ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.2 OF 2003

BETWEEN:

DION DANNY POTTER

Claimant

and

THE QUEEN

Defendant

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne, S.C.	Justice of Appeal

Appearances:

Mr. Sydney Christian, QC for the Appellant
Mr. Cosbert Cumberbatch, Director of Public Prosecutions for the Respondent

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2003: September 16;
2004: February 16.

JUDGMENT

[1] ALLEYNE, J.A.: The Appellant Dion Danny Potter was convicted on 14th February 2003 before a Judge and jury of the offence of murder and sentenced to 20 years imprisonment. The Appellant appealed against conviction on a number of grounds, in summary;

[1] The trial Judge wrongly admitted the post mortem report into evidence by virtue of sections 23, 24 and 27 of the Criminal Justice Act of the United Kingdom and section 12 of the Evidence Act Cap. 155.

[2] The trial Judge misdirected the jury on the issue of self-defence in that he failed to assist the jury as to what evidence gave rise to or was capable of giving rise to the defence, and that he directed that the onus of proof was on the accused and the burden of proof was beyond reasonable doubt, and that the jury had to find as a fact that self-defence was warranted.

[3] The trial Judge misdirected the jury on the issue of provocation in that he failed to identify what evidence was capable of constituting provocation; failed to assist the jury adequately or at all on the evidence on that issue; failed to direct the jury that the provocation was not inconsistent with an intention to kill; and misdirected the jury that the deceased's conduct must be such as to cause a reasonable person to lose his self control.

[4] Notwithstanding that unlawful act manslaughter was canvassed before the jury, no adequate direction as to its ingredients within the context of the evidence adduced was given.

[5] Notwithstanding the Appellant's version of events, which raised the possibility of accident, no directions were given on that issue.

[6] That the trial Judge failed to adequately put the Appellant's defence.

[7] That no reasonable jury properly directed would inevitably have returned a verdict of guilty.

[8] The trial Judge failed to adequately give any proper direction on lies.

The Facts

[2] On 14th November 1998 a car driven by the deceased Clinton "Buck" Simon struck some grocery packages being carried by a 14 year old niece of the Appellant, and knocked those packages out of her hand, scattering them on the ground. The

Appellant witnessed this occurrence, and went in search of the driver of the car, whom he had not identified. Shortly after this, he met George Quinland, the owner of the car, enquired as to the driver as he wished to "deal with" the man, and was informed that the deceased was the driver of the car. George Quinland advised the Appellant to go to Quinland's father, who would reimburse him for whatever he had lost. At that point, the Appellant saw the deceased some distance away, and ran towards him. The deceased was in the car, and the Appellant came up to him at the window of the car. There was an exchange of words, and the Appellant's evidence is that the deceased attempted to drive the car away. He reached into the car and switched it off. There followed a struggle between the deceased, who remained seated in the car, and the Appellant, who was standing outside the car by the driver's door. Witnesses gave evidence that they saw the Appellant making stabbing motions towards the deceased, and there is evidence that he had an ice pick in his hand. The Appellant for his part said that he tried to free himself from the grip of the deceased, who was holding on to his shirt at the neck. The deceased bit him, and he punched the deceased. The deceased pulled what resembled a screwdriver and stabbed the Appellant on his arm. They struggled, the Appellant said he held the deceased's arm because he did not want to be stabbed any more. He managed to free himself, and the deceased came out of the car and ran after him, but soon fell down. The deceased was taken to hospital. He died.

[3] An autopsy was performed by Dr. Duvvuri, a Pathologist, who died before the trial. He, however, prepared and signed a post mortem examination report in which he said that he had performed the examination some 72 hours after death. He found a stab wound ½" x ½" on the left side root of the neck, 8" deep, an incised wound ¼" x ¼" on the outer side of the left upper arm in the midline, and an incised wound 8" long, 48" from the heel.

[4] On internal examination the Pathologist found that the trachea and bronchi were congested, the left pleural cavity contained 1500 cc of clotted blood, and the lower

lobe of the left lung showed a penetrating wound 8" deep, directed downwards and inwards. His opinion was that "death was due to shock and haemorrhage resulting from stab wound to the root of neck on left side with a pointed weapon with a moderate degree of force."

[5] The Pathologist having died before trial, his report was admitted into evidence by the trial Judge over the objection of Counsel for the Appellant. The admission of this report is the basis of the first ground of appeal. However, at the commencement of the hearing, learned Queens Counsel for the Appellant informed the court that he would not be arguing that ground. Counsel indicated that he would argue ground 2, self-defence, ground 5, accident, and ground 3 and 4, provocation.

Ground 2; Self-defence

[6] Learned Queens Counsel for the Appellant submitted that the learned trial Judge had seriously misdirected the jury on the burden of proof in relation to self-defence, and on the relationship between the evidence and the law, and further that the trial Judge had failed to give any direction on the subjective test on the issue of self-defence.

[7] Learned Counsel relied on the case of R. v. Lobell [1957] 1 All E.R. 734, at page 735, where Lord Goddard, C.J. affirmed Woolmington v. Public Prosecutions Director [1935] A.C. 462 and Mancini v. Public Prosecutions Director [1941] 3 All E.R. 272, which established, in the words of the learned Chief Justice, "that in murder or manslaughter, the rule that the onus is on the prosecution permits of no exception except as to proof of insanity."

