SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.5 OF 2002

BETWEEN:

DEON JACOBS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, S.C.	Justice of Appeal [Ag.]

Appearances:

Mr. Carlyle Dougan Q.C.; Ms. Kay Bacchus-Browne with him for the Appellant
Mr. Roger Gaspard DPP; Ms. Suenel Fraser, Crown Counsel with him for the Respondent

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2002: December 2,3;
2003: March 6.

JUDGMENT

[1] REDHEAD, J.A: The appellant was convicted of the murder of Curtis Fredericks and was sentenced to life imprisonment. He now appeals to this Court against his conviction and sentence.

[2] The case presented by the Crown was contained in the evidence given more particularly by two of the Crown witnesses Aaron Fredericks and Julian Caine.

[3] Aaron Fredericks testified that on Friday 1st December 2001 he attended a show at Victoria Park in St. Vincent. The performers at that show were Jamaican artistes. Two witnesses claimed that about 30,000 to 40,000 persons attended the show. This witness testified that he was enjoying himself in a way that is most unimaginable to my mind. In that he was drinking Guinness, jumping and throwing Guinness all around the place. He said that he "fired" a bottle in the air and a fellow by the name of Norman who was at the bar came to him and said that a piece of splinter from the bottle hit him across his face. He said five of his friends came up to him and asked him if he wanted "war". This witness's friends in turn came up to him and explained what happened. Fredericks said under oath:

> "……. bottles started to fire all over the place and people started scattering. I bumped into Dopey [the appellant] … Dopey pushed me as I bumped into him. One of my friends behind me fired a bottle which lashed him (Dopey) in his face. He "dipped" in waist with his hand and I ran a distance from him. I stopped and was looking at him. My brother [the deceased] was standing on the other side . His name is Curtis Frederick. Dopey started to chase him. He was bawling, " It is not me" Curtis was bawling so. Dopey fired a shot, which caught him in his hand and he fell on the ground. Dopey ran over to Curtis' left side. Curtis was trying to get up. He was on his right side trying to rise up from that side. Dopey shot him from his left buttocks. Curtis stretched out and started to bawl on the ground. Dopey ran. I gave chase after him. He ran towards the gate near to Gibson Building Supplies. He ran in front of an SSU officer I ran to that SSU officer and held his hand …….. He [the SSU officer] pulled out his firearm and started to chase Dopey."

[4] Julian Caine who is a Police Constable, an SSU officer, said on oath that at about 5:30 p.m. he was dispatched on duty at Victoria Park. He was dressed in camouflage with other SSU personnel. At about 2:15 a.m. on 2nd December 2000 he was at a bar at the eastern end of Victoria Park. He observed that the people who were gathered in front of the stage where the concert was taking place began running in all directions. This created an open space. He then observed that the appellant was running behind another man. The appellant then pointed his right hand at the said man. He noticed an object which appeared to be a gun. He then heard an explosion which sounded like a gunshot to him. He then saw the appellant standing over the said man for about one minute. The appellant then

ran towards the gate which is situated on the eastern side of Victoria Park. This witness said he then left where he was standing and ran for about 110 feet towards the appellant. According to P.C. Caine the appellant on recognizing his presence turned back and ran towards the stage. He said that he fired one shot in the air from his 45 pistol in an attempt to slow down the appellant. P.C. Caine said that the appellant was caught about 350 feet from where he first tried to intercept the appellant. This witness testified that the object he saw in the appellant's right hand appeared to be a gun. The appellant had the object in his right hand while he was standing over the fallen man. P.C. Caine said that he heard a second explosion, a gunshot which came from the direction of the appellant.

[5] P.C. Caine said that before the incident he had known the appellant for about two or three years and he would see him mostly on weekends.

[6] P.C. Caine testified that when he first saw the appellant running after the man on the morning of the incident he was about 15 meters away from the appellant. He said Victoria Park was "well lighted" that morning by floodlights. Victoria Park was bright. This witness also said that nothing was obstructing his view of the appellant and the fallen man.

[7] In cross-examination P.C. Caine said that he never lost sight of the appellant. He was watching him all the time. He actually caught him.

[8] Eight grounds of appeal were filed on behalf of the appellant. The appellant by application was granted leave to add another ground of appeal.

[9] I deal with that additional ground of appeal first. The appellant through his learned Counsel, alleges that 'the learned trial Judge misdirected the jury on the definition of murder.'

[10] At page 38 line 25 of the record the learned trial Judge instructed the jury as follows:

> "Now murder simply defined is causing grievous bodily harm with intent or by a reckless act resulting in the death of a person."

[11] "A reckless act resulting in death of a person" that to my mind is the definition of manslaughter for example where there was a number of persons gathered, for instance, as was the case at Victoria Park and one pulls out a gun randomly not intending to kill or cause grievous bodily harm to any one but someone is accidentally shot and died as a result in those circumstances. In that regard it could be said that that person who pulled out the gun acted recklessly and thereby may be guilty of manslaughter. But certainly this was not the prosecution's case which I shall return to shortly.

[12] Further on the learned trial Judge told the jury to ground the charge of murder the prosecution would have to prove to you that there was an intention to kill. Although the standard of proof is left out from that direction, it is not otherwise flawed. But unfortunately the learned trial judge fell into serious error again. Continuing he said "or there was a reckless act on the part of the accused which led to the death of the deceased". In my view this does not and cannot establish the offence of murder.

[13] To compound this unfortunate error the learned trial Judge went on at page 39 of the record to tell the jury:

> "Secondly, you can also look at the act as being a reckless act with an intention to cause grievous bodily harm because look at the confines of Victoria Park. We are told that there was (sic) about 30,000 to 40,000 people there, a show comprised of artistes from Jamaica … Now if you take a gun of that calibre in the confines of Victoria Park and fire this weapon twice aiming at somebody what is your intention? That whole scenario clearly tells you that this is a reckless act; recklessness on the part of whoever had the gun…"

[14] To my mind to speak of a reckless act with intention is clearly a contradiction in terms. Recklessness is where a person who does not intend to cause a harmful

result takes an unjustifiable risk of causing it. If he does so he may be held to be reckless". See Smith and Hogan Criminal Law 6th Ed. Page 61. Intention on the other hand, is said that when one intends something that one sets out to bring about a desired result.

[15] It is quite apparent to me that there was a lack of appreciation of the concepts, intention as distinct from recklessness. It also indicates to my mind that there was a failure of appreciation that the word "reckless" when used particularly in relation to the offence of murder connotes a special significance in that once it is alleged that the person charged with murder that his act which brought about the death of the deceased was reckless then the issue of manslaughter arises. Because it means that he would not have had the specific intent to kill or cause grievous bodily harm which is the requisite intention necessary for the prosecution to prove in order to establish the crime of murder.

[16] The prosecution's case was that the appellant deliberately and intentionally shot the deceased. Whereas the appellant's defence was a straight denial. There was not even a suggestion in the case that the act of the appellant which resulted in the death of the deceased was a reckless one.

[17] In Woollin v Regina (1998) 3 WLR 382 8 the appellant lost his temper and threw his three-month old son onto a hard surface. The son sustained a fractured skull and died. The appellant was charged with murder. The prosecution did not contend that the appellant desired to kill his son or cause him serious injury. The issue was whether he had had the intention to cause the child serious injury. In summing-up to the jury the judge followed the Nerdrick direction [R v Nerdrick (1986) 1 WLR 1025]. That on a charge of murder they were not entitled to infer the necessary intent unless they felt sure that death or serious bodily harm was a virtual certainty from what he was doing and he appreciated that fact. However later in the summing-up the jury were directed that if they were satisfied that the appellant must have realized and appreciated that when he threw the child that

there was a substantial risk that he would cause serious injury to him, then it would be open to them to find that he had intended to cause injury to the child and they should find the offence of murder proved. The appellant was convicted and the Court of Appeal (Criminal Division) dismissed the appeal.

[18] On appeal to the House of Lords, it was held allowing the appeal, that where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer that necessary intention, unless they felt sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's action, and that defendant appreciated that such was the case. The decision was one for the jury to reach on a consideration of all the evidence. The use of the phrase "a virtual certainty" was not confined to cases where the evidence of intent was limited to the admitted actions of the accused and the consequences of those actions. Thus in the instant case, the learned trial Judge by using the phrase "substantial risk" had blurred the line between intention and recklessness and hence between murder and manslaughter; and as that misdirection had enlarged the scope of the mental element required for murder; it was a material misdirection. Accordingly, the conviction for murder would be quashed and a verdict of manslaughter substituted.

[19] So too, in the instant case the learned trial Judge had blurred the line between intention and recklessness.

[20] I deal now with ground 2 of the appeal. Under this ground it is alleged that the learned trial judge misdirected the jury by failing to direct them adequately or at all on the issue of self-defence. In particular he failed to tell them that when the issue of self-defence arose it was the duty of the prosecution to disprove it. The appellant gave evidence on oath. In his evidence he spoke of two previous incidents in which he and his brother were attacked by the deceased and his brother.

[21] On the 1st December 2000 he went to Victoria Park. He denied having a gun at Victoria Park. He said he saw Aaron Fredericks and his deceased brother at Victoria Park that night.

[22] The appellant said on oath that he saw Aaron Fredericks and the deceased in a group of about eight men, they were pelting bottles at another group of about ten men. He said that there were lots of people at the park. Some people ran back from the pelting. He continued:

> "Aaron butt into me, so I fended him off with my hand. It was an intentional butting on me. I saw Curtis right by Aaron's side. Aaron Fredericks boxed me in my face. Someone pelted a bottle and hit me in my face. Then they started beating me. Aaron Fredericks and his brother and their friends. I fell to the ground. They continued beating and kicking me and lashing me with things. I happened to get away and I started running. I ran to the eastern side of the park.
>
> I ran to escape from the beating I was receiving. While running Aaron and his friends ran behind me. I saw them. One of them pelted something which hit me in my back. I heard a couple of explosions. I ran to the eastern side of the park in front of the concrete pavilion. A police officer held on to me and asked me what I was fighting for. He took me to the police transport and then to the police station. I did not see any gun that night. I was not running with any gun. I did not fire off any gun. I did not throw any gun under any vehicle … I was then taken to the Kingstown General Hospital. This was because of the beating I had received from Aaron Fredericks and his friends. I was seen to by the doctor. I was also seen by the prison doctor, Dr. Ranjani."

[23] The issue of self-defence cannot, in my view, arise on the prosecution's case. The evidence for the prosecution as given by Aaron Fredericks and supported by P.C. Caine was to the effect that the deceased was being chased by the appellant who shot him in the arm. The deceased fell to the ground and while he was trying to get up the appellant shot him in the buttocks.

[24] The appellant testified under oath that he was beaten by the deceased, his brother Aaron Fredericks and their friends. He was kicked, he fell to the ground, he got up and escaped their beating. He denied ever having a gun. He denied ever shooting

off a gun that night. Does that raise the issue of self-defense? I think not. Learned Counsel for the appellant in his skeleton submissions argued:

> "He [the appellant] never said that in defending himself he shot the deceased and this latest assertion was never a part of the [appellant's] case. Thus the learned trial judge was himself seemingly misled and in consequence misdirected the jury on the issue [of self defense]."

[25] Learned Counsel however argued that the learned trial Judge having raised the issue of self-defense to the jury he had a duty to direct them on the burden of proof. Learned Counsel referred to Archbold Criminal Pleadings and Practice 2000 19-43.

[26] At page 57 of the record the learned trial Judge instructed the jury as follows:

> "Now secondly, the defence has raised another defence. They raised it, they mentioned it and I have to put it to you, that is the issue of provocation. What learned defence Counsel told you is assuming, having considered all the evidence – you say the accused is guilty you have to consider the element of provocation because we are saying it was the deceased and his brother who attacked him, hit him in the face with a punch, hit him with a bottle, hit him on the ground, hit him with bottles whilst on the ground. He was provoked to a point where he got up and decided to defend himself and in defending himself he shot the deceased. If you accept that version from the defence and you say the accused was provoked that will reduce the charge of murder to manslaughter, manslaughter has (sic) as lesser offence, that is if you believed that the accused was indeed provoked."

[27] The learned trial Judge was directing the jury on the issue of provocation, in doing so he unfortunately seemed to have straddled into the realm of self defence by the use of such terms as "He was provoked to a point where he decided to get up and defend himself and in defending himself he shot the deceased."

[28] This appeared too, to be an unfortunate mixing up of the issue of self-defence and provocation. I am in agreement with the submission of the learned Director of Public Prosecutions that on the totality of the evidence in this matter and having regard to the issues in dispute that the learned trial Judge was under no duty to leave the issue of self-defence to the jury.

[29] In Pinto v the State (1986) 40 WIR 342 at page 353 Bernard C.J. said:

> "….. A summing if it is to be intelligible, must be relevant and must be confined to the issue of fact raised whether directly or indirectly in the case and the inferences arising therefrom having regard to contentions of the parties."

[30] This ground of appeal is dismissed.

[31] Under ground 3 it was argued on behalf of the appellant that the learned trial Judge ought not to have left the issue of provocation to the jury.

[32] Learned Counsel argued that the appellant denied shooting the deceased and there could have been no killing by him as a result of provocation and that the Crown led no evidence to support the issue that the deceased had provoked the appellant.

[33] I do not agree with the argument of learned Counsel for the appellant. Aaron Fredericks in testifying on behalf of the crown said in examination-in-chief:

> "I fired a bottle in the air and a fellow Norman who was by the bar next to me, came up to me and said a piece of splinter from the bottle hit him across his face. Five of his friends came up and asked what happened and asked if I wanted war. My friends came and I explained to them what happened and bottles started to fire all over the place and people started scattering. I bumped into Dopey ….. Dopey pushed me as I bumped into him. One of my friends behind me fired a bottle which lashed him in his face."

[34] Mr. Gaspard argued that the issue of provocation did arise having regard to the evidence given by this witness for the prosecution notwithstanding that, the provocation did not emanate from the deceased.

[35] In Alphonso (Stephen) v The State of Dominica (1994) 92 at page 94 Singh J.A. delivering the judgment of the Court of Appeal observed that:

> "the alleged provocative acts relied on by the appellant consists of (1) a previous beating of him by the deceased's family, (2) the impression that

> the deceased on the day of the incident had reported him to the police, (3) a stone thrown at him by the deceased, (4) the deceased's mother and father armed with a cutlass and a stone walking towards him. The law in these circumstances required the judge to direct the jury that on the issue of provocation, then consideration should not be limited to acts of the deceased only but also to acts of the deceased's father and mother (R v Small (1966) 9 W.I.R. 340; R v Thompson (1971) 18 W.I.R. 51)."

[36] It seems to me that in order for the issue of provocation to arise having regard to Justice of Appeal Singh's dicta in the above is that there should be some acts done by the deceased to the accused, though acts should not be confined to acts done by the accused. Indeed the two cases, Small and Thompson referred to by Singh J.A. provocation emanated also from the deceased person as well as from other persons.

[37] However in R v Hall (1928) 21 C.A.R. 48 – The Court of Appeal held that the defence of manslaughter on the ground of provocation arose notwithstanding that it appeared to the learned trial Judge that the provocation had come from one man and the appellant stabbed and killed another man, it may be possible to rationalise that decision on the ground that the Court of Appeal took the view that the deceased had been a party to a previous attack that night on the appellant.

[38] Having regard to the setting and the confusion that existed at Victoria Park on the morning of the 2nd December 2000, the throwing of bottles by Aaron Fredericks, the appellant being struck by a bottle as testified to by Aaron Fredericks; the butting into the appellant as testified to both by the appellant and Aaron Fredericks and finally the previous beatings of the appellant by the deceased and Aaron Fredericks. I am of the view that the learned trial Judge was justified in leaving the issue of provocation to the jury.

[39] The learned trial Judge having left provocation to the jury he misdirected the jury. He failed to instruct the jury that the onus was on the prosecution to negative the defence of provocation.

[40] The learned trial Judge also told the jury:

> "Defence is telling us that because the deceased and his brother and their friends attacked the accused to that extent he became so insensed that he lost his self control and he chased after the deceased and shot the deceased."

