur

C.M. DENNIS BYRON
Chief Justice (Ag.)

I Concur

ALBERT REDHEAD
Justice of Appeal