GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 6 OF 1998

BETWEEN:

JERRY DATE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. C. M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. R. Ferguson for the Appellant
Mr. M. Holdip, Director of Public Prosecutions/and Miss N. John, for the Respondent

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1998: November 23.

JUDGMENT

MATTHEW J.A. [AG.]

On July 26, 1998 the Appellant was found guilty by a Jury of the murder of Reginald Bastin committed on December 11, 1996. The case for the Prosecution rested mainly on the evidence of an alleged confession made by the Appellant to a fellow worker, Pilton Charles, on or about April 3, 1997. According to Pilton Charles while the Appellant and himself in the employment of Mr. Kenneth Nedd, were breaking and removing the pulp from cocoa pods they were at one point speaking about a Mr. Gibbs and the Appellant said to him it is the same thing you see Reggie met him on the river bank peeling coconuts and said to the Appellant “I go lock you up today, I go lock you up today”. He told Reggie to let him go, he is

not his woman. He said Reggie realized he was wrong and so he let him go. The Appellant said he then started chopping Reggie and Reggie fell in the river. He also said the last chop he gave Reggie was behind his head and if the cutlass was sharper he would have taken off his neck. Pilton Charles said he understood Reggie to be the man Reginald Bastin who was found dead a few months ago in the river.

The prosecution led evidence from De Costa Andrew, a road worker, who said that on the day in question he was working in the area and that at about 2.30 to 2.45 in the afternoon he was walking along the road and he saw the Appellant come out from between the land of Mr. Gayman and the Deceased, that he had a bag on his shoulder and he observed peeled dry coconuts in the bag. The witness said he told the Appellant. "Boy you making a hustle".

There is also the evidence of the pathologist, Dr. Jayaran, who listed five wounds on the body of the Deceased. She referred to the second wound as a wide gaping lacerated wound over the posterior upper neck measuring 8 cm x 6 cm extending deep and causing fracture of the 5th and 6th cervical vertebrae, i.e. the bones of the spine at the neck area. They were broken. This extended deep enough to cause contusion or bruising of the spinal cord which is enclosed within the vertebrae.

She said the main cause of death was fracture of the cervical vertebrae with contusions of the spinal cord causing shock. She was of the opinion that the wound was inflicted when the Deceased was turned away from his assailant.

On August 13, 1998 the Appellant filed a notice of appeal containing one ground of appeal namely, that the Trial Court wrongly admitted the confession statement in the evidence. Subsequently, additional grounds of appeal were filed.

Learned Counsel for the Appellant made submissions to this Court on the following six grounds of appeal:

[1] The Learned Trial Judge erred in law when he ruled that the failure of the Committing Magistrate to comply with the mandatory provisions of the Criminal Procedure Code was of such a formal nature as not to vitiate the committal of the accused to stand trial.

[2] The learned Trial Judge gave no directions on provocation even though there was on the evidence material fit for the consideration of the jury in that regard.

[3] The verdict of the jury is unsafe and unsatisfactory and should be reversed and a new trial ordered-

[a] because the learned Trial Judge failed to give proper directions or any at all to negative the highly prejudicial evidence concerning the Defendant's bad character.

[b] because the serious discrepancies concerning time as disclosed by the evidence leave lurking doubts as to the time the deceased was killed and as to [I] whether the Appellant was in the vicinity of the alleged crime at the material time or at all and [II] whether the Appellant had the opportunity to kill the said deceased.

[c] because the jury had to deliberate for long hours into the night under conditions of serious inconvenience and pressure, being [I] poor lighting [II] no refreshments, [III] an extremely hot and stuffy courtroom, [IV] having to walk through rain to and from the jury room, and [V] uncertainties as to the means of transportation to get to their homes.

[d] because the lengthy deliberations and sharp divisions among the jurors, in the absence of any need for any further directions from the learned Trail Judge, strongly suggest that they were lurking doubts in the minds of some jurors and had their circumstances been

more conducive to reasoned deliberations the verdict may have been different.

[e] because the late hour the jury was sent off to deliberate in such a serious case posed the danger that the jurors due to sheer tardiness, irritation and other factors might have reached a verdict which they would not have reached had they approached their deliberations with fresh minds.

[4] The learned Trial Judge erred when he failed to discharge the Jury after they had returned from deliberations on the first occasion with a divided verdict on murder thereby demonstrating that they had not understood the fundamental prerequisites regarding such a verdict.

[5] The learned Trial Judge failed to raise with the jury the serious discrepancies regarding the time the alleged confession was reported to the police, and the inordinately long delay before the alleged confession appears to have been reported to the police.

[6] The learned Trial Judge erred in law when he failed to discharge the jury or to give any or any proper directions to them as a consequence of the specific reference by the learned Counsel for the Prosecution in his opening address to the jury to the highly prejudicial and subsequently ruled inadmissible evidence against the accused.

Ground 1

This ground of appeal which seemed to be the main one was centred on Section 104 of the Criminal Procedure Code and the submission was that the provisions of the Section were not complied with in that the record did not indicate that the Magistrate had specifically asked the accused if he wished to call any witness.

To understand the submission under this ground it is perhaps necessary to set out the provisions of Sections 103 and 104 and I set them out below as follows:

> "103 [1] After the examination of the witnesses on the part of the prosecution has been completed, and the depositions have been signed as aforesaid, the Magistrate shall, unless he discharges the accused, address him in these words, or to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you say will be taken down in writing, and may be given in evidence against you at your trial.'
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> [2] Whatever the accused then says in answer thereto shall be taken down in writing, as nearly as possible in the accused person's own words, and shall be signed by him, if he will, and by the Magistrate, and kept with the depositions of the witnesses, and may, without further proof, be given at the trial.
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> 104. The Magistrate shall then ask the accused if he wishes to call any witnesses. Every witness called by him who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken, signed and given in evidence in the same manner as the deposition of a witness for the prosecution.
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> If the accused calls no witnesses the magistrate shall state that fact on the depositions."

We were not supplied with copies of the depositions but we note that at the commencement of the trial of the Appellant on July 20, 1998 learned Counsel for the Appellant made similar submissions based on Sections 103 –106 of the Criminal Procedure Code to which learned Counsel for the Prosecution replied. The presiding Judge after hearing the Parties made a ruling on July 21, 1998 with which we agree. This ground of appeal fails.

Ground 2

This ground relates to the defence of provocation. It was submitted that the learned Trial Judge ought to have given

directions to the Jury on the issue of provocation, even though the defending Counsel did not raise the possibility of such an alternative defence, since there was clear evidence upon which to justify such a direction.

Reference was made to Sections 239-242 of the Criminal Code pertaining to cases in which intentional homicide is reduced to manslaughter and related matters. Section 239 is as follows:

> "A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if any of the following matters of extenuation are proved on his behalf, namely-
> [a] that he was deprived of the power of self control by such extreme provocation given by the other person as is mentioned in the next succeeding section; or".

Learned Counsel for the Appellant referred to a judgment of this Court, PAUL LALLION V THE QUEEN Criminal Appeal No. 1 of 1995 decided on September 18, 1995 where it was stated, following a line of distinguished cases, that it is the duty of the trial Judge to deal adequately with any view of the evidence which will reduce the crime to manslaughter or afford the accused the chance of a complete acquittal.

The evidence in this case on which the Appellant relies to support provocation is part of the confession he made to Pilton Charles. It comes from the words –

> "Reggie told him; 'I go lock you up today. I go lock you up today' while holding the Appellant. He then turn to Reggie and said 'Let me go. I'm not your woman.' Reggie realized he was wrong and let him go."

The inference is that the Appellant was provoked when the Deceased held him and told him he was going to lock him up today.

One of the basic ingredients in provocation is the loss of self-control which must come upon the Accused and it is difficult to envisage such loss of self control in the circumstances of the case. Further Dr. Jayaram's evidence suggests that the Deceased was the victim of a savage assault such as the fatal wound being struck

when he was turned away from the assailant. In his confession to Charles the Appellant also said if he knew the Deceased had money in his pockets he would have taken the money before leaving the scene. The Judge was right not to leave provocation to the Jury on the facts of this case.

Ground 3

This ground states that for a number of reasons the verdict is unsafe and unsatisfactory. Under this head complaint is made of the fact that the learned trial Judge failed to give proper directions on evidence concerning the Appellant's bad character. This first arose under cross-examination of Pilton Charles when he said that himself and the Appellant spoke about the Appellant's experience in the prison and about marijuana. I agree the trial Judge should have reminded the Jury that he ought not to be prejudiced for that.

In my view the trial Judge gave adequate directions to the Jury as regards discrepancies concerning the times of various events in the case.

I agree that the Jury had to deliberate for longer hours than is usual and they did arrive at their verdict at 8.25pm.

However I am content to let the matter stand as it is as there is no lurking doubt in my mind which makes me wonder whether an injustice has been done.

Ground 4

I do not agree that the Trial Judge should have discharged the Jury because they returned to Court without being unanimous for a murder verdict. This ground is without merit.

Ground 5

This ground relates to the weight or acceptance of evidence. It is directed at the evidence of the confession to Pilton Charles. In the first place complaint is made about the discrepancies regarding

the time the confession was made to the police. Pilton Charles said the confession was made to him about April 3, 1997 and he reported the conversation to Corporal Harold Frame at Grenville Police Station days after, perhaps more than a week after. Corporal Harold Frame says that he recalls receiving a report from Pilton Charles before May 13, 1997, about a day or two before and Inspector Gittens was present. Inspector Gittens said he cannot recall any report being made by Pilton Charles.

Complaint is also made of the inordinately long delay before the alleged confession was made by Pilton Charles to the Police.

In my view these are all portions of the evidence which the Jury must have deliberated upon before arriving at their verdict. This ground of appeal fails.

Ground 6

In his opening address to the Jury learned Counsel for the Prosecution referred to a cautioned statement made by the Appellant to the police in which he admitted a confrontation with the Deceased and that he had inflicted injuries to the neck and head of the Deceased. It does not appear that learned Counsel for the Appellant objected at this stage to the contents of the statement. However when the last prosecution witness, the investigating officer, was about to tender the statement learned Counsel took the objection. A voir dire was then held after which the learned Judge ruled that the Prosecution had not discharged the burden on them of satisfying him beyond reasonable doubt that the confession statement was voluntary and he ruled it inadmissible and excluded it from evidence in this case.

I am of the view that since the Jury had already heard evidence which was later ruled inadmissible they should have been told to disregard the confession.

I do not think the Jury should have been discharged. In my view the Prosecution had made a strong case against the Appellant and there was no miscarriage of justice.

At the end of the submissions on behalf of the Appellant we did not call upon the Director of Public Prosecutions but proceeded to dismiss the appeal and affirm the conviction and sentence.

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

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

ALBERT J. REDHEAD
Justice of Appeal