SAINT LUCIA

IN COURT OF APPEAL

CRIMINAL APPEAL NO.5 OF 2003

BETWEEN:

ALEXANDER DETERVILLE

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 Rawlins	Justice of Appeal

Appearances:

Mr. Callistus Vern Gill for the Appellant
Ms. Victoria Charles-Clarke, Director of Public Prosecutions for the Respondent

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2006: February 7;
October 9.

JUDGMENT

[1] BARROW, J.A.: The valour of the late Mr. Linus Pamphille was not restrained by thoughts of discretion. At about 2:00 a.m. in the morning of Tuesday 3rd October 2000 he and his wife heard the sound of intruders in his shop, above which he lived, and he went to investigate.[1] He took a small cutlass with him.

[2] The intruders were still inside the shop when he went down. While Linus Pamphille was outside the door of the shop the intruders tried to open the door by pulling it open. The door opened inwards. Linus Pamphille resisted this effort by holding on to the door and pulling it to keep it closed. Linus Pamphille also used his cutlass to strike the hands that were pulling the door.

[1] Credit is given to the prosecution for the very helpful summary of the facts contained in their written submissions which I paraphrase.

[3] Both Mr. Pamphille and his wife, who had remained upstairs, called out for help. Among the persons who responded and came to the scene were Linus Pamphille's brother, George Pamphille, and a neighbour, Doris Matthew. When these two responders arrived at the front of the shop they saw Linus Pamphille with his cutlass striking at the hands that were pulling the door.

[4] After a while the door was pulled open and one man ran out. George Pamphille pursued him and struck him with a piece of wood. Doris Matthew recognized the man who ran out as one "Peter".

[5] Then Linus Pamphille went inside. By this time the wife, also named Doris, had come down and was also outside the shop. The wife, George and the neighbour all testified that they heard the sound of "wrestling" coming from inside the shop but they could not see inside the shop. After the deceased had been inside the shop for some five or ten minutes a second man emerged. He was carrying in his hand the cutlass that Linus Pamphille had taken into the shop. The witnesses later identified that man as the appellant. All three eyewitnesses testified that outside was well lit: there was a light on the front of the shop and one on the side of the shop as well as a streetlight across the road from the shop.

Comment [j1]: The deceased has not heretofore been identified. Does it help that in the very first sentence of the judgment reference is made to the late Linus Pamphille/

[6] George Pamphille said the accused ran past him. This witness said he was standing about 8 feet away from where the accused passed and saw his whole body and face clearly. The witness said he saw the accused for about 2 minutes.

[7] Doris Matthew said the accused passed about 5 feet away from her. She said she saw his face clearly and there was nothing that obstructed her view. She said she observed him for about 2 to 3 seconds.

[8] The wife said the accused passed about 2 feet from her. She said she saw him clearly. She testified that she had seen him earlier that day when he came to the shop with another man.

[9] After the second intruder ran off the three went into the shop and saw Linus Pamphille lying on the floor, unable to get up. The wife testified that "His legs were mashed up" and "he looked very bad". The thieves had left behind two crowbars and a broken wooden stool. The police later took these items.

[10] George Pamphille testified that while he was on the way with his injured brother to the hospital he spotted the accused near a garbage dump. George testified that the accused was wearing the same clothes he had been wearing when George saw the accused earlier.

[11] At the hospital, after a nurse had attended to Linus Pamphille the accused arrived and sought treatment for his hand. George Pamphille testified that he exclaimed, in the presence and hearing of the accused, "look the same man who got wounded on his finger". At that time police officers were present at the hospital. The police arrested the accused and took him away. No identification parade was ever held.

[12] Linus Pamphille was discharged from the hospital after about five days, with casts on both legs. On 11th October 2000 he was readmitted and he died later the same day. The pathologist testified that the cause of death was pulmonary embolism secondary to clots forming in the veins in the leg. The injuries to the legs and the resulting immobilization of the legs caused the clots, which travelled to the lung. The pathologist also testified that a contributing cause of death was "sepsis, as a result of aspiration pneumonia and the right knee wound infection". The doctor stated that the injuries were consistent with blunt force trauma to the front of both legs.

[13] Although the appellant remained silent at the trial he had given a caution statement to the police that explained that he had got a cut on his finger when four men attacked him that night and one of the men chopped him on his finger while he, the accused, was holding a stick that he, the accused, had taken away from one of his attackers. In that statement the accused raised the defence of alibi. The

prosecution brought the alleged alibi witness to testify that the appellant was not with her, as he had stated.

[14] Against the jury's verdict of guilty of murder the appellant relied on three grounds of appeal. The appellant submitted that the judge misdirected the jury on the issues of identification, intention and alibi.

Alibi

[15] In the course of oral argument the court indicated that it did not wish to hear the Director on the issue of alibi because it remained clear, after hearing counsel for the appellant, that there was no flaw in the judge's direction on alibi. The scant submission of counsel on the alibi direction was that the judge "failed to instruct the jury that it was still the duty of the Prosecution to make sure of the guilt of the accused." The unarticulated premise of the submission was the well established proposition of law that a jury must be told that even if they are satisfied that an accused has given a false alibi, and they have therefore rejected the alibi, the jury must not conclude, because the defence of alibi has failed, that the accused is guilty but they must go back and consider the prosecution's case to see whether the prosecution's case satisfies them of the guilt of the accused.[2]

[16] In the instant case such a direction was virtually the last thing the judge told the jury. She told them:

> "But even if you come to that conclusion [that the alibi was a lie], remember the directions I gave you about the alibi, the fact that he is not speaking the truth is not the end of it. Even if you find that he wasn't speaking the truth in the caution statement, you cannot convict him for just that reason. You have to go back and look at the rest of the prosecution's case, because they must prove the case so that you feel sure."

In my view there was no misdirection on alibi and I would reject that ground of appeal.

[2] See R v Lesley [1994] E.W.J. No. 820 at paragraph 4

Identification

[17] The misdirection on identification that counsel for the appellant advanced was that the judge failed to give the particular attention that was merited, in directing the jury, to the discrepancies among the three eyewitnesses and to the inconsistencies in their evidence. Counsel referred only passingly to R v Turnbull[3] and I think he was quite right to do so because the judge gave a very clear Turnbull warning on the need for great care in acting on evidence of identification because of the ever present risk of mistaken identity.

[18] Counsel relied explicitly on Langford and Freeman v The State of Dominica[4] to argue that the judge paid insufficient regard to the evidence of identification by not warning the jury "about the absence of evidence about the identification of the Appellant by George Pamphille at the Hospital." Counsel also argued that the judge did not give the issue of the appellant's attire the kind of attention that it warranted. Counsel submitted that the judge "merely highlights the inconsistencies and discrepancies but [does] not address it (sic) properly in directing the jury on identification and the care to be taken by them. The specific direction had to be dealt with step by step and the evidence relating to each aspect of the direction addressed at that time. Not a separate time. There needs to be sufficient clarity in an ordered fashion."

[19] In his written submissions the only instance that counsel gave to support the general criticism was that the judge dealt with the dock identification of the appellant not at the point in her summing up when she dealt with the evidence of the witnesses' observation of the appellant on the scene, but at a later point in her summing up. The only addition in oral argument to that instance was counsel's complaint that the judge did not refer to the length of time and distance for which and from which George Pamphille observed the appellant at the dump and at the hospital.

[3] [1977] QB 224
[4] (2005) 66 WIR 194

[20] The judge began her directions on identification by telling the jury to pay close attention to what she was going to tell them on the subject because the prosecution's case "stands or falls on the correctness" of the identification of the three eyewitnesses. She then told the jury to approach that evidence with the utmost caution and told them of the reason for that caution. The judge told the jury that it was possible for the three eyewitnesses to be all mistaken. Therefore, she continued, they must "examine carefully how long each witness who identified the accused knew him for." The evidence was that Doris Matthew and George Pamphille were seeing the accused for the first time; and of Doris Matthew the judge said "her evidence was replete, full of confusion, contradiction, inconsistencies …" The judge then drew to the jury's attention the specifics of the confusion and unreliability in the evidence of Doris Matthew.

[21] The judge next directed the jury on the length of time that each witness said he or she had the appellant in sight. The judge drew the jury's attention to the fact that when George Pamphille spoke about two minutes that did not mean that he was viewing the face of the accused for two minutes. As the judge indicated to the jury, after the person had run past George Pamphille there was no evidence that George Pamphille would still have been able to see the face of the person.

[22] The matter of the distance from which the witnesses saw the person was then examined by the judge after which she adverted to the absence of any obstruction of the witnesses' vision. The witnesses had testified to the existence of the three light sources and this evidence was uncontradicted. The judge also repeated that certainly two of the witnesses were seeing the person for the first time. The judge referred, as well, to the time elapsed between the original observation of the accused by George Pamphille and his identification of the appellant to the police. She directed the jury that George Pamphille was the only one who identified the accused to the police and that the other two witnesses made a dock identification,

which she distinguished and later warned was undesirable and generally unsatisfactory.

[23] A considerable amount of time was spent by the judge in highlighting the differences in the evidence of the three witnesses as to the clothing the person was wearing. The judge identified both the inconsistencies in the evidence of individual witnesses and discrepancies between the testimonies of different witnesses and directed the jury's attention to the relevant evidence. The judge then returned to the matter of dock identification and stated that the reason why it was unsatisfactory was that the identifying witness was likely to be persuaded that the person in the dock must be the same person who committed the offence. The judge ended on the issue of identification by stressing how important it was in the case and by reminding the jury of the need for special caution in relying on identification evidence, because of the possibility of an honest witness making a mistaken identification. Her last words on the matter were that there have been wrongful convictions in the past as a result of such mistakes.

[24] An examination of the judge's direction reflects, in my view, that the judge gave a satisfactory direction to the jury on all relevant aspects of the evidence of the observation of the appellant. The judge dealt with all the factors that were identified in Turnbull[5] as the normally relevant ones and that were not properly considered by the judge in directing the jury in Langford and Freeman.[6] The specific complaint that counsel made that the judge should have directed the jury on dock identification when she was dealing with the circumstances when the witnesses were observing the appellant is without merit, in my view. The judge had to choose between breaking off her direction on the factors surrounding the observation of the appellant to deal with dock identification and then returning to the factors, or completing on the factors and then dealing with dock identification. I think she was perfectly entitled to do as she chose and that it was the better choice, because it avoided confusing two related but distinct issues.

[5] ibid, at p. 228
[6] ibid, at paragraph 26

[25] The other complaint of counsel, that the judge failed to direct the jury on the time and distance relating to George Pamphille's identification of the appellant at the dump and the hospital, overlooks the distinction that must be drawn in this context between identification and recognition. George Pamphille recognized the appellant at the hospital as the person he had identified at the shop. That is to say that at the shop George Pamphille had noted the features of the person, which gave an individual identity to that person: this is the process of visual identification. When it is said that George Pamphille identified the appellant to the police at the hospital the word is used in the sense that George Pamphille was identifying *again* a person he had previously identified. In other words, he was informing the police that he recognized the appellant. The judge in directing the jury did not need to touch on whether or not George Pamphille had correctly or mistakenly recognized the appellant as the person at the dump. When George Pamphille told the police he recognized the appellant he expressly stated, in effect, that this was the man he had identified at the shop by referring to the appellant as the same man who got wounded on his finger (at the shop); he did not refer to the appellant as the man he had seen at the dump.

[26] The injuries to the appellant's hands were an aspect of the evidence that counsel did not address. The evidence of the cuts to the appellant's hands must have served to strengthen George Pamphille's recognition of the appellant. In delivering the opinion of the Privy Council in Langford and Freeman Lord Carswell stated[7]:

> "The need for a very careful summing-up on identification on recognition was the greater because there was no scientific evidence linking either appellant with the crime, neither made even a partial admission at any time and Ms. Bridet was unable to make any identification. Everything therefore turned on the reliability of Alexander's account."

Comment [MSOffice2]: this is accurately quoted

In the instant case the cuts to both of the appellant's hands belied the explanation the appellant gave in his statement to the police that four men had attacked him and chopped him on the hand with which he was holding a stick that he had taken away from an attacker. That explanation was shown by the evidence of a police

[7] At paragraph 16.

officer to be untenable because the appellant bore injuries to both hands, not one hand. The jury were therefore left with only one reasonable inference from the fact that the appellant bore injuries strikingly consistent with the injuries received by the person who had been in the shop: that the appellant was the man who had been in the shop. It was just about one hour after the thief had been chopped on his hands at the shop that the appellant turned up at the hospital with chops on his hands. In this case, therefore, unlike the situation in Langford and Freeman, there was cogent physical evidence to go along with the visual identification.

[27] In my view the judge's direction on the evidence of identification was fully satisfactory, and when that evidence is considered along with the physical evidence of the injuries that the appellant bore, I can have no doubt about the reliability of the identification of the appellant. I would reject this ground of appeal.

