SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 2 OF 2002

BETWEEN:

WILSON EXHALE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. K. Foster Q.C., for the Appellant, Mrs. S. Lewis with him.
Miss V. Charles, D.P.P [Ag.] for the Respondent and Mr. L. Mondesir with her.

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2002: November 6;
2003: May, 12.

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JUDGMENT

[1] REDHEAD, J. A.: The appellant was tried for and convicted of the offence of murder and was sentenced to a term of life imprisonment. He now appeals to this Court against his conviction.

[2] The evidence for the prosecution was given by four witnesses who testified to the incident, which led to the killing of Pius Antoine on Sunday 28th February 1999.

[3] On that day there were two beach parties, one at Vieux-Fort, Sandy Beach, and the other Belle Vue Beach, both in close proximity with each other. Desmond Aldonza attended one

of those beach parties, he got into a fight with Randall Eugene who was attending the other beach party held by some people from Vieux-Fort on that same beach.

[4] Pius Antoine, the deceased, father of Desmond Aldonza left the Belle Vue Beach party and went towards the Vieux-Fort beach party. He was carrying a stick and got into an altercation with a young man from the Vieux-Fort group. He was then attacked and chased by a group of young men from the Vieux-Fort beach party. The men included Randall Eugene, Donald Hunte, Osborne Charles, Garvin Theodore and the appellant.

[5] Osborne Charles, Garvin Theodore and the appellant were prosecuted for the murder of the deceased. The learned trial Judge after hearing submissions by Counsel for Osborne Charles and Garvin Theodore directed the jury to return a verdict of not guilty in favour of the two accused.

[6] The trial then proceeded against the appellant alone.

[7] The prosecution relied on the evidence of eyewitnesses Nicholas Williams, Randal Eugene and Donald Hunte.

[8] Donald Hunte and Randall Eugene had at some stage taken part in the attack on the deceased.

[9] Randall Eugene who was 24 years old at the time of the trial testified that he lived at Bridge Street at the time of the incident. He along with other persons went to the beach at Vieux-Fort at about 6.45 p.m.

[10] He told the jury that when they got to the beach they cooled out, drank one or "two liquors." At about 7.00 or 7.30 p.m. he had a fight with a "youth man".

[11] This witness testified that after the fight, his assailant ran and he ran after direction that his assailant ran. He said that he looked for his assailant but did not find him. He ended up by the next beach party.

[12] He then saw a man with a stick. He was walking towards the man. He saw three men "rushing up" towards him and the man. He identified the three men as Garvin Theodore, Alton Sealy and Donald Hunte.

[13] Randall Eugene testified that he saw Alton Sealy with a bamboo in his hand. Donald Hunte with a stick and Garvin with a stone. The three of them 'rushed' up to a man [the deceased]. Garvin began lashing the man with the stone on the left side of his face. The man fell down. The deceased got up and ran towards a little house. He then saw Garvin, Alton and Donald go up to the deceased. Garvin had a stone again according to this witness. He saw him lash the man at the side of his face again. He did it the same way as he did before. The man fell down.

[14] This witness testified that he then saw a gang of "fellas" coming from the museum, Vieux Fort.

[15] According to his testimony he recognized Wilson Exhale alias Lightning, the appellant, as a member of the gang.

[16] Kendall Eugene testified that the appellant was in front of the approaching gang he heard the appellant say "look him there, look him there." The gang joined the three men who were beating the deceased and the gang began to beat him as well. He said that some of the men in the gang had sticks while others had bottles

[17] This witness testified that during the beating he saw the deceased "falling down, he kept trying to get up and strike them at the same time."

[18] He said after a while he heard the appellant say "Leave him to me."

[19] Kendall Eugene told the jury that he saw Alton Sealy take a garbage bin and slammed it on the deceased. The appellant then said again "Leave him for me." He said that he saw the crowd spread out. The appellant went up to the deceased who was lying on the ground. The appellant pulled out a long knife from his waist and "jug" the deceased.

[20] This witness said on oath when he "jug" the man he heard the man say in patois "don't kill me." Lightning continued "jugging" him and stabbing him.

[21] Kendell Eugene said he then heard a siren or an alarm. One of the men said 'police!'. He said he saw the group began to spread out. Lightning then said "if anybody talk I murdering them."

[22] Donald Hunte also testified that the appellant said to the gang that was attacking the deceased, "Leave him for me." And then he stabbed the deceased.

[23] Initially three grounds of appeal were filed on behalf of the appellant:

(1) The verdict is against the weight of the evidence and cannot be supported.

(2) The learned trial Judge failed adequately and/or properly to direct the jury on the law relative to the identification of the accused.

(3) No proper and/or adequate directions were given as to the effect of the dismissal of the case against the other two defendants at the close of the prosecution's case.

[24] Additional grounds of appeal were filed on behalf of the appellant.

(1) That the learned trial Judge failed to direct and/or address the jury on the defence of provocation vis-à-vis verdict of manslaughter, a fatal omission which deprived the appellant of an acquittal on the murder charge as well as a verdict of manslaughter.

