GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.10 OF 2005

BETWEEN:

LENNIE ROSS

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 Rhamdanni and Ms. Annette Henry for the Respondent.

2006: May 29;
September 18.

JUDGMENT

[1] BARROW, J.A.: On the fateful Saturday the deceased visited the appellant at the appellant's home in Concord. The deceased was the brother of the appellant's mate and was "Uncle Alister" to the appellant's children. At the suggestion of the deceased the appellant and the deceased went by bus to La Borie to fetch the children who had been staying with an aunt. The children's mother had absented herself from the home for some weeks.

[2] On the way back from fetching the children the appellant and the deceased went in a shop and "buy a rum." They made another stop and consumed "an eights of rum" at a bar in St. George's. When they reached Concord the children went

ahead and the two men went into a shop where they spent at least 45 minutes drinking rum. At some point that day the deceased reached a stage of staggering inebriation, according to the evidence. Nothing was said about the effect of the drinking on the appellant but the defence proceeded on the basis that he, too, was adversely affected by drink.

[3] The appellant gave both a caution statement to the police and an unsworn statement in court. The appellant said that at some point after they had returned to the appellant's home after fetching the children the deceased went to visit another person and he, the appellant, went to lie down. The deceased returned about half an hour later and went to lie in the bed of the appellant. By this time night had fallen. The appellant said he told the deceased to move but that the deceased refused to remove and the appellant left him and went to another room. After a short time the appellant returned to the bedroom and the deceased was then sitting in a chair. The appellant said he went back in his bed and fell asleep.

[4] About an hour later, the appellant said, he heard his daughter call. He went and saw the deceased lying on the floor between the two rooms. The appellant said he asked the deceased if he came to rape his children. Then, the appellant said, the deceased got up and hit him and they started to 'scramble.' According to the appellant the deceased kept punching him. The appellant said the deceased then started breaking up his glass items. Then the deceased took the appellant's stove and threw it in the appellant's chest. It was very painful, the appellant said.

[5] In the words of the appellant from his unsworn statement: "Then I took my cutlass which was underneath of the stove. Then I threw a few planass at him. He then fell down and then after he fall I go was to help him." In the caution statement the appellant had said he "started planassing him in his head and face."

[6] The appellant's daughter, who was around 13 years of age at the time, testified to a different version of how the appellant injured the deceased. Taking the story

from the point where the deceased returned to the appellant's home and went to lie in the appellant's bed and would not remove, the daughter said that then her father, to whom she referred as Lennie, asked for his cutlass and went outside. When the appellant came back inside the appellant asked where the deceased was and the children showed the appellant where the deceased was sitting in a chair. She said: "He just hold him and he knock him down on the ground. It had an old bed, he break out piece from it and start hitting him with it. Lennie was hitting Uncle Alister on his head with it."

[2] The daughter said the appellant was asking the deceased for the whereabouts of the children's mother and the deceased said he would not tell the appellant. The daughter said the piece of wood fell from the appellant's hand and the appellant again said he was going for his cutlass. Apparently, the appellant returned with his cutlass and, the daughter said, "Lennie hit Uncle Alister with the cutlass in he face. He fall down. Lennie come back inside the house and he hold Uncle Alister and start to hit him more with the cutlass. Me and my brothers and sisters we just go inside the room and was screaming."

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[3] She continued:

> "While in the room I heard Lennie ask Alister where me mother is. Alister say he not telling him where she is. Alister leave and he come inside my room. He drag inside of the room on he knee. Blood was running down from he head to his face.
> Lennie came and he was asking us if to cut out he neck. We tell him no."

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The daughter testified that:

> "Uncle Alister ask Lennie for help. Lennie tell him to stay there and dead. Lennie hold him and drag him in front of the door – the main door. He just leave him there."

[4] The deceased managed to drag himself to the drain outside the house. The accused went to a neighbouring residence and told the occupants that he had killed a man. The police were alerted. They took the wounded man away. There is no direct evidence but the pathologist who performed the post mortem

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examination thought the deceased may have lived for about 4 to 8 hours after he received the wounds.

[5] The pathologist said he found multiple wounds. There were six superficial wounds in the scalp. There were four deep wounds. There was a large haematoma in the centre of the scalp. There were two more deep wounds in the scalp. There were other wounds on other parts of the body including an external haematoma on an extensive area of the chest and defensive wounds on the left arm and both hands.

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[6] The internal examination revealed two complete fractures of the skull. There was a very severe brain contusion with laceration and sub-arachnid haemorrhage. As a result of the brain contusion there was a very severe brain oedema. The cause of death was the very severe brain contusion with very severe brain oedema and cerebral herniation secondary to the two complete open fractures of the skull.

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[7] The pathologist stated that there had been at least 10 different blows to the body. He said the "heavy-cutting, perforating instrument" "such as a heavy cutlass" that caused the injuries must have been wielded "as a very heavy blow in order to cut the skin and the bone." He said that a person who received such injuries had very little chance of survival.

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Intent

[8] Counsel for the appellant contended that the direction that the judge gave on intent was confusing and inadequate. The direction that the judge gave was as follows:

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> "[The prosecution] must also prove that the act was carried out intentionally. Now you know that intention is not capable of positive proof because it's all in the mind, so it is important that you consider all the events that took place before, and you must consider all the things that were said and seek to arrive at a determination whether the accused intended to kill the deceased, and you are satisfied of that to the extent that you feel sure.

"In order to prove the offence of murder, the Prosecution must prove that the accused had the specific intention to kill. Nothing less will suffice. The Prosecution have to prove the accused had the specific intention to kill the deceased, and that intention can only be subjective to the accused; so in deciding whether the accused had had the necessary intent to kill, you must consider the evidence as to what he did, what was said to him, what he did not do and the effect of his actions. The law in the Criminal Code gives us some guidance. It says that

> "if a person does an act for the purpose of causing an event he is taken to have intended to cause that event, although what he did is unlikely to have caused the event."

"Also, if the accused acted voluntarily believing it is probable that a certain event will follow, he is taken to have caused that event. The actual intention of the accused is really what matters and that intention must exist at the time when the offence allegedly took place. It need not have been something that is of long standing; it could arise on the spur of the moment. If a person does an act for the purpose of causing an event, he intends to cause that event; therefore, if you feel sure that the accused delivered those blows for the purpose of causing the death of the deceased, then he intended to kill him. Also, if a person does an act voluntarily, believing it will cause an event such as death, he must be taken to have caused death although he did not act for the purpose of causing death."

[9] In his written submissions, in which counsel contended that the judge's direction was confusing and inadequate, counsel did not set out those directions. Counsel set out only the judge's quote from the Criminal Code and the second half of the penultimate sentence in the last paragraph. The contention that the judge's direction was confusing and inadequate was, therefore, a contention bereft of any analysis of what the judge actually said. It was a dubious way of proceeding.

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[10] In expanding on his contention counsel argued that the judge "failed to give directions touching on the subjection (sic) test of intention where section (sic) raises a presumption of intent following a voluntary act, the probability of consequences which resulted from the act of "chopping"." Counsel relied on the decision of this court in Tench v R[1] in which a conviction for manslaughter was substituted for a conviction for murder because the judge in that case did not direct

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[1] (1992) 41 WIR 103

the jury that they must consider the subjective belief of the accused in the probability of the consequence of his act but directed them only in terms of an objective test. The difference, of course, between the instant case and Tench is that in the instant case the judge gave a direction in clear terms that the specific intention to kill "can only be subjective to the accused".

[11] Counsel also argued that the judge failed to direct the jury as to how probable were the consequences of the chopping and whether the accused foresaw that consequence in the moment before or at the time of the blows. Counsel accepted as settled law that:

> "In directing the jury on the mental element 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 in argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.
> " In trials of murder even where death results indirectly from the act of the accused cases that will call for a direction by reference to foresight on consequences will be exceptionally rare."[2]

[12] Counsel submitted that this was one of those exceptionally rare cases. Counsel therefore argued that the judge in the instant case should have directed the jury in accordance with the statements of the law made in a number of leading cases on the way in which juries were to be directed on how to determine the intent with which the accused did the act that caused death. In such cases the issue arose as to the degree of probability that the actions of the accused would cause death and the probability that death was therefore intended because it was a virtual certainty. It is revealing to look briefly at the factual situation in the cases on which counsel for the appellant relied.

[13] The earliest of the cases cited was R v Hyam[3] in which a mistress learned that the object of her affection was proposing to marry another. The mistress went early

[2] R v Moloney (1985) 81 Cr. App. R. 93, headnote
[3] [1973] 3 All ER 842

one morning and set fire to the home of the rival. The daughters of the rival were overcome by the fumes and died. The defence of the mistress was that she had intended only to frighten the rival away from the neighbourhood and had not intended to cause either bodily harm or death to anyone. The judge directed the jury that if they were satisfied that when the appellant set fire to the house she knew that it was highly probable that it would cause death or serious bodily harm then the prosecution had established the necessary intent and it was immaterial that the appellant had intended merely to frighten the rival. The English Court of Appeal held that the direction to the jury was proper. It held that intent could be established by showing that the accused had foreseen that death or grievous bodily harm would be the probable consequence of his act; it was not necessary to prove that the underling purpose or motive was to bring about that consequence. However, it was necessary to prove by reference to all the evidence that the accused had actually foreseen the consequence.

[14] The second of the cases in which the question of probable consequences and foreseeability arose was R v Moloney[4] in which the appellant had shot his stepfather in a drunken contest between the two of them as to who could load his empty shotgun more quickly and shoot first. The question that arose was whether, when he fired at his stepfather, the appellant realised that the gun was pointing straight at his stepfather's head or whether in his drunken condition it never entered his mind when he pulled the trigger that the gun was pointing at his stepfather. Lord Bridge of Harwich, with whom the other law Lords concurred, in fact stated that no question of foresight of consequences arose for consideration: it was a straight case of what facts the jury believed the appellant realised or appreciated at the time. The sole issue was whether, when the appellant pressed the trigger, the fact that the gun was pointing at the stepfather's head and the inevitable consequence of that fact were present to the appellant's mind. If they were present to the appellant's mind the inference would be unmistakable that the appellant intended to kill his stepfather.

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[4] (1985) 81 Cr. App. R. 93

[15] The third relevant case is Frankland v R[5] in which the appellant had tied up and gagged an elderly man who died as a result of the harm this caused him because of his underlying medical condition. The judge directed the jury that they were not concerned with what the accused himself contemplated as the probable result of his unlawful act but were to apply the objective test of what an ordinary reasonable man would in all the circumstances contemplate as the natural and probable result of his actions. The House of Lords decided that this direction was wrong; it quashed the murder conviction and substituted a verdict of guilty of manslaughter.

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[16] R v Hancock[6] is the fourth of the cases in this area upon which counsel for the appellant relied. Two striking miners stood on a bridge and threw a concrete post and block when a car carrying a non-striking miner was passing below. The block hit the car causing the driver to lose control and it hit the post and crashed, killing the driver. The prosecution contended that by the very nature of the actions the accused must have intended to cause really serious harm to the occupants of the car. The defence case was that the accused had intended only to frighten the occupants. In this context the guidance given in Moloney (supra) was reviewed and found to be misleading because of its failure to address the factor of the probability of a natural and foreseeable consequence occurring. The House of Lords thought that the degree of probability was crucial to the jury's consideration of whether the accused must have intended the consequence.

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[17] In Tench v R[7] the appellant was a mental defective with the intelligence quotient of a child of 6 to 8 years. One night he had a row with his father with whom he lived and while the father was sleeping he hit the father at the back of the head with a heavy stick, killing him. As discussed earlier, this court decided that the failure of the judge to direct the jury that they should consider the subjective belief of this appellant vitiated the conviction. Because of the mental state of this

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[5] [1987] A. C. 526
[6] [1986] 1 ALL ER 641
[7] Supra

appellant there was a likelihood that the jury would not have concluded that at the time when the appellant hit his father the appellant believed that it was probable that the blows would have killed his father.

[18] The final case on which counsel for the appellant relied was R v Woolin[8] in which the appellant lost his temper and threw his three-month-old son on to a hard surface. The child sustained a fractured skull and died. The prosecution did not contend that the appellant intended to kill the child but pitched their case on the basis that the appellant intended to cause serious harm – which the appellant denied. In this case the Lord Steyn confirmed that the jury should have been directed that they should not find that the appellant had the necessary intention, unless they felt sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the appellant's actions and that the appellant appreciated that such was the case.

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[19] The facts of these cases gave rise or had been thought to give rise to the need for an elaboration of the simple direction to the jury that they must consider the intent of the appellant in light of the relevant facts. In these cases the appellant contended variously that she or he intended only to frighten, or did not realize that the gun was pointing at the victim, or did not advert to the ill health of the victim, or did not think about the effect of throwing a child, or did not have the intelligence to realize that the blows could kill. They were all cases in which the fatal action consisted of either a single act or two acts. It was because of that factor that the defence was able to argue that the fatal consequence of the act or acts was not so probable as to be obviously intended. It is that argument that made it necessary (or arguably necessary) for the judge to give an elaboration on the direction on intent.

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[8] [1999] 1 Cr. App. R. 8

[20] In the instant case there were no facts of a similar nature to give rise to a need for elaboration of the simple direction on intent that the authorities continue to firmly hold is all that should be given save in exceptional cases. Subject to the issue of drunkenness, which I will address as a separate ground of appeal, it was a straight case for the jury to consider the intent behind the appellant delivering at least ten chops or blows with a cutlass to the deceased. I find there was no need for the judge to have elaborated on the direction on intention that he gave. I would therefore reject this ground of appeal.

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The effect of drink

[21] The appellant complains that the judge did not give sufficient direction on the effect of drink on the appellant's mind at the time of the incident. This is what the judge told the jury:

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> "Now, in this case there is evidence of voluntary consumption of alcohol. There is evidence coming from Sherrian and also, we heard evidence from the accused himself, of he and the deceased having consumed alcohol on at least two occasions. The accused says three occasions; Sherrian says two occasions. Now the Prosecution must prove the specific intent to kill, I did tell you that, for the offence of murder at the time when the acts were perpetrated. There is evidence that the accused had been consuming alcohol prior to the material time when the deceased sustained the injuries that ultimately led to his death. Now that is a factor that you can take into account when considering whether the Crown has proved the necessary intent.
>
> You must have regard to all the evidence, including the evidence of the accused having consumed drink in order to draw the inference as you consider proper from the evidence. Then after you've done that, you must ask yourselves whether you feel sure at the material time the accused had the requisite intent to kill. But I must warn you that the mere fact that the accused mind may have been affected by drinks so as to cause him to act in a way that he would not otherwise have acted if he was sober, does not assist him so long as you find that the necessary intent is present."

[22] In his written submissions counsel for the appellant referred only to the first and second sentences in the second paragraph of the judge's direction that I have quoted above. That is what counsel identified as inadequate. Counsel simply

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ignored the major portion of the judge's direction on drink. The inevitable effect of counsel's failure to challenge or criticize the direction that the judge gave is that there is before this court no challenge to the summing up on the effect of drink. I would dismiss this ground of appeal.

Self-defence

[23] Counsel's written submissions on the judge's direction on self-defence are similarly selective on what they challenge. Counsel contends that the judge failed to give a direction in terms reflecting the guidance given by Lord Morris in Palmer v R[9] that juries must be told that it may be difficult for a person under attack to weigh in the balance the degree of the force with which he responds:

> "If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

[24] The criticism is egregious because the judge explicitly directed the jury in very similar terms. This is what the judge said:

> "Now if the amount of force was out of proportion to the nature of the attack or in excess of it, then it amounts to murder or manslaughter, as you may find it. You must decide whether the force used was excessive or out of proportion or whether it was reasonable. You must have heard the expression "taking a sledge hammer to kill an ant'; that is a demonstration in metaphorical form of excessive use of force. Remember that in the heat of an affray a person cannot really weigh precisely the amount of force that he must deploy to repel an attack because it's all happening in a very short space of time. One does not have time to stop, think and weigh. You must take that into account and bear in mind the danger that the accused honestly thought that he was facing."

[25] I would also dismiss the complaint that the summing up on self-defence was defective.

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[9] [1971] A.C. 814 at 832

Adapting the law to the facts

[26] The remaining ground of appeal asserted that the judge failed in his summing up "to provide the jury with comprehensive directions of law adopted to the facts of the case in order to enable them to properly understand their task." For such a contention to succeed the appellant needs to point to specific instances where the direction fell short of what was required in the circumstances of the particular case. The one specific instance to which counsel for the appellant pointed was the following direction to the jury:

> "Now if you disbelieve the accused' story then, of course, you must find him guilty. If you disbelieve that what he told you is true then you must go back to the prosecution's case and examine it as a whole and give it careful consideration."

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[27] It appears clearly from the remainder of the relevant direction that the word "not" was accidentally omitted from the second part of the first sentence and that what the judge intended to tell the jury was, "of course you must not find him guilty." The entire direction was in these terms:

> "Now if you disbelieve the accused' story then, of course, you must find him guilty. If you disbelieve that what he told you is true then you must go back to the prosecution's case and examine it as a whole and give it careful consideration. You are to convict only upon the strength of the Prosecution's case. The Prosecution must satisfy you to the extent that you feel sure. I will recount to you in a moment what he said to you in his unsworn statement. In having regard to that, do not say to yourselves that you must convict him purely because you believe he is telling lies or because you believe he has a weak defence. This case must be determined on the strength of the Prosecution's case and not upon the fact that you consider the defence to be weak or maybe that the accused is telling you lies."

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[28] In my view the jury could have been in no doubt that if they disbelieved the story of the accused they were not to find him guilty but were required to go back to the Prosecution's case and examine it and should convict only if the strength of the Prosecution's case made them feel sure of the guilt of the accused. This is exactly what the judge told them. I have no doubt, therefore, that the rest of the direction completely cured the mistake in the summing up and neutralized the

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misstatement. I would apply the proviso to section 41 of the West Indies Associated States Supreme Court (Grenada) Act and hold that notwithstanding that it is the opinion of the court that the point raised in the appeal might have been decided in favour of the appellant, I find that no miscarriage of justice has actually occurred. Accordingly, I would also dismiss this ground of appeal.

Conclusion

[29] In my view the appeal fails on all grounds and I would therefore dismiss the appeal.

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Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal