COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.10 OF 2002

DON PROSPER

Appellant

and

THE STATE

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. Julien Prevost for the Appellant
Mr. Roger Pinfold, DPP with Ms. S. Ali for the Respondent

2003: March 24; 25;
November 13.

JUDGMENT

[1] BYRON, C.J.: Don Prosper has appealed against his conviction for manslaughter in the stabbing death of Wadico Bunche. He was sentenced to 4 years imprisonment after an extensive sentencing hearing.

[2] The appellant and the deceased were both students at the St. Andrew's High School and about 16 years of age. The evidence revealed disagreements between them, and the Appellant receiving beatings from the deceased who was much bigger and stronger than him. The deceased made other threats to beat the Appellant who reported these incidents to the police as well as the principal of the school. The deceased was suspended from school for these incidents and he confronted and threatened to shoot the Appellant. On the morning of the 16th April

2002 the Appellant went to school with a serrated knife. He said he carried the knife because he was afraid of the deceased.

[3] After he had arrived at school that morning, he indicated to a classmate that he was prepared to kill the deceased if he came after him. Soon afterwards the deceased walked into the classroom, approached the Appellant pushed him at his throat and then held him in a chokehold. Evidence was adduced from two fellow students that the Appellant took his knife and inflicted fatal stab wounds to the deceased's chest. The Appellant in his defence said that he was using the knife to keep off the deceased without intending to injure him but the deceased held his hand and was wrestling for the knife when they fell onto a desk. On rising he saw blood.

[4] The Appellant left the classroom and threw the knife into a nearby river. The police never retrieved the knife. Soon afterwards two students and a teacher apprehended him. He had been indicted for murder.

The Grounds for Appeal

[5] The Appellant has advanced grounds of appeal on accident, self-defence and provocation. I think that I should dispose of the ground on provocation at once. There are two reasons. In the first case the jury convicted of manslaughter indicating that the defence of provocation was successful. It is illogical to appeal against a conviction for manslaughter on that basis. In any event the particular point on which the Appellant had relied did not have a factual basis. He was contending that the Judge failed to direct the jury that an intention to kill was not inconsistent with the defence of provocation. On the contrary the Judge specifically told the jury that they should not consider the defence of provocation unless they accepted that all the ingredients of murder, including the intent to kill or to cause grievous harm had been proved.

[6] It is therefore unnecessary to consider provocation as a ground of appeal. This leave three areas of appeal, accident, self-defence and an allegation that the Judge failed to direct the jury properly on the Appellant's complaint of collusion between the prosecution witnesses.

Accident

[7] The Appellant raised three main issues under this heading. He criticised the Judge for:

[a] not explaining the legal meaning of accident to the jury;,

[b] not identifying to the jury all the evidence that could have supported the case for accident; and

[c] not directing them that the burden of proof was on the prosecution to negative accident.

The Definition of Accident

[8] Did the trial Judge explain the legal meaning of accident to the jury? Counsel suggested that the Judge was obliged to explain the meaning of accident in much the same terms as in R v Bailey (1991), unreported, as quoted approvingly in R v Muir 48 WIR at page 268. It stated:

> "But with all respect to the trial judge, it is too clear for words that self defence arose on the appellant's unsworn testimony. But having identified the defence as accident, he was in our judgment bound to explain the meaning of accident. No directions in that regard were given to the jury. He would have had to tell the jury that a killing, which occurs in the course of a lawful act without negligence, is accident, which they had to have in mind. It plainly was not the jury's laymen's view of accident which mattered."

[9] The test, which the Judge left to the jury was far more beneficial to the Appellant than that to which Counsel referred. The Appellant was saying that he did not voluntarily inflict the fatal wound. He gave a description of the circumstances under which the wound was inflicted. The Judge addressed the legal issues by

telling the jury in unequivocal terms that the evidence adduced was capable of amounting to accident. In my view this was an appropriate technique of directing the jury on the law. The Judge did not discuss the question of whether the act that the Appellant was performing was lawful, or whether the Appellant was negligent. He did not invite the jury to consider these questions in determining the applicability of the defence of accident. It is trite that the law draws a distinction between death resulting from a lawful act and an unlawful act. The Appellant in my view received the benefit a direction, which opened the defence of accident without any assessment of whether what the Appellant was doing was lawful or not. The effect of the Judge's direction was that if the jury believed him or was in doubt he should be acquitted. In my view the Judge did give directions on the law in a manner that was favourable to the Appellant. This could be easily appreciated by reviewing a section of the summation.

[10] After the learned trial Judge related the evidence adduced on behalf of the Appellant, he continued:

> "The summary now of the accused's defence; he did not stab Wadico. It was not his voluntary act. Wadico attacked him by jacking him, then Wadico let go of him, his throat. Wadico went back a little and was coming forward towards him again, he Don took the knife from the desk and swung it between both of them to keep Wadico away and without any intention of injuring him. Wadico then held his hand with the knife, that is Don's hand, the accused's hand with the knife, they wrestled for the knife, Wadico lost his balance, fell on a desk and Wadico pulled him, Don on him, he did not stab Wadico. Wadico injuries must have been caused when they fell on the desk because when Wadico pushed him off, he Don say blood…
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> From these facts as related by the accused he is inviting you to find that the act which caused Wadico's death was not his voluntary act, it was an accident. Well, if you accept that evidence or even if you are of the view that Wadico's death may have been caused in that manner then the accused is not guilty of any offence and you must acquit him because it was not his voluntary act."

In my view the first leg of the submission must fail.

The Facts

[11] Counsel complained that the Judge did not point out to the jury that the pathologist noted that the fatal wound moved upward and inward, while the prosecution eye-witnesses testified that the Appellant held the knife with the point facing downward and thrusted downward. He contended that this was evidence, which bolstered the defence of accident and damaged the credibility of the prosecution's star witnesses.

[12] The prosecution's eye witnesses, Hydie Gordon and Marvin George said that the deceased entered the classroom walked up to the Appellant and jammed or jacked him under the throat. The Appellant then pulled out a knife from his left side and stabbed the deceased. Marvin George said one blow, Hydie Gordon said the Appellant made two blows at the deceased with a knife. The Appellant said that he and the deceased were wrestling for the knife, and the deceased fell and pulled him down onto him he saw blood and it was then he realized that the deceased was injured. These were the competing versions of the facts. During cross-examination Counsel for the Appellant extracted answers from the two eye-witnesses which he said indicated that the Appellant held the knife with the point facing downward and thrusted downward. The pathologist testified that during the post-mortem examination he found a gaping stab wound with a double tail below the nipple of the right breast. The wound penetrated inwards and upwards damaging parts of the lung air passages and the soft tissue around the spine. The doctor attributed death to that wound. In cross-examination he said that if a knife was held with its point facing downward the natural tendency is for the wound to go downward, and he conceded that it was possible for the wound to have been inflicted during the course of a struggle and one person falling on the other.

[13] The Judge did relate the concessions of the pathologist to the jury. He did not say that the concession was a point to be used in support of the defence. I do not think that his failure to do so interfered with the fairness of the trial in any way. The

evidence was there, Counsel had addressed and the Judge referred to it in his summation. It was open to the jury to make appropriate findings. This was not a complicated matter and it was well within the province of the jury to make findings on that aspect of the testimony.

The Burden of Proof Relating to Accident

[14] Counsel submitted that the trial Judge failed to give a specific direction on the burden of proof on accident and he failed to say the onus was on the state to negative accident[1].

[15] I also reject this argument. Throughout his summation the Judge referred to the duty of the prosecution to prove its case against the accused, and he addressed the jury on the presumption of innocence. With regard to the defence of accident, he referred to those propositions in a manner that I think would have been intelligible to the jury, when he told them:

> "Well, if you accept that evidence or even if your are of the view that Wadico's death may have been caused in that manner then the accused is not guilty of any offence and you must acquit him."

[16] In my view the learned trial Judge adequately assisted the jury in relation to the defence of accident.

Self-Defence

Counsel for the Appellant submitted that:

[a] The Judge failed to direct the jury that having an intention to kill is not inconsistent with the defence of self-defence; and

[b] The Judge did not direct the jury on the components of subjectivity and honest belief as they relate to self defence.

[1] The State v Simmons 24 WIR 149 and Baptitse v The State 34 WIR 253

Intent to Kill

[17] Counsel for the Appellant submitted that the Judge had failed to direct the jury that an intention to kill was not inconsistent with a plea of self defence. He relied upon the cases of Krishendath Sinanau et al v The State[2] and Baptitse v The State[3] in support of his submissions. In the latter case the Appellant raised the defences of self-defence, accident and provocation in answer to his indictment for murder. The learned trial Judge omitted to direct the jury that the Appellant may have availed himself of the pleas of self-defence or provocation even though he formed the requisite mens rea for murder. The Court of Appeal of Trinidad and Tobago in allowing his appeal stated at page 262 of its judgment:

> "Another important direction that a judge must give to a jury in appropriate cases is that an intention to kill is not inconsistent with the establishment of the plea of self defence… Expression was given to that principle as far back as 1965 by Lewis JA in R v Bunting 8 WIR 276 at 278:
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> > 'In a case where provocation arises as a defence to a charge of murder it is proper and indeed necessary to for the trial judge to tell the jury that murder is not established unless an intention to kill or to cause grievous bodily harm is proved; but the converse proposition, namely that the accused is guilty of murder if such an intention is proved, is not necessarily correct'…"

