ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 2002

BETWEEN:

BRIAN GONSALVES

Appellant

and

SHELLY JOSEPH

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Gerald Watt, QC for the Appellant
Mr. Justin Simon for the Respondent

2004: February 5;
May 24.

JUDGMENT

[1] REDHEAD, J.A. [AG.]: This appeal to my mind turns fundamentally on the learned trial Judge's findings of facts and inferences which she has drawn from some of the facts in order to arrive at her decision. There are other matters raised in this appeal which in my view will not affect the outcome of the appeal.

[2] Learned Senior Counsel, Mr. Watt, QC argued that the learned trial Judge erred in admitting the medical report in evidence. He also argued that the learned trial Judge placed too much emphasis on the report particularly in light of the fact that the doctor was not called and was not cross-examined.

[3] The learned trial Judge said that the main issue is "whether the defendant, as he claims, acted in self defence in shooting the claimant". I agree. In arriving at this critical question the learned trial Judge critically analyzed the actions of both the Appellant and the Respondent and drew inferences. She drew three inferences in my judgment which were in support of her judgment. Inference number one, that the Appellant's premises were not secured between the hours of 10:00 am and 12 midday on the 5th August 1990. The Appellant gave evidence that his premises were secure. The Appellant said in evidence:

> "I go around the property and check all of the main areas when I visit it. When I left on the 4th August it was properly secured. I did not go into the container that day but it was secured with a lock and padlock on the outer door. When I left the property on the 4th August I secured the gates. No animal as far as I know could get through gate or fence. I went to the property on 5th shortly after midday as I approached the front gate to the property I observed that half of the gate was off the hinge lying on the driveway."

[4] There was no evidence given to contradict this testimony. However, the learned trial Judge said in her judgment:

> "The Defendant said in cross-examination that he passed by the hotel about 10:00 am on the morning of the next day, the 5th August and the gates were closed. He visited the hotel about midday later the same day with his cousin Christopher Lyder. Half of the front gate to the premises was on the ground."

It is true that the Appellant only said in cross-examination that he passed by the hotel at about 10:00 am on 5th August 1990. But having regard to the whole tenor of the evidence, is that enough to reject his evidence and come to the conclusion as she did, when she said:

> "I do not accept that the defendant passed by the hotel on 5th August 1990 and that the gate was intact then as he only volunteered this information in cross-examination."

[5] First of all I make the observation that from the record the Appellant said he visited his property at midday on the 4th August and his premises was intact and his container was secured with a padlock.

[6] The learned trial Judge gave as her reason for not accepting that the gate was broken between 10:00 am and 12 midday on 5th August the fact that this is a busy area and there was no evidence given in support of this. The learned trial Judge must have used her own personal knowledge to draw that conclusion. This she is not entitled to do. In my considered opinion the reason given by the learned trial Judge is therefore flawed.

[7] Brian Gonsalves gave evidence that he passed by his premises at about midday on 4th August and his premises were intact. No one gave any evidence to contradict that evidence, yet the trial Judge found as fact that the Appellant did not go by his premises on 5th August, 1990 at 10:00 am and his gate was then in tact. She drew the inference that no one would have broken the Appellant's premises between 10:00 am and 2:00 pm on the 5th August 1990. She said:

> "I therefore find it highly unlikely that the Claimant and Heywood broke the gate between the hours of `10:00 am and 2:00 pm that day and I accept that they met the gate down."

[8] No one testified that the Appellant did not go by his premises at 10:00 am, nor was there any evidence that he could not have gone past his premises at 10:00 am. For the learned trial Judge to have concluded that the gate was not intact between 10:00 am and 2:00 pm, she had to reject the evidence that the Appellant went by his premises at 10:00 am and saw his gate intact. There was no evidence to contradict this evidence, so the learned trial Judge had to draw an inference that he did not go past his premises at 10:00 am.

[9] The learned trial Judge drew the inferences from the testimony of the Appellant. She could not have based her conclusions on his demeanor in the witness box because the learned trial Judge had nothing against which to test his credibility eg. she could not say I prefer the Respondent's testimony on that aspect of the evidence. A Court of Appeal in such a case has every right to interfere with that finding. I shall return to this later in this judgment.

[10] On an analysis of the Respondent's evidence and the evidence of his companion in which they said that they entered the premises and they came upon a container. The doors of

the container were wide open and they went inside out of curiosity because the cattle was not inside but denied that they went in to steal. [See paragraph 8 of the judgment].

[11] The learned trial Judge went on to accept this version and other aspects of the Respondent's evidence although she found discrepancies in his evidence when she said at paragraph 15 of the judgment:

> "I accept the version of events given by the claimant on an analysis of the evidence given by all the witnesses and taking into account their comportment in the witness box."

A witness's comportment in the witness box may not, in my considered opinion, be the sole reliable guide in accepting the evidence of a witness.

[12] Significantly, in my view, the learned trial Judge does not say what was it about the comportment of the witnesses in the box which led her to accept the version of events as narrated by the complainant and his witness. It is even more significant in my view that the learned trial Judge did not find the Appellant to be untruthful. In fact she found him to be truthful when she said of him "it is significant that at no time did the Defendant say that the Claimant held the cutlass overhead in the classic attack position. I think the Defendant's innate sense of honesty kept him from telling such a blatant falsehood."

[13] In the Scottish case of **Wilkie v Brown**[1] the Appellant brought an action against the Respondent for damages for breach of contract. The Appellant's claim was for the sum of GBP 15,000 which was the estimated cost of completion of the works in accordance with the contract. The Sheriff rejected the Appellant's claim on the grounds that he did not give any break down of the sum claimed. The Appellant had said that his receipts were destroyed in a fire. The Court of Appeal of Scotland overturned the decision of the Sheriff. Lord Justice Gill at page 5 of the judgment opined:

> "The Sheriff himself has not pointed to any particular matter on which he thought that the pursuer was evasive. In our opinion, the Sheriff should have held that this element of the claim had been proved…
> "The Sheriff does not say what it was about the demeanour of Mr. McKinnon that he found to be unsatisfactory. He does not say in what respect the form of the

[1] [2003] ScotCS 157 (30th May 2003)

> original estimate was unsatisfactory. The fact that the breakdown appeared two years after the estimate…is in our view unsurprising. We cannot see what adverse inference can reasonably be drawn from that fact…In our opinion, the Sheriff has given us no rational basis for the conclusion that Mr. McKinnon's evidence should not be accepted. We consider that on the uncontradicted evidence of Mr. McKinnon, and in the absence of any competing evidence or of any proper reason not to accept him as a witness of credit, this element of the claim was proved."

[14] The Appellant testified that he visited his premises on 4th August and his container was intact with a padlock. There is no evidence to contradict his testimony. The Appellant again testified in examination in chief that he passed by the premises on 5th August 1990 at about midday and found that the front gate to his premises were down.

[15] The learned trial Judge rejected this evidence on the basis that the Appellant said in cross-examination that he also passed by his hotel premises on 5th August 1990 at 10:00 am. The rejection of this evidence as I have said could not have been as a result of the demeanour of the witness from the witness box but more as a conclusion. Moreover when the Appellant said he passed by his premises on 4th August 1990 and he found that his container was padlocked no evidence was led to contradict this testimony. So when the learned trial Judge accepted the evidence that the gate was down and the container was wide opened she was coming to a conclusion as this could not have been based on arriving at facts based on the demeanour of witnesses eg. preferring one's evidence over the other's by contrasting the demeanour of the witnesses.

[16] As against the Respondent's evidence there is uncontroversial evidence that the Appellant had on his hotel premises over $100,000 worth of wine in a container. The Appellant gave evidence that the container was padlocked the fences were intact and the gates were secured.

[17] The learned trial Judge by findings and conclusions found that the Appellant with over $100,000 worth of wines in the container on his premises left his premises unsecured so that the Respondent could walk into a container which contained those wines in search of cattle in spite of the fact that "the cattle was clearly not inside", yet they remained in the

container five minutes before the arrival of the Appellant. In spite of that the learned trial Judge also found that the Respondent did not enter the container to steal.

[18] The learned trial Judge drew an inference that the Respondent did not enter the container to steal because when the Respondent was found in his container all he said to the Appellant was "I just come to look for a cattle".

[19] The learned trial Judge also found that the Respondent's act of trespassing on the premises of the hotel was not a criminal offence as to enable the Appellant to rely on *ex turpi causa* to defeat the claim of the Respondent.

[20] The learned trial Judge made findings of facts which in my considered opinion she was not entitled to find having regard to the evidence. These findings led her inexorably to the conclusion that the Respondent's act of trespassing on the premises of the hotel was not a criminal act.

[21] The Appellant said that he visited the premises on 4th August and the container was secured with a padlock. There was no competing evidence. No evidence to challenge that fact yet inferentially the learned trial Judge came to the conclusion that the container was not locked. The Appellant also said that when he went to the premises on the 5th August and found the Respondent and Heywood in the container he observed that the lock was broken off and lying on the floor in front of the door. Bearing in mind that the learned trial Judge did not find the Appellant to be an untruthful witness but rather a witness `with an innate sense of honesty', the irresistible conclusion to be drawn from the evidence is that the Respondent and Heywood broke off the lock and entered the container. If this conclusion is correct then their intention would have been to steal. The conclusion therefore by the learned trial Judge that the Respondent's act of trespassing on the premises of the hotel was not a criminal act is flawed.

[22] The Appellant's evidence is that the Respondent and Heywood were found in his container on his premises. The Respondent had a cutlass in his hand. Both men emerged from the

container after the Appellant was unsuccessful in his attempt to close the door of the container.

[23] On two occasions, the Appellant told the men `do not move'. The men continued to advance in the direction of the Appellant, the Respondent with a cutlass in his hand whether the cutlass was raised `baton style' as the learned trial Judge found or, `overhead in the classic attack position' [according to the learned trial Judge] in my judgment it was reasonable for the Appellant to apprehend fear for his safety and to take the action which he did.

[24] In Murphy v Culhane[2] Lord Denning at p.536 opined:

> "A man who takes part in a criminal affray may well be said to have been guilty of such a wicked act as to deprive himself of a cause of action, or alternatively, to have taken upon himself the risk…suppose that a burglar breaks into a house and the householder finding him there picks up a gun and shoots him using more force, may be than is reasonably necessary. The householder may be guilty of manslaughter and liable to be brought before the criminal courts. But I doubt very much that whether the burglar's widow could have an action for damages. The householder might well have a defence either on the ground of *ex turpi causa non oritur actio* or *volenti non fit injuria*."

[25] For the word `affray' in the first quote in the above quoted paragraph, I would substitute the words "criminal activity". So too in the case at bar the Respondent was engaged in a criminal activity. In addition, he was armed with a dangerous weapon, a cutlass. The Appellant said to him on two occasions do not move. In spite of these warnings he was advancing in the direction of the Appellant.

[26] In the circumstances, it is my view that there was reasonable ground for the Appellant to apprehend danger for his safety. I therefore have difficulty in coming to the conclusion that the Appellant did more than was reasonably necessary to protect his safety.

[2] [1976] 3 All E R

[27] I address one other aspect of the learned trial Judge's findings of fact that is that the Respondent was shot from behind. She based her findings on a medical report issued by Holborton Hospital and signed by Dr. Prasaad. The report says:

> "The above named patient [Joseph Shelly] came to the Casualty Department on 5th August 1990 with the history of the alleged to have been injured by a known person with a gun shot on the posterior aspect of his left knee…confined to muscular system he has an entrance and exit wounds of the bullet and there in the popliteal fossa of the left. Radiological examination does not reveal any bullet in the left knee."

[28] The learned trial Judge obviously took that to mean that the Respondent was shot from behind but is that so? Is there any evidence to support that finding?

[29] The doctor did not give evidence. From the report it is quite clear that there was an entry and exit wound. Having said that, did the Respondent prove on a balance of probabilities that he was shot from behind? That is the crux of the matter. The Respondent said in his evidence in chief:

> "I had a cutlass in my hand we entered the premises and we searched for about ½ hour. I went there because I keep cattle in the area. On our way we saw a container, the door was open so both of us entered the container. There were liquors and wine and other stuff inside. When we were inside for about 5 minutes we saw the door closing in … I was saying I just came to look for cattle. I saw the door open so I stepped inside. I said that while I was pushing I could not see anybody when I was pushing the door. There was no reply. The person ran back from the door and we exchanged words. Mr. Gonsalves said don't move. I did not know who was speaking when these words were said but I saw the person. I was out of the container at that time. I said why you mean don't move I told You I came to look for a cattle. Rochester was behind me but we were standing behind the door. The door was open halfway. The defendant was standing on the side of the door after he said don't move I peeped and saw him. I stepped out from behind the door and next thing I feel my friend holding me…I realized I was shot."

[30] In my judgment there is nothing in the Respondent's evidence which suggest that he was shot from behind. It is in my view impossible to tell from this report whether this Respondent was shot from in front or from behind. The learned trial Judge must therefore have inferred that from the medical report. It is true the Respondent also said he felt the impact at the back of his left leg, but that does not answer the question because the bullet would have either entered or exited at the back of the knee.

[31] I now turn to the question of overturning the learned trial Judge's decision on a question of fact. In Benmax v Austin Motor Company Ltd[3] the head note reads:

> "An appellate court, on an appeal from a case tried before a judge alone should not lightly differ from a finding of the trial Judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form his own independent opinion, though it will give weight to the opinion of the trial Judge."

[32] In Grenada Electricity Services Ltd and Isaac Peters,[4] Sir Dennis Byron, CJ at paragraph 7 of the judgment explained the different approach a Court of Appeal should adopt, 1955 1 AER 326 2 Grenada Civil Appeal No.10 of 2002. When dealing with a trial Judge's findings of facts as opposed to drawing of inference from facts. He ended by saying:

> "…the court may have to consider a situation where what is in a dispute is the proper inference to be drawn from facts in other words the evaluation of facts. In such a case the appellate court is in as good a position to draw inferences or to evaluate as the learned trial Judge…"

[33] The most critical question to this appeal is whether the Respondent was shot from in front or behind. That is whether he was advancing towards the Appellant with a cutlass in his hand in a threatening manner. The medical report in my view cannot resolve the question ie. whether the Appellant was shot from in front or from behind.

[34] As I said above the Appellant's testimony on this aspect of the case is not clear. The medical report is not clear. On the other hand the Appellant said the Respondent was advancing towards him with a cutlass. He felt threatened. He told the Respondent "don't move". The Respondent kept advancing towards him when he, the Appellant shot him in his leg.

[3] 1995 1 AER 1 326
[4] Grenada Civil Appeal No.10 of 2002

[35] One thing that is clear when the Appellant told the Respondent "don't move" the Respondent ignored that warning because the Respondent said in his sworn testimony "why you mean don't move". He then said he stepped out from behind the door. He still had the cutlass in his hand.

[36] I would allow the appeal and set aside the judgment of the learned trial Judge. The Appellant is entitled to costs. The Respondent was awarded $10,000.00 in the Court below. On that basis he is entitled to 2/3 of that sum as prescribed costs. Costs to the Appellant in the sum of $6,666.66.

Albert Redhead
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]

[37] ALLEYNE, J.A.: On 5th August 1990 Shelly Joseph and his friend Rochester Heywood were found by Brian Gonsalves and Christopher Lyder inside a 40 foot container which was being used as a wine cooler and storage for a quantity of wine owned by Mr. Gonsalves, of a value of approximately $100,000.00. The container was on the premises of the Antigua Beach Hotel, the property of Gonsalves Corporation, of which Mr. Gonsalves was managing Director and majority shareholder. The Hotel had not been operational since the 1980's and the land was not occupied except for the storage of wines in the container.