Intention

[28] Quite properly, I think, the Director conceded that the judge erred in failing to direct the jury that they must be sure that the appellant intended to cause the death of Linus Pamphille. It is true that at the beginning of her direction on intention the judge told the jury that the prosecution has to prove the appellant intentionally caused the death of Mr. Pamphille but what followed effectively wiped out the effect of that statement.

[29] Immediately after telling the jury the prosecution has to prove the appellant intentionally caused the death of Mr. Pamphille, the judge directed the jury that section 71 of the Criminal Code of St. Lucia states that if the appellant voluntarily injured the two kneecaps of the deceased, causing the deceased bodily hurt, and he believed that this would probably cause or contribute to causing harm to the deceased, "the law states that in such circumstances the Accused intends to harm the deceased, even though the Accused had not injured the deceased two kneecaps because he wished to harm the deceased or contribute to harming the deceased." The judge then directed the jury that this speaks to a subjective

intention on the part of an accused person and went on to discuss the presumption of an intention to cause a result contained in sections 72 and 75.

[30] The judge summarized her direction on the law contained in those sections of the Code in these words:

> "So, Mr. Foreman and members of the jury, those three sections under the Criminal Code in effect provide that a person, who voluntarily commits an act, intends the consequence or commits the act with the purpose of achieving that consequence. The belief that the law speaks about is the subject belief of the Accused, the subjective belief of the Accused. So, Mr. Foreman and members of the jury, you must find out the intentions of the Accused by looking at what the Accused believed at the time he committed the act, which caused harm to the deceased and which resulted in the death of the deceased.
>
> So the law states that if you find that the Accused voluntarily hit the deceased on his two kneecaps or injured, caused injury to him and at the time he did this he believed that it was probable that the blow or blows to the deceased kneecaps would harm the deceased, or if you find that he hit the deceased or inflicted injury on his kneecaps with the purpose of harming him then the law states the Accused intended the consequence of his act, that is, he intended to harm the deceased."

[31] Following that direction the judge directed the jury that the evidence seemed to show that the appellant wanted to escape rather than that he wanted to harm the deceased. The judge directed the jury to consider whether the appellant "had foreseen that the deceased would be harmed as a by-product of his action." She then told the jury to consider "if the Accused did not appreciate that serious harm or death was likely to result from hitting the deceased on his two kneecaps then he could not have intended to bring it about." The judge repeated that proposition for the jury. The obverse of that proposition is inescapable: if the appellant appreciated that serious harm **or** death was likely to result from hitting the deceased then the jury could conclude that the appellant intended to bring it about. To my mind it was clearly open to the jury to understand the reference to "it" as the death of Mr. Pamphille. With that understanding the jury would have therefore been left with the view that if the appellant appreciated that serious harm was likely to result from hitting the deceased then the appellant may have intended

to bring about his death. The judge failed to draw the distinction between intending to cause serious harm and intending to cause death.

[32] In the four paragraphs of the summing-up that followed that direction the judge repeatedly directed the jury in terms that they must consider whether the appellant intended to cause "serious harm or death" to the deceased. She used that phrase or its equivalent, "harm or kill", no less than fourteen times.

[33] It is too well-established to need more than the briefest statement that under the Code for a jury to return a verdict of guilty of murder they must be directed that the prosecution must prove a specific intent to cause death and that an intention to cause harm does not permit them to convict for murder; see Jaganath v The Queen.[8] This was the point that the Director conceded.

[34] At a later point in the summing-up, after the judge had dealt with the issues of justifiable force and self-defence, the judge did tell the jury that if they found that the appellant caused the death of Mr. Pamphille by inflicting the injuries to his kneecaps but he did not intend to cause his death then they should find him guilty of manslaughter only because he would not have had the required intent for the offence of murder. Unfortunately this was not sufficient to undo the misdirection that the judge had given because in the sentence immediately preceding that direction the judge told the jury that if they found "the Accused inflicted injury to his two kneecaps intending to harm him and intentionally caused his death by unlawfully harming him, then you have no other choice but to return a verdict of guilty of murder." The jury were likely left in a state of believing that an intention to cause harm, which harm resulted in death, required them to convict for murder.

