COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 OF 2003

BETWEEN:

AGUSTUS DENNIS

Appellant

and

THE STATE

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Gene Pestena for the Appellant
Mrs. Wynante Adrien-Roberts for the Respondent

2003: November 11;
2004: January 26.

JUDGMENT

[1] REDHEAD, J.A.: On Monday 3rd June 2002 the appellant went to work. He took with him his lunch bag. In that lunch bag was a dish containing the appellant's lunch.

[2] At about 8.30 am the appellant saw the deceased close to his lunch bag. At lunchtime he went to his lunch bag. The dish with his lunch was nowhere to be seen. The appellant enquired of one Mr. Defoe if he had seen anyone close to his lunch bag.

[3] Mr. Defoe confirmed that he had seen the deceased close to the appellant's lunch bag. The appellant then came to the conclusion that the deceased had taken away the dish with the lunch and eaten the lunch.

[4] After work the appellant went in search of the deceased. He found the deceased at the premises of Ms. Carlie Xavier and Mr. Algernon Esprit common law husband and wife who were eye-witnesses to the incident which later ensued and the principal witnesses for the crown. Mrs. Carlie Xavier testified that on the afternoon of 3rd June 2002 she and her boyfriend were at home relaxing on the porch. The deceased was also with them in the yard.

[5] At about 4.30 pm the appellant passed by, he called "Borico! Come a while". The deceased was also called Borico.

[6] Ms. Xavier testified that when the deceased came into the yard he was carrying a bag and cutlass.

[7] After the appellant called the deceased, the deceased left the yard with the cutlass and the bag and went out to the appellant who was in the public road. The appellant had a piece of wood in his hand.

[8] According to this witness the appellant began to ask the deceased about his dish in an angry manner. The deceased asked him, "which dish?"

[9] The appellant then said to the deceased "You eat the food already, I want my dish."

[10] Ms. Xavier said the deceased said "boy which dish?"

[11] The appellant then told the deceased "Defoe told me is you that take the food, is you he see pass there."

[12] Ms. Xavier said that she told the appellant "sometimes is well Defoe that eat the food, that is the man."

[13] The appellant then said, "gasa is not no Defoe boy, my mind is to hit you with the wood."

[14] This witness said that the appellant began beating the deceased with the wood all about his body. She told the court that the appellant struck about three blows to the head of the deceased. The appellant also struck blows about the shoulders and back of the deceased. She described the wood as a "big wood."

[15] Ms. Xavier told the judge and jury that the appellant administered about seven blows on the deceased. She said the appellant kept on hitting him until he fell. She said when the deceased fell she saw blood "pitching" all in his head.

[16] This witness also said in cross-examination that after the deceased received about three blows from the appellant, the deceased began swinging his cutlass.

[17] Mr. Algernon Esprit gave evidence almost identical to that given by his girl friend, Ms. Xavier. He differed from his girlfriend in that he testified that when the deceased fell to the ground the appellant administered more blows to his head, whereas Ms. Xavier said on oath that after the deceased fell the appellant did not deliver any more blows to the deceased.

[18] Sergeant Joseph Roberts testified that on 3rd June 2002 at about 4.30 while at the Mahaut Police Station he received a report. As a result he left the police station for Simon Hill to make investigation. On his arrival at Simon Hill he met the appellant. He identified himself to the appellant and told him that he had information that he had struck the deceased with a piece of wood in his head and that the deceased was lying unconscious on the Simon Hill public road. He said that he asked the appellant for an explanation. The appellant told him:

> "Officer a few days ago Elizee Alexander took my food and my dish. I went to ask him for my dish and he went into the yard and came back out with a cutlass and lash me on my hand with the cutlass. I then hit him with the piece of wood."

[19] At his trial for murder the appellant raised the defences of self defence and provocation. He was convicted of the offence of murder. At a separate sentence hearing he was sentenced to life imprisonment. He now appeals to this court against his conviction and sentence.

[20] This ground of appeal was advanced on behalf of the appellant:

> "On the defence of self defence the discrepancies or differences in the evidence of the two witnesses for the prosecution were not adequately examined by the learned trial Judge. Additionally, the learned trial Judge had no discretion to admit additional evidence in the manner in which he did. Such 'evidence' was in consistent with other evidence and the accused was not able to test his credibility. A proper direction could not have erased the defence of self defence."

[21] I deal first of all with the question that the learned trial Judge did not adequately examine the discrepancies in the evidence of the prosecution witnesses in relation to the issue of self defence.

[22] This ground as couched by the appellant is, in my view, purely a question of fact and is therefore a question for the jury.