[8] Counsel for the Appellant pointed to a clear misdirection in this regard at page 105 to 106 of the record, where the learned trial Judge in the course of his direction on proportionality, directed the jury that:

> "If you find the accused action is justifiable self-defence, that is to say he was threatened with serious injury, that he responded to that threat in a proportion manner, in a manner which it was reasonable for him to do in the particular circumstances, and if you are satisfied beyond reasonable doubt that that is the case the accused is entitled to the benefit of the defence of self-defence."

[9] In addition, at page 111, lines 5 – 12, the learned trial Judge left the jury with the impression that the onus was on the accused to satisfy them so that they feel sure that the accused acted in self-defence. He said this:

> "If based on the evidence you are satisfied that what took place inside or outside of the red car at about 4:00 o'clock on the 14th November 1998, the accused in those circumstances was acting in self-defence which he is entitled to, but you have to find on the evidence whether or not self-defence was warranted in those circumstances. It is a finding of fact. Self-defence is a complete defence. So if you find and you are satisfied so that you feel sure that self-defence and the prosecution did not negative it to your satisfaction the verdict will be not guilty of murder."

[10] The learned Director of Public Prosecutions conceded that there was misdirection on the issue, but pointed to other sections of the Judge's summing up where the law was correctly stated, and submitted that the misdirections did not "loom so large" given the totality of the evidence as to make the conviction unsafe and unsatisfactory. I do not agree. At best, the jury would have been in considerable doubt as to the onus and standard of proof to be applied. As there was some evidence on which the Appellant may conceivably have succeeded on the issue of self defence, this misdirection was potentially prejudicial to the Appellant, and the appeal succeeds on that ground.

Ground 3 and 4; Misdirection and non-direction on provocation

[11] Learned Queen's Counsel Mr. Christian submitted that at no stage of his summing-up did the Judge indicate to the jury, or give directions, on the evidence which might have supported the plea on provocation. Counsel submitted that the

learned Judge did not relate back his analysis of the law to the evidence, and that, this was a serious error. There was evidence that the fatal injury may have occurred in the course of an unlawful fight. Counsel relied on the recent unreported Privy Council decision in the case of Shaw v. R., delivered on 24th May 2001. In their decision on this appeal from the courts of Belize, addressing the question whether the issue of provocation should have been addressed by the trial Judge in his summing-up, their Lordships asked the question, at paragraph [29] of the judgment, was there evidence of a situation in which the defendant was justified in causing some harm to the deceased? Their Lordships held as follows;

> "The answer must be affirmative if, in relation to either of the deceased, the appellant's life was threatened or the appellant genuinely (even if mistakenly or unreasonably) believed it to be threatened."

[12] In this case I am of the view, as their Lordships were in Shaw, that there was such evidence, tenuous though it was. As in Shaw, I am of the view that even though the jury might not have considered the Appellant's version of events sufficient to raise the issue of provocation, this conclusion is not inescapable and I cannot rule out that possibility.

[13] In Shaw, the Board "reluctantly concluded (as I do) that there was just enough evidence to require a judicial direction to the jury on the effect of the subsection (relating to provocation), the evidence relevant to application of its provisions and the burden on the prosecution to negative justification under the subsection." The Board found the Judge's failure in the circumstances a misdirection.

[14] Learned Queen's Counsel for the Appellant cited Freeland v. R. [1981] 28 W.I.R. 378 at page 382, 383, Bullard v. R. [1957] AC 635 at 642, R. v. Stewart [1994] AC 999, and Confessor Franco v. R on the issue of the application of the proviso.

[15] The learned Director of Public Prosecutions conceded that the learned Judge's direction was unclear, and that the learned Judge did not direct the jury that the intention to kill is not inconsistent with provocation. He however urged that the

misdirections do not loom so large in the context of this case as to make the conviction unsafe and unsatisfactory, that the proviso should be applied and a verdict of guilty of manslaughter substituted for the verdict of guilty of murder. The learned Director relied on R. v. Whyte [1987] 3 All E.R. 416.

[16] In the case before us, I hold that the learned Judge's failure to direct the jury's attention to the evidence on provocation, or to relate that evidence to the law, was a misdirection. The Appellant was thereby deprived of the opportunity for the jury to consider fully and properly the issue of provocation, resulting in a possible verdict of not guilty of murder but guilty of manslaughter, and on this ground also the appeal succeeds.

Accident

[17] Mr. Christian, QC, for the Appellant, submitted that the learned trial Judge made no reference in the summing up to the defence of accident. This is borne out by the record and is conceded by the learned Director of Public Prosecutions.

The Proviso

[18] The misdirections and non-directions in this matter were extensive, and related to all the issues favourable to the Appellant, and which might on the evidence have resulted in a conviction of a lesser offence, or an acquittal. In the circumstances it would not be appropriate to apply the proviso, and I would decline to exercise the discretion to do so.

Conclusion

[19] The evidence in this case is strong, and it is entirely possible that the jury, properly directed, might have returned a verdict of guilty of murder or manslaughter. The events forming the subject matter of these charges are not so remote in point of time as to result in prejudice to the Appellant if there were to be a retrial. I would

allow the appeal, set aside the conviction and sentence, and remit the matter to the High Court for re-trial.

Brian G. K. Alleyne, SC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal