COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 11 OF 2003

BETWEEN:

AUGUSTUS NICHOLAS

Appellant

and

THE STATE

Respondent

Before:

The Hon. Justice Adrian Saunders	Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal

Appearances:

Mrs. Dawn Yearwood-Stewart for the appellant
Ms. Celia Delauney for the respondent

2004: October 12;
2005: February 14.

JUDGMENT

[1] ALLEYNE, J.A.: According to the brief summary of facts submitted by the appellant and agreed to by the respondent in their respective skeleton arguments, on 2nd February 2003 Linton Didier died from a single stab wound in the chest with perforation of the aorta and pericardium with massive hemopericardium and cardiac tamponade and mild congestion of the liver (which last condition as a contributing factor is denied by the respondent. Nothing turns on this difference). The appellant Augustus Nicholas was arrested and charged with the offence of murder. At the end of the ensuing four-day trial the jury returned a unanimous verdict of guilty of murder. The appellant was sentenced to life imprisonment and has appealed against conviction and sentence.

[2] The grounds of appeal are:

1.1 The learned trial judge erred in law and misdirected herself by failing to put the defence of provocation to the jury and the law applicable thereto.

1.2 The learned trial judge in addressing the jury on intent did not firmly, fairly or adequately put to the jury that even if they found the necessary intent to kill on the part of the deceased (obviously this should be appellant) that this was not inconsistent with the defence of self defence. In other words the learned trial judge gave the jury insufficient guidance on the issue of criminal intent with respect to self defence.

1.3 The learned trial judge failed to direct the jury on the legal meaning of accident.

1.4 The learned trial judge in directing the jury on the defence of accident did not direct the jury that the burden of proof was on the prosecution to negative accident.

1.5 In directing the jury on the burden of proof in relation to accident the learned trial judge on one occasion gave confusing directions on what the jury must be satisfied about.

1.6 The learned trial judge failed to direct the jury to disregard that part of the evidence of Ursuline Pierre the sole eyewitness to the incident where the contents were more prejudicial than probative.

1.7 The learned trial judge erred in law when she wrongly and improperly interpreted the scientific evidence of the medical doctor.

1.8 There was a material irregularity at the trial when the learned prosecutor negatived the defences of the accused before the accused raised it.

1.9 There was a material irregularity at the trial when the learned trial judge at 5.30 p.m. directed the prosecutor to commence her closing address to the jury who had been engaged in the hearing

of the defence's case from 10.45 a.m. on Thursday 30th October 2003.

[3] And against sentence, the grounds were;

1.10 There was a material irregularity at the trial when the learned prosecutor usurped the functions of the trial judge and the defence counsel at the sentencing hearing by addressing and urging the trial judge on the approach she should take in sentencing the accused.

1.11 The learned trial judge erred in law and misdirected herself by wrongly admitting documentary evidence from the United States Virgin Islands on alleged previous convictions of the accused.

1.12 The sentence was too severe in all the circumstances of this case.

[4] Learned counsel for the appellant did not pursue grounds 1.7, 1.8, 1.9 and 1.10.

Provocation

[5] On the issue of provocation, counsel for the appellant submitted that the evidence suggested that the accused's actions were motivated by jealousy. Counsel referred to the evidence of the prosecution witness Collins Victor in cross-examination at page 138, where he said "Well what I want to say is if a man making a move behind my lady I cannot be his friend, because he know I there already." Counsel also suggested that the jury was clearly thinking along those lines, evidenced by their questions to the appellant at page 408 to 409. The appellant admitted that he loved Ursuline, his girlfriend, a lot, but he asserted that it never crossed his mind that the deceased would take his place after he moved out. He said nothing ran through his mind when he saw the deceased at Ursuline's home because that was not the first time he saw the deceased there.

He clearly denied any strong emotion, and certainly did not suggest that he suffered a loss of self control as a result.

[6] Learned counsel submitted further that the evidence of the appellant at page 267 of the record raised the issue of provocation, sufficient to require the judge to give a direction to the jury on that issue. The evidence of the appellant was that when he entered Ursuline Pierre's house, he saw Ursuline and the deceased sitting on the couch. They were not doing anything. The deceased got up off the couch and "he fold he fist." The deceased did not say anything to the appellant, but the appellant said to him "I did not come here for that, me son." He said the deceased then stepped forward and he, the appellant, "back up". The deceased stepped forward about twice. The appellant said he started looking around because the deceased's fist was still folded. The appellant then saw a blade on top of the fridge which he "snatched". The deceased rushed him, they had a little struggle. The appellant said he was trying to back the deceased off, to get the deceased off him.

[7] The appellant said he tripped the deceased, who was falling backward, holding the hand in which the appellant had the knife. The deceased fell on the couch and pulled the appellant down with him. The scuffle continued, in the course of which the deceased apparently received a fatal stab wound.

[8] It is suggested that this evidence raised the issues of provocation, self-defence and accident, making it necessary for the learned trial judge to give a direction on provocation. It is conceded by counsel for the respondent that she did not do so.

[9] Learned counsel for the respondent pointed out, however, that nowhere in the evidence is there any suggestion that the appellant lost his self-control, or that he was subject to passion such as to cause him to retaliate. While this is true, it is

well settled that it is not for the accused to prove provocation, but for the prosecution to negative it where there is evidence from which it may be inferred[1].

[10] In Lee Chun-Chuen v. R[2] the Privy Council held as follows:

> 'Provocation in law consists mainly of three elements – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of *these three elements* ... The point that their Lordships wish to emphasize is that provocation in law means something more than a provocative incident. That is only one of the constituent elements.'

[11] Relying on this statement of the law and on dicta in Berthill Fox v R[3], learned counsel for the appellant invites the court to ask 'what sort of evidence must exist before the judge's duty to leave the issue of provocation to the jury is triggered. In Berthill Fox the Court of Appeal expressed the view that there should be some evidence to show that the appellant must have been gripped by some overmastering passion; there must be evidence to justify a sudden explosion of temper, a matter on which it is for the judge to decide. The court was of the view that if there was no such evidence, the judge must withdraw the issue from the jury. In my view, in the case before us, there was no such evidence, and it was not necessary or appropriate for the judge to direct the jury on provocation.

[12] In those circumstances, and applying the dicta in Lee Chun-Chuen and Berthill Fox *supra*, I would dismiss the appeal on this ground.

Intent to kill not inconsistent with self-defence, accident or provocation

[13] In relation to the second ground of appeal, that the learned trial judge failed to direct the jury that an intent to kill is not inconsistent with the defence of self-

[1] Shevon Gay v. R [1998] ECLR 13.
[2] [1963] A.C. 220 at 231.
[3] High Court Criminal Appeal No. 4 of 1998, St. Christopher & Nevis. See also Nicholls v. R. [1998] ECLR 30; Fox v. R. (No. 1)[2001] 61 WIR 157 at 162, 163.

defence, learned counsel relied on the case of Baptiste v The State[4] at page 263 and 264, where the Court of Appeal of Trinidad and Tobago, *per* Kelsick , Acting Chief Justice, affirmed the general direction that 'Provocation is some act or series of acts done or words spoken by the deceased to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to cause him to retaliate', but added a clear statement that in appropriate cases directions to juries must be carefully crafted so as not to obscure the fact that provocation, self-defence and accident may arise where there is an intention to kill. The learned Acting Chief Justice said this:

> 'We consider it important for the future guidance of judges to summarize the proper directions which should be given to the jury when the special "defences" or issues of self-defence, provocation or accident are raised either directly by the defendant or indirectly from the evidence. In every such case the judge must, in addition to the general directions as to the onus of proof being on the prosecution, give a special direction that a further burden rests on the prosecution *to negative beyond reasonable doubt the existence of these answers*. The jury must be reminded that, when the prosecution does not discharge the onus, the verdict in respect of self-defence or accident should be an acquittal, and, in respect of provocation, manslaughter.'

[14] Learned counsel for the appellant submitted that even though the learned trial judge's direction on intent was impeccable, he failed to give a clear and specific direction that an intent to kill on the part of the appellant was not, in the circumstances of the case, necessarily inconsistent with a plea of self-defence, provocation or accident. We have already discounted provocation. However, both self-defence and accident clearly were issues on which the appellant relied and in support of which there was some evidence.

[4] [1983] 34 WIR 253.

[15] Learned counsel for the respondent submitted that the learned trial judge's direction at page 512 of the record was most favourable to the appellant and adequately conveyed to the jury the law on the matter. The learned trial judge directed the jury thus:

> 'If you conclude that the accused was or may have been acting in lawful self-defence then you must acquit him.'
>
> And further at page 513:
>
> '*It is only if the prosecution has satisfied you that the accused had no lawful justification or excuse for his conduct that day*, and that he must have held the knife against the chest of the deceased and stabbed him, and that he must have foreseen that the deceased would have been injured by the knife, *that you can convict him.*
> *If, having heard the evidence, you are left in any doubt as to the lawful conduct of the accused on that day, it is your duty to give the accused the benefit of the doubt, and to find him not guilty of this offence.*
>
> And at page 514:
>
> *'If on the other hand you find that the accused was acting in self-defence or may have been acting in self-defence he is not guilty of murder, he is not guilty of any crime.'*

[16] Learned counsel for the appellant submitted that these directions were not so clear as to meet the standard required by law as propounded in Baptiste *supra.* In addition, learned counsel pointed out that the learned trial judge made no reference, in this context, to the issue of accident. I agree that the direction of the learned trial judge was somewhat deficient in respect both of its lack of clear guidance to the jury on the issue of the burden of proof, and in its failure to refer to the issue of accident. Nevertheless I am of the view that on the evidence in this case the jury would inevitably have come to the same conclusion even if a proper direction had been given, and I would dismiss ground 1.2, 1.4 and 1.5 of the appeal.

Meaning of accident

[17] Learned counsel for the appellant submitted that the learned trial judge failed to direct the jury on the legal meaning of accident. Learned counsel drew attention to the record, page 512, lines 17 to 22, where the learned trial judge said:

> 'Now the accused has put forward an alternative defence of accident. He is saying that the stabbing was an accident, that it occurred during a struggle for the knife. So by his defence he is saying that he lacks the guilty intent necessary to constitute the offence of murder as I just instructed you.'

[18] Learned counsel for the appellant cited the case of R v Muir[5] in support of his contention. In that case the Court of Appeal of Jamaica found that "the directions of the trial judge made it quite clear to the jury that the question of accident … arose by way of explanation by the applicant (accused) as to the possible cause for the deceased shooting himself. He told the jury what the defence was, namely that the applicant 'did not do the act'. If the evidence supported a finding that the deceased died at the hands of the applicant as a result of an unfortunate mishap, an event which was 'not expected or designed', then it would have been incumbent on the trial judge to direct the jury accordingly and to explain the meaning of accident."

[19] In The State v Simmons[6] on which the appellant relies, Luckhoo J.A. for the Court of Appeal of Guyana quoted the accident direction given to the jury by the trial judge, including directions on the degree of negligence which it would be necessary for the prosecution to prove in order to prove that the death was not caused by accident. The learned trial judge's direction also addressed the issue of the state of mind of the accused, including whether or not he thought that what he was doing was safe, and the issue whether the act being done by the accused

[5] [1995] 48 WIR 262 at 269.
[6] [1976] 24 WIR 149, at 152.

was a lawful or an unlawful act. The learned trial judge also dealt with the options which were open to the jury of returning a verdict of not guilty or a verdict of guilty of manslaughter, as well as a verdict of guilty of murder.

[20] In the case before us the learned trial judge left the jury with the impression that the matter was purely a question of fact, and that if they believed the appellant, or if they were in doubt, they must acquit. The issue of negligence, and the degree of negligence, on the basis of which a verdict of manslaughter might have been available, was not put. In the words of Luckhoo J.A., "there was an inadequacy or incompleteness in (the trial judge's) directions in omitting to remind the jury when dealing with the issue of accident raised by the accused that the onus was on the state to negative accident". It must be said that in this case the learned judge did, however briefly, remind the jury that it was for the prosecution to negative accident. However, she failed to deal adequately or at all with the considerations which the prosecution needed to prove or to negative. In particular, as illustrated in Simmons *supra* at page 155H, the trial judge failed to stress the need for the prosecution to satisfy the jury, on the issue of manslaughter, that the injury caused by the knife that night was the result of gross negligence on the part of the appellant showing such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment. It had to be negligence of a very high degree, and further it must be shown that the accused had a guilty mind.

[21] It seems to me that in this case there was the primary issue of fact for the jury to determine, that is to say whether the incident took place in the way described by the prosecution or in the manner explained by the appellant. There was however a secondary consideration that ought on the evidence to have been left for the consideration and determination of the jury. The direction that the appellant's version would completely exonerate him if accepted by the jury or if they had a doubt about it did not leave it open to the jury to consider the question of

negligence, far less the degree of negligence, on the part of the appellant which might have resulted in a verdict of manslaughter rather than a verdict of murder.

[22] There is no question in my mind that a reasonable jury, if properly directed, might have returned a verdict of not guilty of either murder or manslaughter. The evidence could not reasonably have led to such a perverse result. However, the appellant, to my mind, was deprived of the possibility, on the evidence, of a verdict of guilty of the lesser offence of manslaughter which might conceivably have been returned had the jury been properly directed on the issue of accident. The direction of the learned judge was deficient in that respect, and on that ground of appeal I would allow the appeal against the conviction of murder and substitute therefor a conviction of manslaughter.