[23] As I have pointed out above the two eye-witnesses to the incident gave identical evidence except that Ms. Xavier testified that after the deceased fell the appellant administered no further blows to him, whereas Mr. Esprit, the other eye-witness, in his testimony said that the deceased received three blows from the appellant. He was then asked how quickly were those blows inflicted he replied:

> "I couldn't say how quickly. He got a first one, he fell down and then the second one he fall (sic), gave him another one on the ground and then he got three more shots. I saw in my presence."

[24] According to this witness the appellant struck the deceased further blows while he was on the ground, whereas the other eye-witness said no further blows were struck while the deceased was on the ground.

[25] Another discrepancy is that Ms. Xavier said that after the deceased received the blows he began swinging the cutlass from side to side.

[26] She said "I saw one collect (sic) him on his hand," whereas the other eye-witness, Mr. Esprit, when asked if he saw the cutlass strike the appellant's hand when the deceased was 'swinging' it, he said that he never saw that.

[27] Finally, from the record there is the discrepancy that when it was suggested to Ms. Xavier in cross examination that she heard the appellant say to the deceased:

> "Man, I talking to you about my dish and you even pulling cutlass on me too!" she replied that she heard the appellant say these words to the deceased.

[28] The other eye-witness when asked the same question said the appellant never used those words to the deceased.

[29] Ms. Xavier however said that the appellant said these words to the deceased after the appellant had administered the first blow to the deceased.

[30] As I have said above these are the questions of facts for the jury. The learned trial Judge in fact addressed the jury in relation to the discrepancies as follows:

> "Carlie said she had heard the accused say that the deceased was pulling a cutlass on him. Algernon said he did not hear the accused say so. So you may find that there are discrepancies in the evidence in both of the prosecution eye-witnesses would you consider them material discrepancies to affect the issues in this case?"

[31] The discrepancies referred to above could not in any way affect the issue of self defence. Both eyewitnesses testified emphatically before the jury that the appellant began beating the deceased with the wood before the deceased began to swing his cutlass. There was no conflict on that aspect of the evidence given by both witnesses.

[32] In my view it is not surprising that the jury rejected the defence of self defence. This ground of appeal is without merit and is therefore dismissed.

[33] I now address the other aspect of this ground of appeal, that is to say the learned trial Judge had no discretion to admit additional evidence in the manner in which he did. Such "evidence was inconsistent with other evidence and the accused was not able to test its credibility. A proper direction could not have erased the defence of self defence."

[34] Learned Counsel for the appellant complained that the learned trial Judge admitted into evidence the deposition of Dr. Sani Shahu the Pathologist. Section 170 of the Magistrate's Code of Procedure Act of the Laws of Dominica gives the judge the discretion to admit into evidence the deposition of a witness whose evidence was taken before a Magistrate if the witness is dead, or so ill as to be unable to travel or is absent from the State. However certain conditions must be fulfilled before that evidence is admitted at the trial.

[35] The learned trial Judge in admitting the deposition into evidence said:

> "…This Court is satisfied on the evidence in support of the application that Doctor Shahu who gave his deposition before the Magistrate in accordance with the law has since left the state and therefore the Court will exercise its discretion and would allow the applications made by the D.P.P. for the Doctor's deposition to be tendered in evidence in this case …"

[36] The learned trial Judge in his summation to the jury told them quite rightly, in my view, that they did not have the benefit of seeing and hearing the Doctor in this Court. neither did they have the benefit of his cross-examination. It was therefore a question of what weight they attach to his deposition having not heard or seen him.

[37] This ground of appeal is without merit and therefore fails.

[38] Having regard to the evidence in this case and the direction given by the learned trial Judge at pages 226-227 of the record, in my judgment that direction was exemplary and

cannot bear any criticism from any quarter. In that regard, I view that ground as totally without merit and is therefore dismissed.

[39] On the question of sentence, although it was a ground of appeal it was not in my view pursued with any vigor. In any event whether it was not I was not minded to alter the sentence imposed by the learned trial Judge. The appellant has committed a brutal and senseless crime of murder where he struck a man down to death without any cogent evidence of provocation.

[40] In my view the evidence of the witness Ms. Xavier sums it up when she said "I started telling him look at what you do to the man, look at what you do to the man in front of us and for saying is a man that tell you he take your food."

[41] This to my mind was a brutal and senseless killing I do not think the learned sentencing Judge was wrong in exercising his discretion in sentencing the appellant to a term of life imprisonment.

[42] I cannot find any good and justifiable reason that was advanced before us to cause us to interfere with that discretion.

[43] The appeal is therefore dismissed. The sentence and conviction of the learned trial Judge are affirmed.

Albert Redhead
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]