[38] Mr. Joseph and his friend were trespassers. Mr. Joseph had a cutlass in his hand while in the container. He claimed that while in search of a missing cattle, he and his friend had entered the Hotel premises and had come across the container the doors of which he claimed were wide open. They said they entered the container out of curiosity, and while there Mr. Joseph noticed a shadow like the door closing. Afraid that they would be trapped

in the container, they ran to the door and pushed against it with their shoulders. He said that while doing so, he was calling out that they just came to look for cattle. There was no reply. They got the door open and came out of the container. Mr. Gonsalves ran back from the door and said 'Don't move.' Mr. Joseph responded 'How you mean don't move I told you I come to look for a cattle.' Mr. Joseph felt his friend Heywood holding him, and then felt an impact in the back of his left leg. He realised he was shot. In fact Mr. Gonsalves had shot him in the leg with a .38 Special firearm which he had with him at the time. The learned trial Judge found that Mr. Gonsalves had considerable experience in the use of firearms.

[39] Mr. Gonsalves claimed that Mr. Joseph was approaching him with his cutlass raised in a threatening manner, and that he shot him in self defence. The learned trial Judge rejected that version of events, and declared that she believed Mr. Joseph's version that as he exited the container Mr. Gonsalves shot him. The learned trial Judge rejected the claim that Mr. Joseph was in the course of a direct frontal attack on Mr. Gonsalves, and found that Mr. Gonsalves' action was deliberate and that he had no reasonable ground for believing that Mr. Joseph was about to attack him and his cousin with the cutlass. She found that the shot he fired was deliberate and carefully targeted, and discharged while Mr. Joseph was trying to escape from the container.

[40] After shooting Mr. Joseph, Mr. Gonsalves locked him and his friend in the container and called the police, who arrived some time later. Fortunately, as the learned trial Judge found, Mr. Joseph had not suffered damage to any major blood vessels, and no dire consequences followed. Damages were awarded to Mr. Joseph in the sum of $30,000.00 with interest from the date the cause of action arose, and costs agreed at $10,000.00. From this decision Mr. Gonsalves has appealed. In particular, the appeal is against the order that the Appellant Mr. Gonsalves should pay interest on damages awarded from the date when the cause of action arose. The Appellant is also dissatisfied with the admission of the medical report of Dr. Prasaad, which, as appears at page 26 line 19 of the record, was admitted by consent. Complaint is made that undue weight was given to the medical

report in light of the contention that it is ambiguous, and was not tested by cross-examination.

Date from which interest chargeable

[41] The first ground of appeal is that the learned trial Judge wrongly exercised her discretion under section 27 of the Eastern Caribbean Supreme Court Act[5] when she ordered interest on the judgment from the date when the cause of action arose, rather than from the date of judgment. The section undoubtedly gives the trial Judge a discretion to award interest from the date the cause of action arose, but learned Counsel for the Respondent conceded that the discretion had been wrongly exercised and that interest should in the circumstances have been awarded as of the date of the commencement of the action. We agree.

[42] Learned Queen's Counsel for the Appellant argued grounds 2, 3 and 4 together. The grounds are in the following terms:

> 2. The learned trial Judge erred in law when she admitted into evidence the medical report of Dr. Prasaad, who did not give evidence at the trial and who was not made available for cross examination by counsel for the Defendant/Appellant.
>
> 3. The learned trial Judge erred in law when she relied heavily in her judgment and gave great weight to the contents of the medical report of which no evidence was given by the said Dr. Prasaad and on which he was not cross examined.
>
> 4. The admission of the said medical report without evidential explanation and/or cross-examination was extremely prejudicial to the Defendant/Appellant and this prejudice outweighed its probative value.

[43] Counsel conceded that the medical report was tendered and admitted by consent. He nevertheless submitted that when this was done it was in complete contravention of the case management procedure established by the Civil Procedure Rules 2000 (CPR). He submitted that the matter having been commenced by writ on 20th February 1996 and

[5] Cap. 143 of the Laws of Antigua and Barbuda 1992.

being ready for hearing following the filing of a request for hearing on 14th March 1997, when the Rules of the Supreme Court 1970 were the prevailing procedural rules, when the hearing commenced on 25th April 2002 the transitional provisions of the CPR 2000, in particular Part 73.3, applied to all further proceedings.

[44] Part 73.3 is in the following terms:

> Old proceedings
>
> 73.3 (1) These Rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned.
>
> (2) In proceedings commenced before the commencement date, an application to adjourn a trial date is to be treated as a pre-trial review and these Rules apply from the date that such application is heard.
>
> (3) If a trial date has not been fixed in proceedings commenced before the commencement date –
>
> (a) the court office must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least 28 days notice of the conference; and
>
> (b) these Rules apply from the date of the case management conference.

[45] The matter came on for hearing on 22nd April, and was then adjourned at the request of Counsel for the Defendant/Appellant to 25th April, on which date the matter proceeded to trial. No procedural issue was canvassed. In particular no reference was made to Part 73.3(2). The application for adjournment had not been explicitly treated as a pre-trial review. Nevertheless it is clear that the trial would have proceeded thereafter under the CPR 2000. Part 26.9 provides that an error of procedure or failure to comply with a rule does not invalidate any step taken in the proceedings unless the Court so orders. No order was made.

[46] Learned Queen's Counsel for the Appellant submits that each and every rule under Part 27.5; Orders to be made at case management conference, has been violated. However, this case did not fall within Part 73.3(3), and there was therefore no necessity for a case management conference. Even if there were need for such a conference under the applicable rule, it is my view, contrary to what learned Queen's Counsel contended, that

this would be a manifestly suitable case for the exercise of the power under Part 26.9(3) to make an order to put things right, which order would in my judgment certainly have been made at trial had the issue arisen, and which this Court would make were it necessary to do so.

[47] Such an order would more than likely be for the matter to proceed notwithstanding the failure to hold a case management conference, rather than wasting time and taking unnecessary steps, an order on the summons for directions having been made on 4th December 1996 in preparation for trial under the Rules of the Supreme Court 1970. This order included provision for inspection of documents. The medical report was disclosed in the Plaintiff/Respondent's list of documents. The overriding objective of CPR 2000 includes ensuring that the case is dealt with expeditiously and allotting to it an appropriate share of the Court's resources. To follow the course proposed by learned Queen's Counsel would be to fly in the face of these principles.

[48] Learned Counsel for the Appellant submitted that the admission of the medical evidence by consent was not permitted in the circumstances, in the absence of a case management order or direction permitting the production of the report. The course pursued by the learned trial Judge, in my view, was entirely appropriate and Counsel's submissions in this respect are without merit.

[49] Learned Counsel for the Appellant submitted that the learned trial Judge's conclusion as to the entry point of the bullet was based on the medical report and is therefore inadmissible. For the reasons already given I do not agree. Counsel further contended that this conclusion conflicts with the evidence of the Respondent and of the Appellant, at pages 25 and 38 respectively of the record. That conclusion does indeed seem to conflict with the evidence of the Appellant, but seems to me to be consistent with the evidence of the Respondent, whose evidence the learned trial Judge accepted.

[50] From the evidence the learned trial Judge drew the inference that the Appellant's action was deliberate and that he had no reasonable ground for believing that the Respondent

was about to attack him and Lyder, his companion, with the cutlass. With respect, I find myself unable to support this inference. I have no doubt that the Respondent's action was indeed deliberate, but he found himself confronted by two men, one armed with a cutlass, who by all appearances had broken into his warehouse to steal from his stock of valuable wines. These men had strenuously and successfully resisted his efforts to confine them in the container, and were approaching the Appellant with the cutlass raised in what appeared to the Appellant to be a threatening manner. The Appellant reacted in the way that any reasonable person would do, by firing a shot at the leg of his presumed assailant in a manner to disable him. I cannot hold on that basis that the Appellant was unjustified, that the force used was excessive, or that he should be held liable in damages for assault and battery.

[51] I would allow the appeal, discharge the order of the trial Judge, and order costs in the Court below, which was apparently agreed in the sum of $10,000.00, and of the appeal in the sum of $6,000.00, to be paid by the Respondent to the Appellant.

Brian Alleyne, SC
Justice of Appeal