ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 12 OF 2000

BETWEEN:

STEADROY MCDOUGAL

Appellant

and

THE QUEEN

Respondent

Before:

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

Appearances:

Mr. Dane Hamilton for the Appellant
Mr. Cosbert Cumberbatch for the Respondent

JUDGMENT

2002: May 27;
November 11.

JUDGMENT

[1] REDHEAD, J. A.: The appellant is an Antigua national. He was convicted in the September, 2002 Assizes for the double murder of Louise Torrens and Mitchel Melius and was sentenced to death which was then the mandatory penalty prescribed by law in Antigua and Barbuda.

[2] The deceased, Louise Torrens was Scottish. The appellant and Louise Torrens had a very stormy sexual relationship. She left him and formed a relationship with the other victim, Mitchel Melius. Mary Janette Stuart gave evidence on behalf of the prosecution. She is also Scottish and lived at English Harbour. She met Louise at Glasgow Airport and they

travelled together to Antigua. She testified that Louise confided in her. She said that in October, 1998 she saw bruises on Louise's' arms and legs. She asked Louise to come to her place. Louise went to her house and resided with her for a while.

[3] This witness then told the Judge and jury:

> "Louise got a new boyfriend, Mitchel Melius but Steadroy (the appellant) kept asking her out……. I did not like what Steadroy was doing. I was getting scared myself…… I asked Louise to leave. She went to a place called the Navigator in the Dockyard."

[4] The prosecution's case is that the appellant through jealous rage murdered his former girlfriend, Louise and her lover, Mitchel Melius both of whom were at the Navigator Apartments in English Harbour at the time. The prosecution alleged that after the appellant murdered his two victims he set fire to their bodies.

[5] The prosecution led evidence from Renford Benjamin, a taxi driver who testified that at about 3.30 a.m on 25th December, 1998 he saw the appellant who was on foot at the junction of Falmouth and Catamaran Road. The appellant flagged him down and told him he wanted to buy gas. He took the appellant to M & M gas station. They got to M & M gas station at about 4.00 a.m. The appellant had with him two gas bottles. At M & M gas station the appellant bought the gas, which was put into the gas bottles.

[6] He took the appellant back to Falmouth. He said the journey back to Falmouth took about half an hour. On reaching Falmouth he drove to Harbour view Apartments in Falmouth where he saw the appellant's van was parked. The appellant got out of his (Benjamin's) and poured the gasoline in his van.

[7] This witness testified that the appellant asked him what was the fare. He told the appellant it was $100.00 but because it is an emergency he would charge him $80.00.

[8] Benjamin testified on oath that prior to 25th December 1998 he had known the appellant for a long time. He knew him to be selling shack-shack. He had seen the appellant in

Heritage Quay, Shirley Heights and sometimes on the beach and he knows him to be driving a white Nissan Van.

[9] The appellant told the Judge and the jury that for the duration of the journey the appellant sat next to him in the front passenger seat. He was wearing a T-shirt and boxer shorts.

[10] The Navigator Apartments were destroyed by fire, which the prosecution alleged began sometime after 3.00p.m.

[11] Benjamin gave evidence that on his way back from buying the gas at about 4.00a.m with the appellant he passed a fire truck going towards English Harbour.

[12] It was the case for the prosecution that the fire was set by the appellant after he had killed the two victims and placed them in separate rooms. He had parked his vehicle on a nearby road and in fleeing the scene after the murder his vehicle ran out of petrol. He then hired Renford Benjamin's taxi to take him to M & M gas station where he had purchased petrol for his vehicle. At about 1.45p.m Norene Matthew saw a white Nissan bus parked in a by-road close to the Navigator Apartments.

[13] The Appellant later took three senior police officers, ASP Albert Smith, Inspector Mckenzie Joseph and Inspector Rommel Simmons to Navigator Apartments to a place where he said was the kitchen. He took them to an area close to the Navigator Apartments where he said he got a bottle with Kerosene, which he used to set the bodies on fire. He also showed the police officers where he had parked his bus that night.

[14] The appellant is dissatisfied with his conviction and appeals to this court against his conviction and sentence.

[15] Ten grounds of appeal are filed on behalf of the appellant.

[16] Ground 1 was not argued.

[17] Under ground 2 it was alleged that the learned trial Judge having informed the jury of the elements which the prosecution must prove to establish the charge of murder against the appellant including "that the inflicting of the bodily harm was unlawful, that is without justification or lawful excuse" failed to instruct the jury that the question whether or not the appellant had acted in self defence ought to have been considered.

[18] The law as I understand it is that if there is any evidence at the trial which is capable of sustaining, raising any defence, not a fanciful defence, whether or not it is relied on or raised by the defence, the trial Judge is obligated to leave that defence to the jury.

[19] In Archbold 2001 paragraph 4-379 it is stated:

> "The Judge should look for any possible defence to the charge arising from the evidence and refer to it even though the defence has not been relied on by the defending advocate"

[20] In Bullard v The Queen 1957 A.C. 635 AT P.642 Earl Jowitt said:

> "It has long been settled law that if on the evidence, whether of the prosecution of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the Judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

(See also Mohammed Bashir v. R 77 CAR 59)

[21] This makes eminently good sense because the raising of a defence may prejudice or embarrass the main defence. The instant case is a case in point. The main defence at trial is that of an alibi. The appellant could not, with any credibility, on the one hand say to the jury he was not at Navigator Apartments on the morning of 25th December when the incident occurred and on the other hand say to the jury that he was defending himself against an attack from the deceased acting in self defence.

[22] However there is not one scintilla of evidence on the record from the defence or prosecution which makes it necessary for the trial Judge to give a direction to the jury on that issue. That was never an issue in this case.

[23] At this stage I should deal with an issue, which was raised by learned Counsel, Mr. Hamilton at the hearing of this appeal. At his trial the appellant on oath before the jury concerning a scratch which was on his hand, said:-

> "On Wednesday 23rd December……..I went to Falmouth for the coconuts and to Shirley Heights for the calabash. As I was climbing the tree I slip and slide and scrape my arm."

[24] About that same scratch, Albert Smith, Assistant Superintendent of Police, said on oath that on 27th December, 1998 at about 10.00a.m or thereabout, he and other police personnel accompanied the appellant to the Holberton Hospital where he was treated. The appellant said he had obtained a scratch during a struggle with the deceased Melius. A doctor at the hospital attended him to. He was prescribed drugs and discharged.

[25] Mr. Hamilton, learned Counsel, for the appellant argued that it was incumbent upon the learned trial Judge to leave the issue of provocation to the jury. I disagree that on the mere fact that the appellant had a struggle with the deceased, the issue of provocation should be left to the jury. The court was not told how this struggle ensured, when this struggle ensued. Moreover, it is beyond doubt that violence was meted out to Melius. At what stage of the violence did the struggle ensue? There is no evidence of that and therefore to leave the issue of provocation to the jury, would in my view, asking them to speculate. There is another matter I should address on the issue of provocation. The evidence is that the victims were at Navigator Apartments if the appellant went into the apartment and attacked Melius and to put it at its highest and Melius then attacked him and a struggle ensued the appellant in my view cannot benefit from the defence of provocation. [See the observations of Lord Pearson in Edwards v R [1973] 1 A.E.R. 152 at 158 LG]. This ground of appeal therefore fails.

[26] I now address an issue, which was touched on during argument in this case. It was argued that if the defence of provocation was successful in favour of Melius what would be

the state of indictment? The appellant having being charged on one indictment of killing two victims, Louise Torrens and Mitchel Melius. The argument was that if the defence of provocation was successful as against Melius and the offence against him was reduced to manslaughter would that adversely affect the single indictment of murder? Without deciding the issue but expressing an opinion, I cannot envisage anything wrong in an amendment of the indictment at that stage and add a separate count, as it would cause no injustice to either of the appellants.

[27] I would say that in a case such as this, it is prudent to have separate indictments for each count of murder.

[28] I now address what I consider to be the most important ground of the appeal. Ground 6, which alleges that the learned trial Judge erred, having ruled that the evidence of a statement purported to be made by the appellant in the presence of ASP smith and Inspector Joseph was inadmissible, but permitted evidence to be led of a fruitless search for property as a result of the inadmissible confession.

[29] There are two issues, which arise from this submission. The first is that the learned trial Judge allowed the police officer to repeat at the trial evidence from the statement, which he held to be inadmissible. The second issue is that the learned trial Judge having ruled the statement inadmissible, erred in law in permitting evidence to be led that the appellant took police officers to Navigator apartments and pointed out certain things to them. Learned Counsel argued that whatever was "contaminated" should never be admitted into evidence.

[30] Mr. Hamilton relied on:-

Lam Ch:-ming VR 1991 93 CAR 358 in support of this argument. I shall return to this argument later in this judgment.

I deal with the first issue now. The appellant gave a statement the police who said it was under caution. He however disputed this. He said however under cross examination that he was not beaten or threatened. He also admitted giving a statement to the police but he

did not sign the statement. The admissibility of the statement was challenged on the ground that it was not singed by the appellant. The learned trial Judge refused to admit the statement on that basis.

[31] In Seeraj Adojdha and Others v The State 32 W.I.R 360 at page 371 Lord Bridge of Harwick said:-

> "It may be helpful if their Lordships indicated their understanding of the principle applicable by considering how the question should be resolved in four typical situations most likely to be encountered in practice (1) the accused admits making the statement (orally or in writing but raises the issue of that it is not voluntary. This is simple where the Judge must rule on admissibility and, if he admits the evidence of the statement leave to the jury all questions as to its value and weight (2) the accused as in each of the instant appeals denies authorship of the written statement but claims that he signed it involuntary. Again, for the reasons explained, the Judge must rule on the admissibility, and, if he admits the statement leave at all issues of fact as to the circumstances of the making and signing of the statement for the jury to consider and evaluate (3) the evidence tendered or proposed to be tendered by the prosecution itself indicates that the circumstances in which the statement was taken could arguably lead to the conclusion that the statement was obtained by fear of prejudice or hope of advantage excited or held out by a person in authority. In this case irrespective of any challenge to the prosecution evidence by the defence, it will be for the Judge to rule assuming the prosecution evidence to be true whether it proves the statement to have been made voluntarily (4) on the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely upon oral statements the defence case is simply that the interview never took place or that the incriminatory answers were never given, in the case of a written statement, the defence case is that it is a case of forgery. In this situation no issue as to voluntariness can arise and therefore no question of admissibility falls for the Judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury".

[32] Having regard to the above, in particular with reference to (2) it is my considered view that the learned Judge erred in not ruling on the admissibility of the statement. When I review the state of evidence the learned trial Judge ought to have admitted the statement. The evidence is that the appellant gave the statement he said he was not beaten or threatened. No allegation of any inducement was made against the police or anyone. In the face of no allegation of any impropriety against the police or any person in authority it is simply that

the appellant's allegation is that he did not sign the statement. It was admissible. I do not agree therefore with Mr. Hamilton's argument that the learned trial Judge allowed evidence to be admitted on a statement which was held to be inadmissible. Even if the learned trial Judge ruled that the statement was inadmissible the statement was never before the jury the question therefore what weight should be attached to the statement never arose.

[33] It follows therefore a statement which was not illegally obtained that a police officer could ask questions as a result of information which he gleaned from that statement or which was told to him in relation to that statement.

[34] I now turn to the second issue that is whether the learned trial Judge erred in allowing evidence to be led that the appellant took the police officers to Navigator Apartments to point out certain things.

[35] Learned Counsel, Mr. Hamilton, placed a lot of emphasis on Lam Chi-Ming and Others v. R 93 C.A.R 358. At the appellants' trial the Judge ruled that all the three appellants had said and written while they were in police custody was inadmissible as the prosecution had not satisfied him that the statement made were voluntary. However he admitted in evidence a video recording without sound showing that the appellants had directed the police to the waterfront and each in turn had made gestures indicated throwing the knife into the water and also police evidence describing those actions which resulted in the recovery of the murder weapon in the sea at the place. The Court of Appeal dismissed their application for leave to appeal against conviction holding that the evidence was admissible. On appeal therefrom to the judicial committed of the Privy Council.

[36] Held: allowing the appeal, that although the evidence relating to the conduct of the appellant leading up to the finding of the knife was reliable so far as the discovery of the murder weapon was concerned; nevertheless it was part of their confessions to the police, as were the confessions which they were said to have earlier made while in police custody which the Judge had ruled were inadmissible because the prosecution had failed to prove

that they had been made voluntarily. Thus the silent video recording and the police evidence relating to it should also have been ruled inadmissible in evidence by the trial Judge.

[37] At page 360 Lord Griffiths in delivering the opinion of the Board said:-

> "The Judge also admitted police evidence describing these actions of the appellants which resulted in the recovery of the knife. The admission of this evidence was, of course, virtually as damning to the appellants as if their entire confessions were admitted. It showed that they knew where the murder weapon had been thrown into the sea and it was inconceivable that any one other than the murders would wish to dispose of the knife in that fashion."

[38] At page 364 Lord Griffiths continued:

> "The Court of Appeal upholding the Judge's ruling on admissibility relied upon a passage in Ramasmy (1965 A.C.1) …… It is understandable that they should have done so, but their Lordships are unable to accept that the exception which appears to have existed for a short time in the early part of the 19th century under which evidence, of part of a confession was admitted, ever became established as part of the common law. Such a development was repudiated by Lord Scarman in the following passage of his speech in R v Sang 1979 69 Cr. App. R. 282, 305 …… "Long before 1898, however, the courts were faced with the problem of reconciling fairness of trial with the admissibility of evidence obtained as a consequence of an inadmissible confession. The problem was resolved in Warickshall [1783] Leach 263 by the court declaring at page 264 "Facts thus obtained, however, must, be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived….. The discovery of stolen goods in that case, (or as in Berryman 1854 6Cox c.c. 388.) finding of the remains of the corpse is the best possible evidence of the truth of this confession……but in English law the confession is inadmissible not because it is unreliable (its reliability has been established by what has been found), but because to admit it would be unfair."

[39] Lam Chi-ming's case can be distinguished from the case at bar. In the latter the appellant took the police officers to Navigator Apartments in an effort to recover a knife.

[40] A.S.P Smith told the appellant that he the accused murdered both victims and set their bodies on fine. A.S.P Smith said:

> "I cautioned the accused and he immediately started to cry and said "Let me tell you the truth." I told him that I intended to make a written record of what he had to

say. After the statement the accused took us to the Navigator Bar and Restaurant at English Habour……. No knife was found"

[41] This evidence was given by A.S.P Smith without any objection from the defence. What was objected to was the unsigned statement which the appellant gave to the police and that statement had no reference to any knife or taking the police officers to Navigator Apartments.

[42] It cannot therefore be said with any legal justification that the learned trial Judge erred in law by permitting evidence of a fruitless search for properly made as a result of an inadmissible confession.

[43] It cannot be said either that a knife, which was damaging to the defence, was obtained as a consequence of an inadmissible confession.

[44] It was quite clear, having regard to the evidence of the pathologist, that the knife, which was not found, was not the murder weapon.

[45] It was more likely that not that a hammer was the murder weapon. Dr. Rammath Chandulal said in evidence:-

> "I am of the opinion beyond doubt that the deceased Daniel Mitchel Melius died as a result of blunt force cranial cerebral injuries, in addition of soot with extensive burns causing charring of the body…….force was caused by a blunt object having the striking surface of oval circular and professionally they are labeled as signature fractures. The implement would have to be oval or circular in shape and this impression suggests a hammer."

[46] He said of the female victim:-

> "I am of the opinion beyond doubt that (1) the body on whom I was doing the post-mortem was that of Louise Torrens and (2) she died due to blunt force, cranial cerebral injury causing extensive brain haemorrhage….
> The range of force necessary to cause the injury would be a moderate degree of force contusion was in vortex. The injuries I described were anti-mortem."