[18] These cases supported the proposition that in appropriate cases a Judge must direct the jury that an intent to kill is not inconsistent with pleas of provocation and or self-defence. It is clearly the law that an intention to kill is not inconsistent with the defences of self-defence and provocation. There is no requirement however that the summing up must follow any special format, nor use special words. In my view the Judge made it abundantly clear to the jury that the defences of self-defence and provocation were open even if the Appellant had an intention to kill. He put it in his own words on a number of occasions during the summation. I will refer to one passage as he was concluding his directions on self-defence. He stated:

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[2] 1992 44 WIR 383 at 394-5
[3] 1983 34 WIR 253

> "In discharging the burden of proof the prosecution is inviting you to consider, 1. the weapon that was used;2 the depth of the wound; 3 the fact that the deceased Wadico Bunch was unarmed at the time. They are asking you to look into the mind of the accused, Don Prosper, his intention, what he intended. They said his intention was expressed on that very morning to Kimisha Thomas, if Wadico attack me I will kill him. If members of the jury, you conclude that he was, that is the accused was, or that he may have been acting honestly in necessary self defence then you must acquit him, return a verdict of not guilty. If, on the other hand, you are sure that the accused was not acting honestly in self defence when he caused the death of the deceased, Wadico Bunch, then and only then will you consider the alternative defence of provocation which is available to the accused on the evidence."

Honest Belief and Subjectivity

[19] Counsel for the Appellant submitted that the learned trial Judge failed to direct the jury on the relevant aspects of the Appellant's subjective characteristics that were material to determining the honesty of his belief that he acted in self-defence. He asserted that the trial Judge in his summation ignored the Appellant's characteristics such as his age as well as the emotional strain he laboured under at the time. He relied upon the cases of Beckford v R[4], James Russel Shannon v R[5] and Harley Alfred v R[6] in support of his submission. In my view the Judge was just as clear and proper in his directions on the issues of subjectivity and honest belief. I do not think that I need do more than refer to the final sentence in his directions on those issues;

> "if therefore the accused did no more than what he honestly and instinctively thought was necessary that is very strong evidence, that the amount of force was reasonable and necessary."

I would reject the grounds of appeal relating to self-defence.

[20] Counsel in his third ground for appeal contended that the learned trial Judge erred when he gave the jury the following direction on certain suggestions that were

[4] 1988 AC 130
[5] (1980) 71 Cr App R 192 at 194
[6] 44 WIR 155 at 158

made by Counsel for the accused after he had reminded them of the relevant sessions when these matters arose during the trial.

> "What remains therefore, is a suggestion which was made, which was denied by the witnesses and which is unsupported by evidence. There is no evidence in this case, that the principal of the school held a meeting on the 6th of July 2002 and told the students what to say. Disregard completely all what Mr Prevost has told you on that subject."

[21] Learned Counsel submitted that the learned trial ought to have left this issue to the jurors who were the arbiters of fact and to warn them of the dangers of collusion and believing possibly tainted evidence. He relied on excerpts from Blackstones Criminal Practice 1995[7] and the cases of R v Ryder[8] and Douglas v The State[9]

[a] In the former case, the Appellant was convicted of eight offences including rape and attempted rape against five prostitutes. At his trial the learned trial Judge directed the jury upon the possibility of collusion among the prostitutes because evidence of such had become apparent to him in the course of the trial. The Court of Appeal in dismissing this aspect of the appeal was of the opinion that as the possibility of collusion in that case was more than merely fanciful, the learned trial Judge was correct in directing the jury on how to approach it. Lord Taylor CJ in examining the possibilities that were available to the trial Judge in the circumstances said the following:

> "Finally, even if the judge himself is of the view there is no real possibility of collusion, but the matter has been argued, he should leave the issue to the jury. That view of the law is in accord with the judgment of another division in R v Anantharanayanan [1994] 2 All ER 847."

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[22] The record revealed that Counsel for the Appellant cross-examined those prosecution witnesses who were school children and the school's principal on a suggestion that the latter had called a meeting at the school to tell the students what to say to the Court. Every one denied that any such meeting took place or

[7] Page 1993 at Paragraph F.12:14
[8] [1994] 2 All ER 859
[9] (1988) 40 WIR 396-7

that any such thing was said. Counsel for the Appellant, nonetheless waxed eloquent on this issue during his address to the jury. What the Judge did, was quite simply and clearly to tell the jury that there was no evidence of the alleged meeting and they should disregard what Counsel had said about the meeting. The Judge was factually correct in that no evidence was adduced on the subject at all. In my view the Judge was obliged to warn the jury that they could not act on the speculative remarks of Counsel that were not supported by the evidence.

[23] This appeal should be dismissed. The conviction and sentence are confirmed.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

[Sgd.]

I concur.

Ephraim Georges
Justice of Appeal [Ag.]