GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.12 OF 2003

BETWEEN:

ALLEYNE BOWEN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne SC — Chief Justice [Ag.]
The Hon. Mr. Denys Barrow SC — Justice of Appeal [Ag.]
The Hon. Madam Suzie d'Auvergne — Justice of Appeal [Ag.]

Appearances:

Mr. George W. Prime for the Appellant
Mr. Christopher Nelson, DPP with Mr. Darshan Ramdhanny and Ms. Dionne Lawrence for the Crown

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2005: June 28;
September 19.

JUDGMENT

[1] **d'AUVERGNE, J.A. [AG.]:** The Appellant was indicted for murder of Kenrick Gilchrist (the deceased) on the 25th day of May, 2002 at Perdmontemps in the parish of St. David, in Grenada. On the 26th June, 2003, after a trial by Jury presided over by St. Paul J. the appellant was convicted of the murder and on the 21st day of July 2003 was sentenced to death by hanging.

[2] At the trial many witnesses but only two eye witnesses gave evidence of what transpired at Bain's dancehall at Perdmontemps St. David. Prudence Samuel testified that she arrived at the dancehall at about 11.00 p.m. in the company of the deceased, (her

boyfriend) and Lindonna Richards. She testified that the deceased was also known as Mark.

[3] She further testified that she saw the Appellant at the dancehall dressed in blue pants, black jacket and a bag on his back. That it was while she was dancing with the deceased that the Appellant pushed her away and some wrestling ensued between the two men resulting in both men falling to the ground with the Appellant on top of the deceased. She called for help, tried to part them but in vain. Eventually two friends picked the deceased from the floor where he was lying and placed him in a bus and it was at that time she observed that he had a cut on his chest.

[4] Under cross examination she said that she heard the Appellant speaking to the deceased who did not answer.

[5] Lindonna Richards supported the testimony of Prudence Samuel and further testified that the Appellant also known as Twisters was on top of the deceased while they were on the floor, and that she saw the Appellant's hand moving "in a chopping motion."

[6] Sebastian Bain the owner and manager of the discotheque (dancehall) testified that he knew the deceased as "Black boy" who was a frequent participant at the various parties. He further testified that about 1.15 a.m. that morning he went outside and on his return into the dancehall he heard loud noises and saw a crowd of people assembled on one side of the dancehall.

[7] After that he immediately switched on the bright lights and walked towards the crowd. He saw the deceased lying on his back with a cutlass (which he was holding in the middle) in his right hand. He took the cutlass and later handed it to the Police.

[8] Doctor Mathangi Rajaram Gilkes, a medical doctor at the General Hospital in Grenada testified that he saw the deceased at 2.06 a.m. on the 25th May 2002 at the Casualty Department of the said hospital. His evidence revealed that the deceased was declared

dead on arrival and the following wounds were seen on his (deceased's) body: a 6cm laceration on his left cheek exposing the cheekbone, a puncture wound with clotted blood to his left chest about 2 cm lateral to the nipple and blood draining from his nostrils and mouth.

[9] Margaret Joseph testified that she had a nephew called Neron Joseph who lived with her and that she was aware that Neron, the Appellant and the deceased had problems but denied that the deceased had previously "chopped up" the Appellant.

[10] Neron Joseph testified that he knew the Appellant but had known the deceased for a much longer period. He narrated a previous incident, which he called a "falling out" and not a fight since no one was injured though the Appellant suggested that they should kill the deceased. He emphasized that no one was injured.

[11] He further testified that the Appellant had been a former patient of a mental home.

[12] The post-mortem examination of the deceased was conducted by Dr. Lazaru Vigoa. He found several wounds but the most "severe was a penetrating wound between the fourth and fifth left intercostal space between the ribs going deep in the chest."

[13] According to Dr. Vigoa the cause of death "was hyperbolemic shock" [sic] "due to the perforating wound of the left pulmonary artery. The cutting wounds could have been done by an instrument with a cutting face for example, a knife or a cutlass."

[14] Detective Constable #117 of the Royal Grenada Police Force attached to St. David's Police Station was one of the investigating officers into the case. He confirmed receiving a black rubber-handle cutlass from Sebastian Bain, which he later handed to the Chief Investigating officer Corporal Sheridan Coutain.

[15] Corporal Sheridan Coutain testified that the Appellant identified the cutlass shown to him but refused to put his mark on it.

[16] He further testified that from his observation of the Appellant the latter "appeared normal. He had no bruises, cuts or wounds on his body." He attended the post-mortem examination on the body of the deceased which was identified by his mother, Monica Gilchrist.

[17] Under cross examination Officer Coutain said that he accompanied the Appellant to Dr. Layne's home where he was examined. The officer further said "the accused complained that he was involved in a fight and I observed scars on his body. I saw scars on his face, back, and arm. The accused said he was involved in a fight at Bain's. he did not complain of feeling unwell"

[18] Under re-examination however, this same officer Thomas said "I made no notes about the scars I saw on the accused. The scars appeared to be stale cut-wounds."

[19] The Appellant elected to give an unsworn statement from the dock. He admitted to fighting with the deceased on the 25th May, 2002 at Bain's dancehall.

[20] His version was that everyone was drinking and getting drunk at the said party when "all of a sudden Mark came with a cutlass in his hand. I was scared for me life as they chop me up before. I started wrestling with him. At the same time he end up falling on the cutlass and it went up in his chest. Before that, I managed to wrestle the cutlass away from him. I fire two chops to get him to stop attacking. He managed to wrestle the cutlass from me. By wrestling I fell and he fell on top of me and the cutlass went in his chest."

[21] Apart from the general ground of appeal that the verdict is unsafe and unsatisfactory, the Appellant's grounds of appeal are directed at the learned judge's summing up to the Jury. The summing up was attacked on four grounds and they are as follows:

The Learned Judge, in the course of the trial made a wrong decision on questions of law in that:

(a) i. He failed to assist the jury in relating the law of provocation to the facts. He succeeded in engaging himself in only a theoretical discourse of the law …".

ii. He failed to explain to the jury the import of the words "a person being of ordinary character and being in the circumstances in which the accused was".

(b) He misdirected the jury on the question of self defense, when he told them self defense had to do with what force the accused honestly believed was necessary to protect himself.

(c) He misdirected the jury as to what amounts to an accident in law.

(d) He misdirected the Jury on the law of intention. He failed to adequately review the Appellant's case and put proper remarks thereon.

Finally with regard to sentencing Counsel for the Appellant argued that wrong matters were considered in sentencing.

Provocation

[22] There is no doubt that the Learned Trial Judge addressed the jury on the law relating to voluntary manslaughter under provocation.

[23] The learned Judge correctly directed the jury by quoting the sections of the Criminal Code which deal with provocation but the only directions to the jury as to what facts should be taken into account when considering this aspect of the case are:

> "If you find that the accused was acting under honest extreme provocation then you may return a verdict of guilty of manslaughter and not murder. Was the accused acting under extreme provocation? You heard the evidence. You are the judges of the fact. Was the accused acting under extreme provocation so that the verdict can be reduced from murder to manslaughter?"

[24] While it is true that the Learned Trial Judge read out verbatim all the evidence led at the trial it could safely be said that the law was laid down in one compartment of the summing up and the facts in another.

[25] **In Baldeo Dihal v R 1960 2 WIR 282** Rennie J emphasized that the jury must be told what facts they should be taken into account when considering particular aspects of the law.

[26] This principle has been further emphasized in our jurisdiction in the cases of **Junior Vidal et al v The Queen Criminal Appeal Nos. 4 to 10 of 1992 St. Lucia** and **Stephen Mongroo v The Queen Criminal Appeal No. 3 of 1994 St. Lucia**.

[27] It was argued on behalf of the prosecution that the facts of the case were clear and did not call for elaborate directions.

[28] I do not agree with this proposition since it is incumbent on the trial Judge to direct the jury on all questions that may arise with regard to the law.

[29] Nowhere in the Trial Judge's directions did he direct the jury as to the meaning of the expression "a person being of ordinary character and being in circumstances in which the accused was." A mere direction as noted above is not enough guidance to the jury.

[30] This submission for the Appellant is upheld.

Self Defense

[31] It is my opinion that the trial judge did not misdirect the jury on the issue of self defense but he again fell into the same error of not relating the facts to the law in the case. It is the duty of the trial judge to point out the law to the Jury and put such questions as may appear to him or her properly to arise from the evidence. The failure on the trial judge to do so amounts to a misdirection.

Accident

[32] The Appellant in his unsworn statement from the dock said "At the same time, he end up falling on the cutlass and it went up in his chest." The inference of accident was put in evidence. The trial judge was bound to direct the jury as to the meaning of the word "accident" and to inform them that if they found that the deceased met his death by means of an accident that he was entitled to a complete acquittal.

[33] All the trial judge said was "The third defense was accident. The accused told you that the deceased man had a cutlass, he, the accused, was on the ground. The deceased fell on him and the cutlass screw the deceased chest. An accident. The accused told you that the deceased came with a cutlass to the party. He told you the accused, sorry, the deceased, came to the party with a cutlass. But to the police, hours after the incident, he said, no, the cutlass is his. He admit the cutlass is his but he said is not his, the accused' own."

[34] This lack of proper direction on the accident is indeed a misdirection.

Intention

[35] There is no merit in that ground of appeal. The Learned Trial Judge adequately directed the jury on the meaning of intention. I do not see the miscarriage complained of. This ground of appeal fails.

Wrong matters considered in sentencing

[36] I agree with Counsel for the Appellant that a social inquiry report should have been obtained in absence of a psychiatrist since evidence was led on behalf of the prosecution that the Appellant had been an inmate at a mental hospital.

Verdict unsafe and unsatisfactory

[37] In **Berry v The Queen (1992) 2 AC 364** at 383_Lord Lowry (delivering the judgment of the Privy Council in an appeal from the Court of Appeal of Jamaica) said:

> "the jury are entitled at any stage to the Judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part."

[38] In the circumstances, I would allow the appeal against conviction, and set aside the conviction and sentence. However, notwithstanding the passage of time, I would order a retrial before a different judge and jury.

Suzie d'Auvergne
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal [Ag.]