(2) The learned trial Judge failed to properly and/or adequately put the case for the appellant to the jury whereby he suffered a serious and grave miscarriage of justice

(3) That the learned trial judge fell into error when he directed the jury to accept that the intent to murder would satisfy proof of the guilt of the accused without explaining or qualifying the statement which was equally plausible for the INTENT TO COMMIT manslaughter which was an alternative defence, in view of the gang warfare which was open to the accused.

[25] Learned counsel for the appellant made an application which was granted; Grounds 2 and 3 of the original grounds were withdrawn and in their place the additional grounds were substituted.

[26] I deal with ground 1 now. At pages 139-140 of the record the learned trial judge said:

> "From the testimony that was given however there is some evidence that Pius Antoino was behaving in an aggressive [manner] that night at some point before he was fatally injured. There is evidence that he struck someone with a stick. I therefore feel that it is prudent to address you on the issue of self defence."

[27] Donald Hunte testified on behalf of the prosecution. His testimony was to the effect that there was a fight between the twin brothers and a boy named Desmond. After the fight Desmond ran away. The twin ran after Desmond. Four men came and questioned him. It appeared that the deceased was one of the men who questioned him.

[28] Donald Hunte said he then heard a cry. He looked around he saw a boy on the sand. He said it was the same man who was asking questions. "They asked who was fighting when they asked that Lightening [the appellant] was beside of me. The man had a bamboo in his hand and was behind the boy who was crying.

[29] The unmistakable inference to be drawn from this evidence is that the deceased struck the boy with the bamboo.

[30] Donald Hunte testified that the deceased was chased by him and some men including the appellant was and then caught. He said on oath:-

> "We met him by the reef restaurant. The man had a stick in his hand. One of the twins was there and some other people. Alton, Lightening [the appellant] and I were beating him ……..The man was striking back at us. Other persons were around apart from the three of us beating him with sticks. About fifteen other people were around. Then the man fell by a drum. Then I saw lightning stabbed the man about three times."

[31] All the eyewitnesses who testified as to the events as they unfurled that night told a similar story to the effect that the deceased was chased that night he was beaten and while he was struck to the ground the appellant took out a knife from the waist and stabbed him.

[32] The appellant gave sworn testimony. He gave evidence of witnessing a fight the night. He was not involved in that fight. He denied that he stabbed anyone that night. Under cross examination. He denied that he had a knife with him that day. He also denied under cross examination that he ever said "leave him for me" and that he was involved in the beating of the deceased.

[33] The issue of self defence cannot remotely arise from the evidence adduced by the prosecution. Neither can it arise from the testimony of the appellant.

[34] From the record, it appears that the deceased that night, had a stick and was beating someone. That is the inference, as I have said, must be drawn from the testimony of Donald Hunte. If that is what the learned trial judge had in mind when he said "Pius Antoine was behaving in an aggressive manner that night at some point before he was fatally injured, there is some evidence that he struck someone with a stick.

[35] There is this evidence indeed that the deceased struck someone, the little boy that night. But the mere striking of "someone" cannot give rise to the issue of self defence. Neither can aggressive behaviour as outlined in the evidence in this case give rise to the issue of self defence. Neither the prosecution nor the defence led any evidence of any attack by

the deceased on the appellant. No evidence was led of any aggressive behaviour towards the appellant.

[36] As I understand the evidence, the deceased struck the boy with the stick. The appellant was nowhere around when this occurred. Some men including the appellant later chased the deceased. The deceased was caught and beaten by the men who chased him. During the beating the appellant stabbed the deceased with a knife.

[37] There was no evidence in this case to support the issue of self defence. The trial judge therefore was wrong in law in leaving self defence for the consideration of the jury. [See Pinio v The State 40 WIR 343].

[38] However notwithstanding this error by the learned trial judge, the appellant was not prejudiced by this direction. There was no miscarriage of justice as a result, because the appellant got the benefit of a direction to which he was not entitled.

[39] Under ground 2, the appellant alleges that the learned trial judge failed to direct the jury on the defence of provocation. This he alleges deprived him of a verdict of manslaughter.

[40] Learned Senior Counsel in support of this ground referred to the same passage at paragraph 30 which he used in support of his argument on ground 1 i.e. misdirection on self defence. Where evidence advanced either by the prosecution or defence properly makes the raising of the issues of self defence invariably the trial judge is obliged to address the jury on the issue of provocation. The reason being that the same evidence which gives rise to the issue of self defence will support the issue of provocation. This is not the case here.

[41] Was there any evidence of provocation? The case for the prosecution as I have outlined before is that the appellant struck a boy with a stick on the beach. The evidence is to the effect that the beating of the boy was not even done in the appellant's presence. There is no evidence on the record that this boy is related in anyway to the appellant. After the

appellant struck the boy some men, including the appellant chased him, caught up with him, beat him, then he was fatally stabbed by the appellant.

[42] The appellant in his sworn evidence before the jury said that he witnessed a fight the night of the incident. He described to the court how he had seen a man being struck and a crowd was running after the man who was struck. The appellant also said on oath:

> "While I see the fight going on I just there watching because I see so much fellows fighting with one man. I don't want to involved with that."

[43] Throughout his testimony the appellant denied ever being involved in anyway in that fight.

[44] The issue of provocation therefore cannot arise neither on the evidence as adduced by the defence nor on the version of prosecution evidence.

[45] The learned trial judge was therefore right in not leaving the issue of provocation for the consideration of the jury. This ground of appeal therefore fails.

[46] Ground 3 alleges that the learned trial judge failed properly or adequately to put the case for the appellant to the jury whereby he suffered a serious and grave miscarriage of justice. In support of this ground Learned Queen's Counsel, for the appellant, Mr. Foster contended that the evidence given by Rendal Eugene and Ryan Simeon was suspect because they had themselves an interest to serve namely Rendal had attacked the deceased's son and Ryan's evidence showed, according to Mr. Foster Q.C., that it was manifestly unreliable in that he had under cross examination said that his statements to the police were lies and that they were important omissions.

[47] Rendal Eugene did admit at the trial that he made an untrue statement to the police. He also said at the trial that he told the magistrate that Obsborne Charles was with him that night. However, the deposition was found not to contain the name Obsorne Charles. The learned trial judge at page 42 of the record instructed the jury how to deal with inconsistent statements. At page 151 he dealt specifically with Rendal Eugene's evidence, pointed out

to the jury that Eugene gave three different statements to the police. He again instructed the jury how to deal with this.

[48] The learned trial judge gave a direction on accomplice in light of the fact that some of the witnesses for prosecution had been involved in the beating of the deceased that night. The judge told the jury to consider, in light of the evidence whether Rendal Eugene was an accomplice. The appellant also complained under this ground that the witness Donald Hunte's evidence in the magistrate's court is not consistent with his evidence in the High Court and as a result it is unreliable and suspect.

[49] At page 143 of the record the learned trial judge invited the jury to treat Donald Hunte as an accomplice. At page 152 the learned trial judge told the jury with reference to Hunte's evidence:-

> "You will have to treat his evidence particularly carefully because he admitted that he was part of the gang, that attacked Pius Antoine"

[50] At page 153 of the record the learned trial judge dealt with Hunte's evidence in so far as it relates to inconsistencies.

[51] The appellant also complains Sheeba Sinase recanted her evidence and this new evidence was significantly in favour of the appellant but was not given the proper weight favourable to the appellant by the learned trial judge.

[52] Miss Charles, learned Counsel for the respondent submitted in her skeleton arguments that the learned trial judge properly dealt with the evidence of Sheeba Sinaise by recalling and allowing her to give evidence on oath after she had informed the judge in chambers that she wished to recant her story. This witness after giving evidence on oath said she had wished to change her story because she was threatened to say what she had said previously. The learned trial judge directing the jury said. "The prosecution's witness Sheeba Sinaise recanted her testimonies admitted committing perjury. It is a matter for

you as to how much credence you are going to give any aspect of her testimony in light of that situation." [See R. v Grant 1958 Crim L.R. 42].

[53] Finally under this ground the appellant complained that the learned trial judge failed properly and/or adequately to put the case for the appellant to the jury.

[54] At page 150 of the record the learned trial judge began by telling the jury the defence was putting before them that Rendal Eugene may have inflicted the fatal injuries on the deceased. The defence was so contending because Eugene admitted having a scissor in his pocket that night. He was in an argument with one Desmond. He was running after Desmond and promising to "teach" him a lesson. The doctor testified that a scissor could have caused the injuries.

[55] In my judgment the evidence as a whole does not support the assertion of the defence that Rendal Eugene could have inflicted the injuries on the deceased. All the witnesses for the prosecution testified that they saw the appellant inflict the injuries on the deceased with a knife.

[56] At page 156-158 of the record the learned judge dealt extensively with the appellant's evidence on oath. He dealt with the appellant's denial. He told the jury that if they believed him they will have to acquit him. If they were not sure whether to believe him they must acquit him. He reminded the jury that the burden of proof was on the prosecution. In my Judgment the learned trial judge put the case for the appellant fairly and adequately.

[57] Under ground 4 the appellant contends:-

> "That the learned trial judge fell into error when he directed the jury to accept that the intent to murder would satisfy proof of guilt of the accused without explaining or qualifying the statement which was equally plausible for the intent to commit manslaughter which was an alternative defence, in view of the circumstances of gang war fare, which, was open to the accused."

[58] While I agree that one may form the intention to kill and yet he may not be guilty of the offence of murder, in those circumstances the judge would be required to explain to the

jury why a verdict of murder is not the only verdict open to them. However, in my judgment, having regard to the evidence in this case there were only two verdicts open to the jury guilty of murder or an acquittal. Manslaughter was not an alternative verdict when the summing up on intent is looked at as whole there can be no criticism of it.

[59] In this case manslaughter was not alternative verdict which was open to the appellant.

[60] For the foregoing reasons the appeal is dismissed, the conviction and sentence are affirmed.

Albert J. Redhead
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Ephraim Georges
Justice of Appeal [Ag.]