BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 2 of 2000

BETWEEN:

SHERWIN FAHIE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Albert Matthew — Justice of Appeal

Appearances:

Mr. Joseph Archibald, Q.C. for the Appellant and
Mr. Oscar Ramjeet with him
Mr. Terrence Williams, D.P.P for the Respondent

2001 : January,15
April 2.

JUDGMENT

[1] REDHEAD J.A: The appellant, Sherwin Fahie is now twenty (20) years old. He was a baseball player. From the evidence one could infer that the appellant is one with some intelligence as he has passed school leaving examination and CXC examination.

[2] On 13th October, 2000 he was convicted for the murder of Sheldon Baptiste and sentenced to the mandatory term of life imprisonment. At the time of the killing the appellant was nineteen years old and was still attending school.

[3] The appellant now appeals against his conviction. Two main grounds of appeal were argued by learned Queen's Counsel, Mr. Joseph Archibald, on behalf of the appellant.

Ground 1

That the learned trial judge was wrong in law during his summing up to the jury in that he emphasized to the jury the objective test of reasonableness on the part of the accused in the matter of self defence, rather than the objective test of honest belief of the accused.

Ground 2

Failing to refer to, or to leave to the jury the verdict of manslaughter, after having given direction on provocation which arose on the evidence, and especially after leading prosecuting defence Counsel had together agreed with the learned trial judge's proposal in chambers to direct the jury on the issue of provocation which arose on the evidence and that the learned trial judge's directions on manslaughter were inadequate.

[4] There were other grounds of appeal but on the hearing of the appeal they were not, in my view, pursued with any real conviction. I shall devote more attention to the second ground of appeal.

[5] The tragic incident centers around some young men. The appellant, as I have said, was about nineteen (19) years at the time of the incident. The victim was about seventeen (17) years.

[6] The evidence, which was given on behalf of the prosecution, contained mainly the testimony of about three eyewitnesses to the incident.

[7] Avary Smith, who was about nineteen (19) years old, told the judge and the jury that, on 21st April, 1999 at about 9.00p.m he was in the company of three other young men, Arthur Barnes, Ralston Farrington, Ricardo Farrington and the appellant. The deceased was then walking up the road. The appellant walked up

to the deceased and slapped him in his face. The deceased left, went away and returned with his mother. The deceased was carrying an axe and the mother a cutlass. The mother dragged the cutlass on the ground saying that she was going to kill one of the Belle View boys, chased after one Arthur and Ralston two young men. Her husband, Michael Hypolite, stepfather of the appellant and a witness for the prosecution came up later and took away the cutlass from his wife, Pauline Hypolite. Thereafter a fight ensued between Pauline Hypolite and the appellant while the appellant and the mother of the deceased were engaged in the fight, the deceased swung the axe twice at the appellant's back. According to Avary Smith's testimony:-

> "He" (the deceased) swung the axe, "hard, like he cutting a tree".

[8] He also said:

> "There is a mark on the wall from the same axe……. The second time he swing {sic} it, when it hit the wall it bounced off towards Sherwin, the appellant's side…….. The axe like {it} appeared to come off and hit Sherwin towards the side. The third time I hold the axe and get it from him. I went aside."

[9] Thereafter it appeared that the fighting between the appellant and the mother of the deceased went on for a while until it was broken up by Mr. Hypolite and Ralston. Avary Smith continuing in his testimony said:-

> "Then Sherwin {the appellant} went where he had the baseball bat went towards Sheldon by the car and hit him two times in the head and he fell."

[10] Michael Hypolite another witness for the prosecution said of the final episode that after some exchange of harsh words between his wife and the appellant, the appellant "give her a fist or slap" in her face. She held on to him and they began wrestling. Michael Hypolite testified that he separated the appellant from his wife. The appellant then ran towards the parking lot, Ralston Farrington gave him a baseball bat. The appellant then followed the deceased, who was then on his way home and this witness then said:-

> "He [the appellant] held the baseball bat with both hands. He swung it and struck him several times from behind."

[11] The appellant gave a statement under caution to the police. It is part of the prosecution's case. That statement was not challenged by the appellant, in fact he gave evidence on oath and not only adopted that statement but added to it. In addition he said that he forgot to tell the police in the statement that Ralston Farrington and Richards Farrington were holding the deceased that night. They were struggling to get the axe away from him and during that struggle the deceased hit Ralston on his chest. As a result Ralston struck the deceased in the face with a block.

[12] The appellant said on oath that Ralston slammed the block against the face of the deceased "bringing blood from his face and the deceased was in a dizzy walking motion."

[13] From the appellant's statement he is saying that he and the deceased were "getting along" up to a particular time when the deceased stopped speaking to him. It seemed that thereafter there was bad blood between the appellant and the deceased. In the statement he described an occasion when he asked the deceased why he wanted to fight with him. The deceased replied:-

> "Don't worry when it is time he will know".

[14] It appears that from the statement that this was the said day of the incident because the appellant said later in the afternoon about 5.00 p.m. he met with the deceased and he told the deceased that he hoped that when the deceased meets him that he {the deceased} has the gun and that he the deceased would shoot him and don't fake it because he the appellant would not be playing. The appellant said that the deceased then came up in front of him he then pushed the deceased.