The defence is not saying that. That was not the defence case. The defence never said or admitted that the appellant chased after the deceased and shot him. The appellant denied at all times that he shot the deceased. The defence was a denial and for the learned trial Judge to put it that way to the jury was to rob the appellant of his defence. No matter how untenuous that defence might appear to be, he should put it to the jury. In directing the jury on the issue of provocation, the learned trial Judge continued at page 25:

> "What the law is that having chased after the deceased and shot him the first time, was there a need to shoot him the second time? Because we have evidence that he stood over the deceased for a minute and after shooting the deceased the first time he should have been able to regain control of his senses to realize that. "Look! What I am doing is wrong or I have gone too far." But he stands over the deceased for a minute and then fires a second shot willfully and intentionally. That is the prosecution's case and that is the law. If you accept that what I have put to you as the law, then provocation does not come into play."

[41] In the above passage it is difficult for one to comprehend what was the law on provocation the learned trial judge put forward for the consideration of the jury. By the learned trial Judge asking a question based on the facts of the case does not, in my mind, enlighten the jury as to what the law is one way or the other. For example the learned trial Judge asked the question in the following manner:

> "What the law is, that having chased after the deceased and shot him was there a need to shoot him a second time?"

[42] The learned trial Judge then referred to the evidence about the appellant standing over the deceased for about a minute then shooting the deceased for a second time.

[43] The learned trial Judge then makes the comment, "he should have been able to regain control of his senses… 'What I am doing is wrong. I have gone too far.' But

he stands over the deceased for a minute and then fires a second shot, willfully and intentionally. That is the prosecution's case and that is the law. If you accept that what I have put to you as the law then provocation does not come into play.

[44] I ask rhetorically what is the law? "Shooting the victim a second time?" "I have gone too far!" "What I am doing is wrong:" I cannot discern what direction the learned trial Judge gave the jury on the law of provocation. See R v Martindale (1966) 3 AER 305.

[45] In my view the learned trial judge gave little or no legal direction on provocation and moreover, the way he dealt with the issue amounts to a withdrawal of the issue of provocation from the jury.

[46] In R v Gilbert (1978) 66 Cr App 237 at page 242 Viscount Dilhorne quoting a passage from Lord Devlin in Lee Chung-Chuen-R (1963) I AER 73 where he said at 79:

> "Provocation in law consists mainly of three elements, the act of provocation, the loss of self control both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issues to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other particularly in point of time, whether there was time for passion to cool – is of the first importance.
>
> The point that their Lordships wish to emphasize is that provocation in law means something more than a provocative incident."

[47] Viscount Dilhorne went to say:

> "In the light of Section 3 of the Homicide Act 1957 [these] passages require to be qualified to the extent that since the passage of the Act of 1957, if there is evidence in which a jury can find the accused was provoked to lose his self control, the issue of provocation must be left to the jury."

[48] The law on provocation S 162 (2) of the Criminal Code of St. Vincent and the Grenadines is quite clear and explicit in its terms and is identical to Section 3 of the Homicide Act 1957 of England.

[49] Archibold 40th Edition paragraph 2476, the learned authors opined:

> "… Section 3 involves two questions: (1) was there any evidence of provocation of the accused and (2) was there any evidence that the provocation caused him to lose his self-control. If both questions are answered in the affirmative the plea of provocation should be left to the jury notwithstanding the fact that in the opinion of the trial judge no reasonable jury could conclude on the evidence that a reasonable person would have been provoked to lose his self control and that on the evidence a verdict of manslaughter would have been perverse R v Gilbert (1928) 66 Cr. App. R. 237."

[50] In light of the foregoing there can be no doubt in my mind that the learned trial judge misdirected the jury and failed to direct them adequately on the law of provocation.

[51] I however entertain no doubt that having regard to the evidence in this case that an intelligent jury properly directed would have rejected the defence of provocation.

[52] I turn now to ground 4. Under this ground it was argued that the learned trial Judge misdirected the jury by failing to ask them to consider what light if any, the evidence of the bullet wound cast on the merits or demerits of the prosecution and defence cases.

[53] The medical evidence was given by Dr. Ranjani who performed the post mortem examination on the body of the deceased.

[54] She testified that death was caused by gun shot injury to the right lung and abdominal aorta. She said a bullet was removed from the right Clavicular region and handed over to Sergeant Bailey.

[55] The doctor also gave evidence of an entry wound in the exterior aspect of the right forearm and an exit wound on inner aspect of the right forearm. She also said that there was an entry wound on the left hip and an exit wound below the right clavicle.

[56] The doctor referring to the internal examination said; "The exit wound below the right clavicle would have been caused when the bullet hit the body, it takes its own course inside of the body. It fractured the ribs and went up to the right clavicle. The exit wound below the right clavicle would be due to the bony fragments removed from the fracture which made "its own exit wound."

[57] Learned Counsel for the appellant argued that the doctor gave as the cause of death gunshot wound, injury to the right lung and abdominal aorta. She described the course of the fatal bullet through the body and removed bone fragments from the right clavicle region.

[58] The submission of learned Counsel is that the doctor expressed no opinion about the plausibility of the prosecution's version in light of the bullet wound and the trial judge did not ask to consider what light, if any, the evidence of the bullet wound cast on the merits and demerits on the prosecution and defence case.

[59] Mr. Dougan, Queen's Counsel, argued that these omissions were serious. He referred to Everald Nichols v The Queen, Privy Council Appeal No. 14 of 2000.

[60] Aaron Fredericks who testified on behalf of the prosecution said that the deceased fell to the ground. The appellant ran over to the left side of the deceased while he was trying to get up. The deceased was then on his right side the appellant then shot the deceased on his left buttocks.

[61] Learned Counsel argued before us that it was not possible for the appellant to have shot the deceased in the position as described by Aaron Fredericks and for the bullet to have entered the body in the manner described by the doctor. I reject that argument because to entertain such argument is to get involved in speculation.

[62] That ground of appeal is without merit and is therefore dismissed.

[63] I now deal with ground 5. The learned trial Judge misdirected the jury on identification by his failure to warn them of special need for caution before convicting an accused on the reliance on the correctness of identification.

[64] Learned Counsel in support of this ground argued that the learned trial judge failed to give an appropriate "Turnbull" direction to the jury. (R v Turnbull (1976) 3 AER 549).

[65] Having regard to the evidence of Aaron Fredericks and P.C. Julian Caine, in which the former said he knew the appellant for about six years, the latter said he knew him for about two to three years. Having regard to the lighting condition at Victoria Park, the evidence of the appellant who said he bumped into Aaron Fredericks who confirmed on oath that the appellant bumped into him; having regard to the fact that P.C. Caine who said he gave chase to the appellant, he kept his eyes on the appellant all the time and caught up with and apprehended him. The appellant himself said on oath before the jury that on the morning in question he was beaten by the deceased and his brother. The Turnbull principles are not applicable. Moreover the appellant is not saying it is a case of mistaken identity. He is saying that he did not shoot and kill the deceased. This ground of appeal is dismissed.

[66] I turn now finally to grounds 6, 7 and 8 which could be dealt with together.

[67] The issue which these grounds raise are basically unfairness and imbalance in the summing-up.

[68] At page 53 of the record the learned trial Judge said:

> "now you also have to look carefully at the evidence of Inspector John Annell because that is clearly where the defence are basing everything."

Learned Counsel contended that this was clearly an unbalanced and unfair conclusion since the defence contended that the appellant did not shoot the deceased.

[69] John Annell, forensic firearms examiner, testified that he examined among other things .357 magnum caliber revolver. He said that he was also given five spent magnum shells and one container containing a piece of lead. He said that the piece of lead was a semi-warcutter bullet of .38/357 magnum caliber. The lead was very deformed and appeared to have struck a hard object before coming to rest. It contained a strand of hair, dried body tissue and blood on its surface. Having carried out his test he concluded that the lead semi-wadcutter bullet – .38/357 magnum bullet does not have sufficient individual characteristics with the lead fired bullet for a positive match.

[70] This witness also said in cross examination that it was very likely it was from the gun but that the he could not say positively that the damaged bullet was fired from the gun which was handed to him. I agree with learned Counsel for the appellant that it was an unfair conclusion, for the learned trial Judge to have commented that the defence was "basing everything" on John Annell's testimony. However it is quite apparent from the record that the cross examination by the defence placed a great deal of emphasis on Annell's testimony. This may have prompted the learned trial Judge to conclude the way he did.

[71] In my judgment Annell's testimony was not of great significance to the defence. There was no denying that the deceased was shot. The defence was that the

appellant did not do the shooting. In my view it ought not to have been of any importance to the defence whether the bullet removed from the body of the deceased was matched with the gun that was recovered.

[72] Learned Counsel also submitted that the appeal should be set aside because the verdict is unsafe and unsatisfactory. He argued that the general feel is that an injustice has been done. Learned Counsel relied on circumstances which he referred to as the general chaos that existed at Victoria Park on 2nd December 2000. The several misdirections of the learned trial Judge, the fact that the forensic expert could not say with certainty or conclusively that the bullet extracted from the deceased came from the gun which the prosecution say the appellant had; the material differences in the evidence of the identification witnesses and the conduct of Aaron Fredericks.

[73] Learned Counsel relied in support of his submission on: R v Cooper (1969) I AER 32. George Polina v Regina – Privy Council Appeal No. 45 of 1995 and Everard Nichols v Regina – Privy Council Appeal No 14 of 2000. Some of these matters relied on by learned Counsel are already dealt with.

[74] There may have been general chaos at Victoria Park on the morning of the incident but there was clear and cogent evidence given to the jury by P.C. Caine and Aaron Fredericks. The manner in which they said the incident occurred. The "parting" of the crowd which left an open space – there was no doubt P.C. Caine had a full view of the appellant whom he had known for about two to three years before the incident. P.C. Caine chased the appellant whom he had never lost sight of and caught him. From the reading of the record it can be inferred that Aaron Fredericks was at a different vantage point from the witness P.C. Caine when the deceased was shot. However this witness testified that Dopey [the appellant] pushed him as he bumped into him, one of his [Fredericks'] friends threw a bottle which struck the appellant who then pulled out a gun. Fredericks said he was looking at the appellant who began to chase his brother. He then shot his brother.

Having regard to the lighting condition at Victoria Park and the fact that Fredericks said that he had known the appellant for about seven years, if the jury accepted his evidence and the evidence of P.C. Caine there is little room left for doubt that they infact recognized the appellant as the assailant of the deceased.

[75] What is more, the appellant on oath said "Aaron butt into me so I fended him off with my hand."

[76] Aaron Fredericks testified on oath that after his brother was shot he was running after the appellant. An SSU officer was chasing the appellant. He had gone up to the SSU officer and told him Dopey had shot his brother. The officer then pulled out his firearm and started to chase Dopey. P.C. Caine who was the SSU officer testified that he chased the appellant, he pulled out his fire arm and fired a shot in the air.

[77] He however denied that anyone had said anything to him or that anyone was running with him chasing the appellant.

[78] Fredericks said an SSU officer. The records do not reveal that he identified P. C. Caine as the SSU officer. If the unmistakable conclusion is drawn that Caine was the SSU officer then there is an apparent discrepancy but in my judgment the jury may not have found it material to discredit either witness.

[79] Finally Counsel referred to Aaron Fredericks' conduct. He testified that he saw the appellant while running throw the gun under a vehicle. He [Fredericks] picked it up but he did not hand it over to the police until midday on 2nd December 2000. When he was persuaded to do so by his sister. The reason he gave for keeping the gun was that he wanted to avenge his brother's death i.e. kill the appellant. The fact that he wanted to take the law into his own hands would not in my view, by itself, tarnish the sanctity of the oath he had taken or impaired his evidence on oath before the jury.

[80] The case as presented by the prosecution was one based on very strong compelling evidence.

[81] There is nothing in this case to cause a lurking doubt or to wonder whether justice has been done.

[82] Grounds 6, 7 and 8 are therefore dismissed.

[83] However having regard to the misdirections on manslaughter and on the definition of murder as outlined above the conviction for murder is set aside. The sentence of life imprisonment is also set aside. A conviction for manslaughter is substituted for that of murder. A sentence of twenty-five years imprisonment is substituted for that of life imprisonment.

Albert Redhead
Justice of Appeal

I concur.

Ephraim Georges
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal [Ag.]