GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.2 OF 2004

BETWEEN:

PETER DUNCAN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Brian Alleyne S.C. — Chief Justice [Ag.]
The Hon. Michael Gordon Q.C. — Justice of Appeal
The Hon. Hugh Rawlins — Justice of Appeal [Ag.]

Appearances:

Mr. George Prime for the Appellant
Mr. Christopher Nelson, Director of Public Prosecutions

2005: March 3.

JUDGMENT

[1] GORDON, J.A.: The Appellant was convicted of murder on the 18th of December, 2003 and sentenced to seven (7) years of hard labour on February 4, 2004. He filed a Notice of Appeal against both sentence and conviction.

[2] At the hearing of his appeal, learned Counsel appearing for the Appellant sought and was granted leave to withdraw the Notice of Appeal in respect of sentence, leaving the issue of conviction as the only live issue. Two principal grounds of appeal were urged on behalf of the Appellant, namely: one, that the learned trial Judge erred in law by failing to fully and accurately direct the jury on the defence of self-defence; and two, that the learned trial Judge erred in law by failing to fully and accurately direct the jury on the defence of provocation.

[3] Dealing with the second ground first, namely, the provocation ground, the Learned Director of Public Prosecutions, in his written skeleton arguments filed in this appeal, very properly made the following concession: "Provocation pursuant to Section 239(a) was a live issue in this case. It arose under Section 240(a) and possibly 240(b) but was not dealt with adequately or at all by the learned trial Judge". The Learned Director of Public Prosecutions did, however, reserve his position on the issue of the application of the proviso in this circumstance.

[4] At our invitation, learned Counsel for the Appellant confined his oral argument to the issue of misdirection by the learned trial Judge on self-defence. The learned trial Judge prefaced his comments to the jury on the subject of self-defence in an absolutely unexceptional way, with these words:

> "It is for the Prosecution to disprove that the accused acted in lawful self-defence. The accused does not have to prove he acted in self-defence, that is, notwithstanding the fact that he went into the witness box and endeavoured to give you an explanation of what transpired."

However, thereafter he made a number of statements of which the Appellant complains, for example, and I quote:

> "You have to ask yourselves, did the accused believe or could he honestly have believed it was necessary to defend himself. That is the first question you must ask yourself. In doing so, you must consider that acts of revenge or retaliation are unlawful as in such situations the use of force is unnecessary; so it is important that you consider and satisfy yourselves--"

Again:

> "--to the extent that you feel sure that the accused did strike the blow in the belief it was necessary to defend himself. If you are not so satisfied, then of course, you must resolve that doubt in his favour.
>
> Now, if you believe that the accused was or may have been acting in the belief that it was necessary to defend himself, only then should you go to the next question."

[5] And again, he said,

> "You must bear in mind what the accused may have believed to be the danger he was facing. You heard him give evidence as to what transpired and you must take that into consideration. You must consider whether there was a threatened attack or an actual attack."

[6] And at the very end of his summing up, when he invited Counsel to speak to anything that he may have neglected, learned Queen's Counsel for the Appellant, the accused below, said this:

> "I think I would like to put it that I am not satisfied about self-defence. They give the impression that the onus is not on the Crown."

[7] The learned trial Judge then said the following words:

> "Perhaps I should make that very clear. Now the issue of self-defence rests upon the same principle that applies to the entire case, that is, the Crown must prove every aspect of this case. It means that they must disprove self-defence, and in considering self-defence, you must consider what the accused honestly believed in his own mind. And that is very important in this case. The test in this case is subjective. You must consider what is in the accused himself mind. Is there anything more I can add?"

[8] In each of these quotations, the learned trial Judge either suggested that there was a burden on the Appellant to prove the circumstances of self-defence, or at best, left it unclear that the burden, in all circumstances, remained on the Prosecution to disprove until the jury were sure that the defence of self-defence was not available to the Appellant.

[9] A further point raised by learned Counsel for the Appellant concerned the learned trial Judge's alleged misdirection on the issue of an unlawful fight. The learned trail Judge's direction was as follows:

> "Now, what is an unlawful fight? The easiest way I can describe it to you is that if two people engage in a boxing match, that will not be an unlawful fight. An unlawful fight is an exchange of blows that is prohibited by the law. This is a situation where combatants are in physical contact with each other in circumstances not permitted by the law. Your task is to decide whether what transpired in the shop amounted to an unlawful fight, because if you find that it amounted to an unlawful fight and that whatever happened to the deceased occurred in the course of that unlawful fight, then self-defence does not avail the accused. If you find that it did so occur, that the accused was engaged in an unlawful fight, he cannot justify his actions for the offence that he was charged by setting up self-defence. So it is very important that you consider this whole question as to whether there was an unlawful fight."

[10] Section 62(6) of the Grenada Criminal Code reads as follows:

> "No force used in an unlawful fight can be justified under any provision of this Code and every fight is an unlawful fight in which a person engages or which he maintains otherwise than solely in pursuance of some of the matters of justification specified in this title."

It becomes immediately apparent that in the directions of the learned trial Judge, he did not address the proviso in this section, which I will read again,

> "Otherwise than solely in pursuance of some of the matters of justification specified in this title."

[11] One of the matters specified in the title is self-defence. We find this to be a material misdirection. Cumulatively, we find that the misdirections adumbrated above to be material.

[12] The learned Director of Public Prosecutions urged upon us that even if we were to find that the misdirections were material, that this was an appropriate case for the application of the proviso. He referred the Court to examples of the evidence which he urged justified such an application.

[13] I believe that the statement by the Privy Council in Shaw vs. The Queen, Privy Council Appeal No. 58 of 2000, a decision delivered on 24th of May, 2001, is apposite. It appears at paragraph 32 of that judgment, and I quote,

> "It has been necessary to consider whether, despite the misdirection that was found, the Board should apply the proviso to Section 31(1) of the Court of Appeal Ordinance on the ground that no substantial miscarriage of justice has actually occurred. Given the absence of an adequate direction on the central issue in the case, the appellant's contention that he acted in self-defence, the Board cannot be sure that no miscarriage of justice has occurred.

"A proper direction could, even if improbable, have led to a different outcome."

[14] I take the same view of this case. We do not believe that a jury properly directed would inevitably have come to the same conclusion. The appeal against the conviction for murder is allowed. However, there is one further matter. Should there be a retrial?, In a sense this has been the more difficult determination to

make, under the West Indies Associated States Courts Act of Grenada, this Court has the power when allowing an appeal to order a retrial. In England, the Court of Criminal Appeal to determine the justness of such a course has used the criteria of the the length of time since the commission of the offence and how much time the Appellant has spent in custody. This incident took place in February 2002, since which time the Appellant has been in custody. We are of the view that in the particular circumstances of this case, relying as it does on eye-witness rather than forensic evidence, the passage of time creates a staleness in the evidence and hence it would not be in the interest of justice to order a retrial.

In the result, the appeal is allowed and conviction and sentence are quashed.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh Rawlins
Justice of Appeal [Ag.]