[47] A.S.P Smith testified that on 25th December at about 5.30 a.m. he visited the Dockyard area, he saw the Navigator Bar and Restaurant on fire. He carried out an investigation of

the burnt area. He noticed that there were two burnt bodies in two separate rooms- one a female, and the other a male.

[48] A.S.P Smith said on oath he, other police personnel and members of the Fire Brigade carried out a search of the burnt debris and during that search a claw hammer was found on the floor in a room where the female body was. It appeared to be smeared with what appeared to be blood.

[49] It appears to me therefore, that the knife had very little relevance evidentially apart from the appellant saying he was taking the police officers to show them where the knife was.

[50] And the learned trial Judge mistakenly told the jury in his summation at page 101 of the record:-

> "Under cross-examinations Sgt. Edwards stated that the accused said that he had been attacked with a knife by Melius, now deceased."

[51] The record reveals no such evidence. However the learned trial Judge in an attempt to correct the record at page 109 said:-

> "Mr. Foreman, members of the jury, what I said about the cross examination of Sgt. Edwards you must totally ignore since I may have taken down a wrong an incorrect note but there was nothing mentioned by Sgt. Edwards about the knife. So totally ignore what I had earlier said about Sgt. Edwards under cross examinations."

[52] Yet inspite of what the learned trial Judge had told the jury, learned counsel under ground 8 alleged that "the learned trial Judge to the prejudice of the appellant had instructed the jury that under cross examination Sgt. Edwards stated that the accused said that he had been attacked with a knife by Melius, now deceased."

[53] Learned counsel after referring to the Judge's warning to the jury that they should totally ignore what he had told them earlier about Sgt. Edward's testimony under cross examination, went on to contend that the time which had elapsed between the first statement and the second was such that `one could not guarantee what the damage could have been done or was repaired'. He further argued that the appellant had been placed by

his own alleged words directly and firmly in the presence of the deceased moments before his death.

[54] It is quite obvious that the learned trial Judge in his summation to the jury made a slip when he incorrectly told them that Sgt. Edwards had said in cross examination that the appellant told him that he was attacked by Melius with a knife. The learned trial corrected this error. I do not see what else he could have done.

[55] Finally I turn now to consider the question of imbalance in the summing up. When one goes through the Judge's summation one would immediately see that there could be no justification for any allegation that the summing up was an imbalanced one.

[56] The appellant's defence was one of alibi. His testimony before the jury was that at the time of the incident he was at his home sleeping. The learned trial Judge reminded the jury of this at pages 104 and 105 of he record.

[57] He gave a direction on the law as it relates to alibi. Renford Benjamin, the witness, who testified that he drove the appellant from Falmount to M & M Gas Station, a journey which lasted for half of an hour and then back to Falmouth, that journey lasting for about that same time told the jury for both legs of the journey the appellant whom he had know for a long time sat beside him.

[58] The learned trial Judge dealt with that evidence this way:

> "The accused is also saying that this is a case of mistaken identity on the part of Renford Benjamin. He then at page 108 of the record gave the jury a Turnbull direction.
>
> (R v. Turnbull 1976 3 ALL ER 549)

[59] Novelle Matthew gave evidence that he saw the appellant's bus park in the vicinity of the Navigator Apartment between 12.30 am and 1.00pm on the morning 25th December, 1998. The learned trial Judge told them that he could have been mistaken.

[60] The police officers, Inspector Joseph and ASP Smith testified that the appellant took them and showed them where he had parked his van that night and where he got the kerosene to burn the bodies. The appellant in his testimony before the jury denied all of these things and said that the police told lies on him. The learned trial Judge pointed all of these things out to the jury in his summation. I have no doubt that the learned trial Judge dealt with all the issues fairly.

[61] For foregoing reasons the appeal is hereby dismissed. The conviction is affirmed.

[62] The appropriate sentence to be passed is to be determined by hearing at a date to be fixed by the one of the Judges of the High Court.

Albert J. Redhead
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Satrohan Singh
Justice of Appeal