Admission of prejudicial evidence

[23] Learned counsel for the appellant submitted, under ground of appeal 1.6, that the learned trial judge failed to direct the jury to disregard certain evidence given by Ursuline Pierre, the sole eye-witness, for the prosecution, which was more prejudicial than probative. The words, "he (the accused) always had that hot temper"[7], and "knowing how dangerous he (the accused) is"[8], are arguably somewhat prejudicial and of little if any probative value, and ought not to have been admitted.

[24] Counsel submitted that the trial judge should have warned the jury to ignore the evidence, or should have discharged the jury. Counsel in her written submissions says the witness "blurted" the evidence.

[25] I think it would be useful to put the words in their context. It was in the course of examination-in-chief of the witness Pierre. She was explaining that she and the appellant were still lovers, that he still slept at her home, but the relationship was

[7] Page 97 line 8 of the record.
[8] Page 110, line 25 of the record.

at a "low profile". In answer to the question "What exactly do you mean by low profile?" the witness said "The relationship wasn't as happy as before. It was like – there was a fear in me after that because of the way he used to embarrass me in the midst of people, embarrass my mother and I on the road, and he always had that hot temper."

[26] The second statement complained of was made also in examination-in-chief. Counsel was seeking clarification of the situation in which the appellant continued to come to Pierre's home.

> Question: "So that is what you mean when you say you didn't invite him but he would still come?" Answer: "He would still come, even if it was otherwise he would still come at my home, knowing him and knowing how dangerous he is." Q. "No, no. I want to understand this clearly, just try and refrain from the extra comments, okay? Are you therefore saying since he moved out, the only time he came to your house is when he would walk up with you? A. Yes."

[27] To the extent that these statements may have influenced the jury negatively in their assessment of the character of the appellant, they are prejudicial. They contributed nothing to proof of guilt, and were therefore irrelevant and inadmissible. They slipped in through no fault of anyone other than the witness Pierre. It seems to me that at worst the damage done was minimal and negligible. In the context in which they were made, and taking into account the totality of the evidence in the case, they were probably quickly forgotten, and for the learned judge to mention them, even to direct the jury to disregard them, might have done nothing more than to bring the statements to the fore and to perpetuate the very mischief which learned counsel submits the learned judge should have neutralized in his summing-up.

[28] It seems clear to me on the other hand that the potential prejudice was not nearly so serious as to justify the judge discharging the jury as proposed as an alternative by counsel. Looked at in the round, I am of the view that there was no real danger of the appellant being prejudiced by these two statements. I would dismiss this ground of appeal.

Sentence

[29] The appellant having been convicted of murder, and having considered all the facts placed before him, the learned trial judge, in a considered ruling, sentenced the appellant to life imprisonment. Under the laws of Dominica[9], a person convicted of manslaughter is "liable to such fine as the Court may award and to imprisonment for life", a lesser maximum punishment than that mandated for murder. At the sentencing stage of the trial the judge declared that the prosecution and the court agreed that the case was a non-capital one, and the death penalty was not considered.

[30] Learned counsel for the appellant contended that the learned trial judge was wrong in law to take into consideration in determining sentence the appellant's record of convictions in another jurisdiction, namely the United States Virgin Islands where he lived for many years until he was deported back to Dominica. Learned counsel proffered no authority in support of this proposition, and I see no reason in principle why these convictions should not be taken into account. I note that at the sentencing hearing the appellant did not deny these previous convictions and indeed no issue was taken as to the propriety of their admission.

[31] It seems to me that the learned trial judge took into account the appropriate and relevant considerations in passing sentence, and on the basis of his conviction of murder the sentence cannot be faulted. However, on a variation of the conviction to manslaughter, the matter of sentence has to be considered afresh. This court has all the relevant material before it and there is no reason why we should not determine the sentence to be served.

[32] The Assistant Chief Welfare Officer's very comprehensive and helpful report indicates that the appellant is very remorseful regarding this crime. One can only hope that this sense of remorse will lead to reform and rehabilitation of this so far

[9] Offences Against the Person Act Chap. 10.31, section 6.

wasted youthful life. On the other hand, the Psychiatrist's report suggests the absence of remorse.

[33] The appellant has a record of drug offences and of violent crime, including aggravated assault against a Police Officer. The seriousness of these offences is indicated by the severity of the penalties imposed, including a sentence of 5 years imprisonment. The learned trial judge described his previous criminal record as substantial. In the circumstances I am of the view that a term of imprisonment of 10 years would be appropriate.

[34] To summarize, I would allow the appeal against conviction of murder and substitute therefor a conviction of manslaughter. I would in consequence allow the appeal against sentence and substitute for the sentence of life imprisonment a sentence of ten years, commencing from the date of his sentence in the High Court, that is to say 28th November 2003.

Brian Alleyne, SC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Michael Gordon, Q.C.
Justice of Appeal