[15] Later that evening the deceased went to the home of Denise, the girlfriend of the deceased. He said that the deceased passed up the road about five times going towards where Denise was. The first "two times" when Sheldon {the deceased} passed he put his hand as though he had a gun and pointed it towards him. He said:-

> "The third time when he the appellant passed he was doing it again. I told him what you looking for around here you are going to get."

[16] Continuing in his statement the appellant said:-

> "Then he tell me to come up the hill and see what I going get and I laugh. About five minutes later he came down. While he was coming down I was coming down. I walking across the road and going to the green garbage pan. When I was coming I stop in the middle of the road.
> The appellant said that he told the deceased to do what he has to do.
> The appellant then said:-
> "Sheldon {the deceased} put he hand under he shirt and I reach and hit he a hard slap and tell him don't reach for it pull it"

[17] I make the observation that in my view, it was quite obvious that the deceased was representing to the appellant that he was carrying a firearm. For the appellant to do what I would term "call his bluff" in the manner, in which he did, was no more than adolescent bravado. Be that as it may this was a serious assault on the person of the deceased.

[18] The evidence is that the appellant left and came back with his girlfriend. Thereafter he left and came back with his mother. His mother had a cutlass and he had an axe. This to my mind, is the center of the dispute. That was to my mind the genisis for the killing. There was a fight between the mother who was armed with a cutlass and who said that she would kill some one that night. There was the son, the deceased, armed with an axe firing blows with the axe at the appellant. It was a bellicose scene. The evidence is that the stepfather had disarmed his stepson, the deceased. The deceased was walking away when the appellant struck him with the baseball bat.

[19] The learned trial judge told the jury on the issue of self-defence:-

> "Generally, if a person who is attacked, may justify the use of necessary force to prevent a crime against him. Thus a man…….who is attached in circumstances where he believes that he may be killed or that he is in danger of having dangerous bodily harm inflicted on him may use such force as on reasonable grounds.

> He believes it is necessary to prevent and resist the attack. And if in using such force he kills his assailant, he is not guilty of any crime even if, and notwithstanding that the killing was intentional."

[20] In Beckford v. R. 1987 36 W.I.R. 300 –

> The head note reads:-
>
> "An honest belief in fact which if true would justify self-defence constitutes a crime of personal violence [in this case murder]. The issue of reasonableness of belief is relevant only to the question whether the accused's mistaken belief was honestly held."

[21] One could very well understand a jury rejecting the issue of self defence as the evidence from an eye witness which the jury must have accepted is that the deceased was walking away when he was struck from behind with a base ball bat by the appellant but on the issue of provocation, in my view there was a lot of material for the jury to consider on that issue.

[22] In directing the jury on the issue of provocation the learned trial judge told the jury that they had to consider whether it was any wrongful act or insult which would have been done to the accused, Sherwin Fahie, that could have been responsible for his doing what he did.

[23] Then the learned trial judge said:-

> "It might be viewed as insulting, bringing Denise {his girlfriend} for his defence….
> And you might think a male may think it offensive if you brought a female to defend you. It might be alright if you brought your girl, but if you brought your girl fill it might mean that you think I am not sufficient to dispose of you and her and you are challenging his manhood. That may very well be insulting."

[24] That to my mind is trifling with the very serious issue of provocation, as there were very serious, relevant and important issues to the direct the jury on the question of provocation.

[25] The mother of the deceased returning with the cutlass, the deceased being armed with an axe, the fighting between the deceased's mother, firing chops at the appellant with the axe and at one point in time striking the appellant. These were some of the relevant issues and worthy of consideration by the jury on the question of provocation.

[26] The learned trial judge told the jury:

> "Provocation is an issue. It is a defence, however, that is a partial defence in murder only. It is available only in murder and all it does it reduces, if it is there, it can help to reduce the charge of murder to one of manslaughter."

[27] In my view there is nothing wrong with this direction so far. But the learned trial judge went to say "*this matter of provocation doesn't have to be proved by him even if he was raising it. But he is not raising it* {my Italics}.

> The learned trial judge also told the jury:
> "Remember the accused has not said that he has lost control or that he is going to rely on any defence of provocation."
> "As I said, I am explaining this as the judge. I am not telling you that this is the defence being raised by the accused."
> The learned trial also told the jury:
> "Because, however, the prosecution must prove the guilt of Sherwin Fahie that is the accused, it is not for Sherwin Fahie to prove that he was provoked and, he did not seek to do it. He did not raise it."

[28] In my judgment the repeated instances the learned trial judge told the jury the above quoted passages was tantamount to a misdirection and a withdrawal of the issue of the consideration of provocation from the jury. The appellant is entitled to have that issue left to the jury even if the provocation was self induced. (See R v. Johnson 89 C.A.R.148)

[29] The law is quite clear that it is the duty of the trial judge to direct the jury on every issue raised on the evidence whether or not it is canvassed or raised by the defence.

[30] In my judgment the appellant was deprived of the consideration by the jury of the verdict of manslaughter and for that reason I would allow the appeal set aside the conviction of murder and substitute a verdict of manslaughter for that of murder and a sentence of 15 years.

Albert J. Redhead
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Albert N.J. Matthew
Justice of Appeal