[35] In my view the conviction for murder cannot stand. The evidence is compelling, however, that the appellant caused injuries to the deceased that resulted in his death. I can have no doubt that the jury would have returned a verdict of guilty of manslaughter had they not been misdirected in relation to murder. Quite properly,

[8] (1968) 11 W.I.R. 315

also, Mr. Gill conceded on behalf of the appellant that it would be appropriate to substitute a conviction for manslaughter for the verdict of murder. I would so direct.

Sentence

[36] The judge held a sentencing hearing after which she gave a reasoned decision for imposing a sentence of life imprisonment with a recommendation that the appellant should not be considered for parole or a review of sentence before he serves a period of imprisonment for 20 years. In her reasons for decision the judge directed her mind to the sentencing guidelines stated by Byron C.J. in Evanson Mitchum v The D.P.P.[9] and further considered the sentencing guidelines stated in Spence and Hughes.[10] The judge identified the factors that she must take into account as including any mitigating factors obvious from the evidence and the pre-sentencing reports or otherwise adduced by the appellant, the character and record of the appellant, the nature and gravity of the offence, the design and manner of the execution of the offence, the subjective factors that may have influenced the conduct of the appellant, the degree of culpability of the accused and the possibility of reform.

[37] The judge considered the facts of the case against these factors, including the aggravating factors present in the actions of the appellant. The judge made clear mention of the mitigating factors including the fact that the appellant restrained himself from using upon the deceased the cutlass that it would have been so easy for him to use. The judge also relied on the facts that the appellant's 8 previous (spent) convictions did not include any for violence and that there was no element of premeditation in the harm that the appellant caused to the deceased. There were other mitigating factors on which the judge relied. I am therefore clear that the judge properly conducted the sentencing process and exercised her judgment. Counsel made no criticism of any aspect of the sentencing for murder.

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[9] St. Christopher and Nevis Criminal Appeal Nos. 10, 11 & 12 of 2002, judgment delivered on 3 November 2003.

[10] Spence v R St. Vincent and The Grenadines Criminal Appeal No. 20 of 1998 and Hughes v R St. Lucia Criminal Appeal No. 14 of 1997, judgment delivered 13th September 1999

[38] Before he is sentenced for the offence of manslaughter it seems to me that the appellant is entitled to have the court reconsider, in the context of a conviction for the lesser offence, all the factors that the judge considered. Upon such reconsideration the factors in relation to which there have been significant changes are both the nature and the gravity of the offence. The appellant's conviction for the offence of murder carried with it the proposition that the appellant intentionally killed the deceased, even if that intention was ascribed as a matter of responsibility for foreseeable consequence rather than as a matter of desire for the actual consequence. For that reason the nature of the offence of murder involves a significantly greater degree of moral culpability than manslaughter. The difference in the gravity of the two offences is manifested in the difference in the maximum sentences: for murder it is liability to suffer death[11] while for manslaughter it is liability to imprisonment for life.[12] I am therefore satisfied that there can be no possibility of leaving the original sentence undisturbed.

[39] This was a bad case of manslaughter, because it was a killing caused by unlawful harm inflicted in the course of housebreaking, but I do not consider that it comes close to being one of the worst cases of manslaughter. The maximum sentence of life imprisonment for the offence of manslaughter must be reserved for the worst cases and therefore, in my view, is not the appropriate sentence for this case. While I consider it fair to give significant weight to the appellant's restraint from using the cutlass to wound the deceased (and to the fact that the appellant did not inflict any upper body injury to the deceased) it must be emphasized that it was the legal obligation of the appellant to have accepted that he had been caught in the act and to have surrendered.

[11] Section 86 (3)of Criminal Code of Saint Lucia
[12] Section 93 of the Criminal Code of Saint Lucia

[40] In terms of the factual circumstances of this case the decision of the appellant to resist apprehension far outweighs all the mitigating factors. In Kenneth Samuel v R[13] this court accepted the view of one trial judge that 15 years' imprisonment may be regarded as a benchmark sentence for manslaughter, before discount for a guilty plea and for the circumstance that the mitigating factors outweigh the aggravating factors. In that case this court substituted a sentence of 8 years imprisonment for a sentence of 25 years imprisonment because of the strong mitigating factors. For the reasons that I have given I consider that there should be an increase, in this case, on the benchmark sentence. I consider a sentence of 20 years' imprisonment would be just and that is the sentence that I would substitute. Time should start running from the date of the appellant's arrest and detention.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[13] St. Vincent and The Grenadines Criminal Appeal No. 7 of 2005, at paragraph [19], judgment delivered 28 November 2005.