GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.11 OF 2005

BETWEEN:

KEITH MITCHELL

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Anselm Clouden for the Appellant
Mr. Christopher Nelson, DPP, with Mr. Darshan Ramdhani and Ms. Annette Henry for the Respondent

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2006: May 29;
September 18.

JUDGMENT

[1] GORDON J.A.: According to the appellant, on the night of the 14th September 2004 he met the deceased at his brother's premises and asked the deceased what he was doing there. The deceased cuffed him in his mouth. When the appellant asked him what did he do that for, the deceased hit him a lash with a cutlass on his (the appellant's) back. The appellant escaped, but not before being hit again several times with the cutlass, one such hit being on his head "with all his [the deceased] might" and after being dragged in the street. Further, according to the appellant he, the appellant, did not go to the hospital that night, because he was feeling weak and his brother's transport was down. He spent the night at his home and administered to himself some grated saffron and panadol.

[2] Continuing with the appellant's story, the following morning, September 15, he and his brother started working at repairing the roof of the appellant's parents' house, which had been blown off by Hurricane Ivan. At that time he saw the deceased pass by about 15 feet away in the company of his girlfriend Delrie Edwards. The deceased was holding his infant child. At the time that the appellant saw the deceased he, the appellant had in his hand a cutlass which he was using to cut the galvanize that was being used to repair his parent's roof. The appellant's story is that the deceased gave the child to his girlfriend and came towards him. A scuffle took place with the deceased trying to take the cutlass from him. The appellant says he ran away from the deceased who continued to follow him; the appellant continued swinging his cutlass left and right "to keep him [the deceased] at his distance." The deceased got cut and fell in a drain.

[3] Delrie Edwards gave a somewhat different version of the events on September 15. She said that she was walking with the deceased who was holding her daughter Delica, who was some 16 months old at the time, in his right arm. The deceased was, she said, the father of the child. When they got to the gap of the parents of the appellant she saw the appellant standing next to a van. She said she was walking about one or two steps ahead of the deceased when she heard a "whooping noise" and at that time she heard her baby screaming. Her evidence thereafter was: "I looked around and saw my baby on the ground, lying in the center of the road on her left side with blood all around her; and Allan [the deceased] was being chopped by Keith Mitchell."

[4] The deceased died subsequent to this incident and one of the issues in this appeal is the cause of death. This will be dealt with subsequently.

[5] The appellant was charged with murder and, at his trial, was convicted of murder and sentenced to 12 years with hard labour. He has appealed against his conviction on essentially two grounds.

[6] Medical evidence as to the nature of the wounds suffered by the deceased was given by Dr. Douglas Noel, an Orthopaedic surgeon who qualified as a doctor in 1984. Quoting directly from the record of proceedings these were Dr. Noel's findings:

> "Findings – laceration: Left temporal – 2.5 cm; left shoulder – 12 cm; left proximal forearm – 17 cm – curved, deep with dislocated left radial head grit, grass, leaves – fully divided muscle bellies of flexur digitorum superficialis, flexur carpi radialis (muscle tendon going down), pronator teres, flexor carpi ulnaris (muscle fully divided), ulna nerve, median nerve palmar interosins atery, fracture ulna mid-shaft plus proximal ulna comminuted (multiple pieces).
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> "Left forearm laceration – 9 cm. with all extensive tendons divided, 2 cm left forearm laceration.
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> "Right upper limb – right elbow laceration – 12 cm with dislocation of the right radial head, right ulna wrist laceration – 12 cm, laceration between index and middle fingers split."

In cross-examination the doctor characterized the wounds as "the worst wounds I have ever seen in my life"

[7] The first ground of appeal was that the learned trial Judge's "direction to the jury in regards to "intention" confused them and was not in keeping with the facts and the governing law".

[8] The learned trial judge had this to say to the jury on intention[1]:

> "The Prosecution must also prove that the accused intentionally caused the death of the deceased. Now intention is not something that can be proved positively because we can't see into each other's mind, so therefore, in order to determine intention you must look at all the surrounding circumstances – the things and the things done, and use those circumstances to decide in your minds whether you feel sure that the accused intended to kill the deceased. Now no other intention will suffice. The intent must be the intent to kill for murder. It can't be anything less. So it's important for you to decide whether the accused intended to kill the deceased.
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> "The Prosecution have to prove that the accused had the specific intent to kill the deceased and that intent can only be subjective to the accused.

[1] P. 6 of the Record of Proceedings line 22 – page 7 line 22

So that in deciding whether the accused had the necessary intent, you must consider the evidence of what he said, what he did, and the effect of what he said and did.

"In law, and it's set our in our Criminal Code, "If a person does an act for the purpose of causing an event", such as the death of the deceased, "he is taken to have intended to cause that event although what he did is unlikely to have caused the event."

"Similarly, if the accused acted voluntarily believing that it is probable that a certain event, in this case the death of the deceased, will be caused, he is taken to have caused that event. The actual intention of the accused is what matters in this case. Now that intent need not be longstanding. It could arise on the spur of the moment. It's not something that needs to have developed over time.

"Now if you find that the accused used that cutlass on the deceased believing that the death of the deceased would be caused, then he must be taken to have intended to kill the deceased although he didn't do it for that purpose."

[9] As I understand the complaint of learned counsel for the appellant as stated in his skeleton argument, this case was an extraordinary case which the trial judge treated "as a run-of-the-mill murder case and failed to alert the jury that 'they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty'".

[10] Section 12, subsections 1 – 3 of the Criminal Code Cap 1 of the Revised Laws of Grenada, 1994 are apposite and read as follows:

"12. (1) If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also in this belief, the act is unlikely to cause or to contribute to cause the event.

"(2) If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this Code, although he does not do the act for the purpose of causing or of contributing to cause the event.

"(3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event,

> he shall be presumed to have intended to cause that event, until it is shown that he believed that the acct would probably not cause or contribute to cause the event."

[11] It would appear to me that the learned trial judge covered, in his own words, all the issues raised by section 12 that were relevant to this case.

[12] As learned counsel for the Crown pointed out, this court, in this very jurisdiction, has held that simplicity is to be preferred to complexity in any direction on intent. In Nathan Charles v The Queen[2] Singh JA adopted the statement by Lord Bridge in R v Maloney[3] to the following effect:

> "… The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the Judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding. In trials for murder or wounding with intent, I find it very difficult to visualise a case where any such explanation or elaboration could be required, if the offence consisted of a direct attack on the victim with a weapon, except possibly the case where the accused shot at A and killed B, which any first year law student could explain to a jury in the simplest of terms. Even where the death results indirectly from the act of the Accused, I believe the cases that will call for a direction by reference to foresight of consequences will be of extremely rare occurrence. I am in full agreement with the view expressed by Viscount Dilhorne that, in Reg. V Hyam (1975) A.C. 55, 82 itself, if the issue of intent had been left without elaboration, no reasonable jury could have failed to convict." (emphasis supplied)

[13] Counsel for the appellant argues that the direction given by the trial judge "flies in the face of Woollin[4] and those decisions that have since expanded upon it in these highly exceptional circumstances. Therefore, the appellant's appreciation of death or serious bodily harm as a virtual certainty does not constitute the necessary intention for murder, in these special circumstances of casting a baby down on a cement floor or getting into a shoving match with your life-long friend a few days after everyone's world has been turned upside down, unless the jury is

[2] Gdn. Criminal Appeal No. 1 of 2001, July 16,2001
[3] [1985] 1 AC 905 at page 926
[4] R v Woollin [1999] 1 Cr App R 8

specifically directed in the words found in Woollin and cases following therefrom."[5]

[14] To the extent that I understand the argument of learned counsel, I believe his premise is that in the circumstances of Grenada at the date of this incident, that is that Hurricane Ivan was a very recent memory, the learned trial judge should have eschewed the golden rule of simplicity. Frankly, counsel has managed to give the phrase 'non sequitur' a new dimension.

[15] I find that there is absolutely no evidence to support the inference that counsel for the appellant would have us draw, that the appellant was so unsettled in his mind by Hurricane Ivan and its aftermath that as a person of hitherto unblemished character he set about his good friend of 35 years without an appreciation of what he was about. Neither the defence of temporary insanity nor diminished responsibility was run at the trial and neither will be considered by this court. It needs to be remembered that Dr. Noel, in response to counsel for the appellant in the trial said that the wounds were the worst he had seen in his life.

[16] I have no doubt, and the jury must have had none, that the appellant intended to inflict most serious and mutilating wounds to the deceased. He did it with a cutlass. I find no error with the judge's summing up on the issue of intention.

[17] Learned counsel for the appellant advanced what he referred to as an additional ground of appeal. In essence that ground was that whatever the appellant had done to the deceased did not cause the death of the deceased. There were new and intervening acts, so his argument went, that caused the death, and not the chop wounds.

[18] Evidence of the cause of death was given by Professor Lazarus Vigoa who gave evidence that he qualified as a doctor some 39 years before the case and had

[5] Paragraph 11,12 of Skeleton argument on behalf of appellant

been a pathologist for some 35 years. His evidence as to the cause of death was as follows:

> "In my opinion, the first cause of death was acute adult respiratory syndrome. It is the so-called shocked lungs… Shock is a dynamic process. In this case, it was a very severe infection – a septic shock.
> "Second cause of death – three very recent surgical procedures for extensive debridement of infected wounds and amputation of left arm. Abridement is when wounds are severely infected and the surgeon would have to rip off the infected tissue.
> "The third cause of death was aseptic shock from the clinical viewpoint…
> "Fourth cause of death – like a contribution to death – acute gastritis and fatty liver. It is like a consequence. The shock is like a chain with many links. One of the links is acute gastritis, which is caused by the shock."

[19] In cross examination Professor Vigoa said "I found cuts – in shoulder – in the hand - - in the wrist. He was operated twice due to many cuts in left arm. The infection did not come about as a result of the operation. He had infected wounds. The cut – the chopping caused the infected wound."

[20] The evidence of Dr. Noel was that when he saw the deceased on Saturday, 17th September, he was quite worried. He felt that an upper limb amputation was necessary. He continued: "He had a high temperature; he looked toxic – ill, and there was an offensive smell coming from the left upper limb which smell indicate [sic] severe infection. This was a result of the multiple lacerations.[6]" Later in cross-examination Dr. Noel said the following: "The amputation was done by Dr. Dragon. At that state the sepsis seemed to be in the whole body. He developed a situation of septic shock. Septic shock would have occurred after the operation but had started and was fully established after the amputation. Severe infection and sepsis are the same thing[7]."

[21] In his summing up the trial judge alluded to the cause of death twice. Firstly, he said: "Now in this case also, the prosecution must prove that the act of the accused contributed substantially to the death of the deceased. This is all they need prove in this case. They need not prove that the act of the accused was the

[6] P. 50 of the Record of Appeal lines 21 - 23
[7] p. 51 of the Record of Appeal lines 17- 22

sole or the principal cause of death. All they need to prove was that the act of the accused contributed substantially to the death of the deceased. And I am bringing that to your attention because much was made in cross examination of the Professor, Professor Lazarus Vigoa, the Pathologist, as to whether the deceased died as a consequence of the wounds or whether he died as a consequence of the infection. I will go to show you when I analyse the evidence of Professor Vigoa that what he was saying is that everything happened in series; wounds followed by infections followed by death."

[22] Secondly, when reminding the jury of the evidence of Dr. Noel the trial judge said the following: "He [Dr. Noel] was asked his opinion and he said there was no other subsisting condition which could have aggravated the patient's condition. And the way he assessed it is that 'There was nothing I could have done to arrest the severe infection that occurred after the amputation, and even if the patient had got in a few hours before, that would have not have made much of a difference' Now that becomes important because as I did point out to you, what the Prosecution has to prove is that the act of the accused was the substantial cause of death. So you can probably make the connection in your minds that it was the wounds that led to the infection that ultimately led to the death of the accused."

[23] Learned counsel for the appellant referred the court to R v P.D.[8], a case from the English Court of Appeal, a case most helpful to this court, but, I did not find of assistance to the argument of learned counsel. At paragraph 45 of that judgment Lord Justice Rose, who delivered the judgment of the court, said the following:

> "In R v Malcherek [1981] 1 WLR 690 the defendant inflicted serious brain damage. The victim required a life support machine which the doctors, several days later, turned off and death followed. The trial judge withdrew causation from the jury and an appeal on the ground that the doctors caused the death was dismissed. It was held that the injury inflicted by the defendant was an operating and substantial cause of death and it was immaterial whether or not the doctors also caused the death. Lord Lane C.J. said at page 696H:
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> > 'There may be occasions, although they will be rare, where the original injury has ceased to operate as a cause at all, but in the

[8] [1996] E.W.J. No. 4513

> ordinary case if the treatment is given bona fide by competent and careful medical practitioners, then evidence will not be admissible to show that the treatment would not have been administered in the same way by other medical practitioners. In other words, the fact that the victim has died, despite or because of medical treatment for the initial injury given by careful and skilled medical practitioners, will not exonerate the original assailant from responsibility for the death.'"

And again at paragraph 55

> "The correct approach in the criminal law is that enunciated in Smith and the other authorities to which we have referred: were the injuries inflicted by the defendant an operating and significant cause of death? That question, in our judgment, is necessarily answered, not by philosophical analysis, but by common sense according to all the circumstances of the particular case."

[24] The jury in this case was given an adequate direction in respect of cause of death and there was more than enough evidence to support their verdict.

[25] In sum, I find no merit in the appeal of the appellant. The conviction for murder is confirmed as is the sentence of twelve years imprisonment with hard labour.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal