SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.7 OF 2006

BETWEEN:

JOHNSON THOMAS

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. Shawn Innocent for the Appellant
The Director of Public Prosecutions (Mrs. Victoria Charles-Clarke) for the Respondent

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2007: February 26;
May 14.

JUDGMENT

[1] BARROW J.A.: A jury found the appellant not guilty of murder but by a majority of 10 to 2 found him guilty of manslaughter. The judge stated he would be as lenient as possible and sentenced the appellant to a term of imprisonment for 7 years. The appellant appeals against both conviction and sentence.

Four eyewitnesses' versions

[2] Johnson Thomas, the appellant, testified that at about 10:00 pm on the night of 17th February 2005 he had bought himself some food and was walking on a street in Castries on his way home. While walking along the street, deep in thought and

looking at the ground, he found himself surrounded by a number of persons. These persons were the deceased, Sian Keevan Jones Fostin (called Keevan), and three of his friends. The appellant testified that on six previous occasions the deceased had challenged or actually assaulted him. In all instances the deceased had been the aggressor and he, the appellant, had responded in a passive way and avoided a fight.

[3] The appellant testified that when the persons surrounded him someone in the group urged the deceased to stab the appellant. The appellant said the deceased put his hand to his waist and he, the appellant, responded by using a malt bottle he had in his hand to hit the deceased in the face, above the eye. The deceased seemed dazed and drifted away. The other persons in the group proceeded or continued to attack the appellant, punching and kicking him. At one point the appellant fell to the ground. When he fell to the ground, the appellant testified, he saw the knife that the deceased had pulled from his waist and dropped when the appellant hit him with the bottle. The appellant grabbed the knife with his left hand. A member of the group pulled the appellant by the back of his shirt from off the ground and helped him to stand. The deceased tried to attack the appellant again. The appellant said that he made a stab at the deceased to keep him away and the deceased moved to the side. After that someone hit him, probably kicked him, in the back. The appellant lost balance. He went forward. He hit the deceased. He was off balance. The appellant noticed at this point that only he and the deceased were left on the spot, the others had gone across the road. Then the deceased ran across the road to meet the others. The appellant thought they had gone for guns because everybody has guns these days so he threw the bottle at them and he ran away. It later emerged that the deceased had received a single, fatal stab wound to the chest.

[4] Police constable Kimroy Abbott, who testified for the prosecution, was an eyewitness. The officer was inside the food establishment that the appellant entered before the fight. The officer saw the appellant with a malt bottle in his

hand and told him he was not allowed to bring drinks into the premises. After the appellant had bought food and left, the officer was standing on the street. He noticed a scuffle between five persons. They were about 90 feet away from him.

[5] Earlier that night, around 8:00 o'clock, the officer had seen four of the persons sitting and drinking on the nearby street corner. Other evidence established that the men had been drinking beers and stouts. One of the group testified he had at least five drinks. The officer said when he saw the scuffle he thought the men who had been drinking were playing around so he simply monitored the scuffle. He said he saw punches and kicks being delivered. The scuffle took place on the side of the street across from the spot where the men had been drinking. The officer said he walked towards the scuffle and that was when three of the men ran back to the side of the street where they had earlier been drinking. Shortly after a fourth person followed: that person, who turned out to be the deceased, went to the same area where the other three were standing. That was when the appellant 'pelted' a bottle at the deceased. The constable testified that the bottle hit the deceased in the face and the deceased fell to the pavement. It is probable that the deceased fell not because he was hit with the bottle (which may be doubted) but because he had been stabbed in the heart. The constable obviously had not seen the stabbing because he did not mention it in his testimony of what he saw.

[6] When the bottle hit the deceased in the face, as the constable thought, the appellant started running away. It was only at this point the constable realized the men were not playing. The constable immediately gave chase and caught up with the appellant. The constable said he spoke to the appellant about throwing the bottle and causing harm to the person who was hit. It was when the constable was talking to the appellant he noticed the appellant was holding a knife in his right hand. The constable took the knife. The appellant told the constable that he had just found the knife on the road and the constable could throw it away if the constable wished. The knife was wet with what appeared to be blood. The constable took the appellant back to the scene and called for transportation.

[7] Two of the men who had been in the group testified. They both testified to drinking on the street side that night. The version that O'Brian Gaston gave made no mention of the 'scuffle'. He testified that the deceased walked across the street to his car to play a song on the sound system in his car. When the deceased was returning to the group Gaston heard the deceased say "Ah, ah, ah. What happen, what happen." Gaston said when he turned around he saw a person taking a knife out of the chest of the deceased. The deceased was struggling to get away. Then the deceased ran behind him, Gaston, for shelter and the person picked up the bottle the deceased had dropped and threw it "behind" the deceased. Then the person ran away.

[8] Warner Donovan was the other member of the group who testified. He denied that he was involved in a scuffle or a fight that night. He denied that the deceased was involved in a fight that night. He denied that he and others attacked the appellant that night. He said the deceased had agreed to give him a ride in the car of the deceased and as he was crossing the road to the car he heard a bottle break. When Donovan looked back he saw the deceased dashing from the road. The deceased went and stood behind Gaston. The appellant threw a bottle and hit the deceased on his forehead. The deceased fell and the appellant ran away. Donovan and Gaston took the deceased, who appeared lifeless, to the hospital. Donovan mentioned nothing about the stabbing; he did not even mention a knife.

Grounds of appeal

[9] The appellant contended in his grounds of appeal that the trial judge misdirected the jury on self defence, that he confused the jury by directing them on provocation when this defence did not arise on the facts, that he failed to give a good character direction, that he failed to direct the jury on the matter of lies told by the appellant, that he failed to direct the jury on the defence of duress of circumstances and that he failed to follow the proper procedure when directing the jury on a majority

verdict. In relation to the sentence, the appellant contended that the judge sentenced on the wrong factual basis.

[10] Because, in this particular case, the complaint that the judge erred in failing to give a direction on good character calls for consideration of the overall factual basis of the case and a review of significant portions of the evidence it is appropriate to consider this ground first.

Good character

[11] As will be more fully discussed below, a judge is required to give a direction on good character, in certain circumstances, to draw to the jury's attention that they should consider whether a person of previous good character is more likely to be telling the truth and is less likely to commit a criminal offence than a person who is not of good character.

[12] The Director argued that it made no difference that the judge failed to give a good character direction, which she conceded, because there was no denying that the appellant stabbed the deceased, so propensity to do such an act was not in issue. Similarly, the Director submitted there was no issue of credibility because there was no issue whether or not to believe the appellant committed the act. Indeed, the Director submitted nothing turned on character and counsel did not even raise the matter. The Director urged this court to apply the proviso in the law[1] that permits the court to uphold a conviction notwithstanding there was an error in the proceedings.

[13] A central issue in the case, indeed the fundamental case for the prosecution, was that the appellant had determined to take matters into his own hands and deal with the deceased himself. The prosecution's case was that the appellant went armed with a 12-inch knife intending to use it on the deceased. This was the foundation

[1] Section 35(1) of the Eastern Caribbean Supreme Court (Saint Lucia) Act, Chapter 2.01

of the case for murder. Proof of the appellant's intent, the prosecution contended, was to be inferred from the fact that when the appellant reported to the police five days earlier that the deceased had attacked him, the appellant told the police he did not want the police to do anything. The jury was asked to infer that the appellant desired no police intervention because the appellant intended to get his revenge.

[14] The following extracts from the cross-examination of the appellant show the extent to which this contention formed the premise of the case against the appellant. In the first extract the exchanges went as follows:[2]

> "Q. About how many times after that did you meet Kevan?
>
> A. About six times …
>
> Q. And during the six times that you met him, out of the six times, how many times did he confront you or do anything to you?
>
> A. All six times…
>
> Q. So, you went to the police station on the thirteenth of February, two thousand and five to make a report –
>
> A. Yeah.
>
> Q. -- against Kevan…
>
> Q. Yet you told the police you did not want any action against him.
>
> A. Yeah, I don't like trouble, I don't like going to court and stuff like that.
>
> Q. But he confronted you every time you met him.
>
> A. Yeah, but is not, - -
>
> Q. Six times!
>
> A. - - not everyday. Every three months, every four months, I eh digging nothing on that.
>
> Q. And, you still did not want any police action.
>
> A. Well, to me I like forgiving people, you check it. You hit me I tell you cool out, I finish with that, that done.

[2] Record of Appeal Tab E, page 66, line 8 to page 68, line1

Q. Why did you tell the police that you want to make a record of it, what was the purpose of that?

A. Just so, just to have it there, so if in case anything happen - -

Q. I am putting it to you it's because you intended to take the law in your own hands that is why you didn't want the police to do anything about what was happening with Kevan and you.

A. Well, if I wanted to do him something, first time he attack me, second time I was with a partner of mine. The third time by his self, I was still with another partner and I tell him cool out his self, I eh on them things. The fourth time I was alone, he was there, I could fight with him, I could do something, but I eh on that. I don't get myself in trouble; I like making things simple and easy for me.

Q. No, I am suggesting to you - -

A. Uh-huh.

Q. - - that you decided that you were going to deal with Kevan yourself, you didn't want the police to do anything for you.

A. Well, you could talk to people that know me; they know me better than you. They will tell you about me."

The second extract reads as follows[3]:

Q. Why did you pass in that area where you said you saw Kevan and these guys?

A. Well Burger Plus is just by the road instead of making the whole round I just pass there to cut - - short cut just straight trying to - -

Q. I am putting it to you that you passed - - you deliberately passed in that area because you saw Kevan there - -

A. No, I didn't see Kevan.

Q. - - with his friends.

A. No…

[3] Record of Appeal Tab E page 70, lines 3 to 23

Q. And, the reason why you passed there is because you know that you had armed yourself with a knife and you were prepared for any trouble you got - - you would get from Kevan.

A. No…

Q. Isn't it true that you were carrying a knife on your person that night?

A. No.

Q. You were carrying that knife in particular on your person."

A. No…"

The third extract contains the following exchange[4]:

"Q. You expect this court to believe that there are about four men attacking you and you were able to get a knife on the ground, just waiting there for you.

A. If I had the knife I would not hit him with the bottle in his face. That's - - when I hit him [with the] bottle like he went unconscious and he drop the thing so I pick it up on the ground. I saw it on the ground, I, I feel it's from his waist, so I pick it up."

[15] Issues of revenge, possession of the knife, credibility and propensity clearly emerge in those extracts. But there emerges with equal force the issue of the appellant's character. Properly regarded, the main element in the appellant's testimony in the first extract was that he was a person of good character and that testimony was highly relevant to his answers in the other two extracts. The natural inference from what the appellant said about himself was that he was not a person who would go armed with a knife. His specific testimony was he was not carrying the knife[5], that the deceased was the person who pulled the knife from the deceased's waist and that the appellant got the knife by picking it up from where

[4] Record of Appeal Tab E page 72, lines 5 to 9.
[5] Record of Appeal, Tab E page 76, line 20

the deceased dropped it.[6] The jury's decision whether or not to believe the appellant on this issue would have largely determined what verdict to return.

The usual direction

[16] A good character direction, tailored to suit the facts of this case, would have gone something like this:

> Now members of the jury, the defendant has testified that he was not a person who believed in getting into trouble and holding grievance and he said that persons who know him would say so. In saying these things he has raised the issue of his good character. I am required, therefore, to address you on the relevance of good character in a criminal case.
> The law recognizes that the good character of a defendant is relevant both to the issues of credibility and propensity. As regards credibility you may consider that a person of good character may be more readily believed, is more likely to be telling the truth, than a person who is not of good character. The defendant gave evidence on oath and told you what happened that night and how he came to stab the deceased. In considering whether to believe this evidence you should take into account the fact that the defendant is a person of previous good character.
> As regards propensity you may consider that a person of good character may be less likely to commit a criminal act than a person who is not of good character. The defendant testified that he did not go armed with the knife and that he was not out for revenge; he says that he was not that sort of person. Again, when you consider this evidence you should take into account that the defendant is a person of previous good character.

[17] Failure to give a good character direction is not necessarily fatal to the verdict, as the Privy Council has stated in a number of decisions. In Balson v The State[7] the Privy Council held that though a good character reference might have assisted the appellant both in relation to propensity and credibility the nature of the circumstantial evidence of the appellant's guilt was so strong that the failure to give the direction made no difference to the verdict. In Singh v The State[8] Lord Bingham stated that failure to give a good character direction was not necessarily fatal. "The ends of justice are not on the whole well served by the laying down of

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[6] Record of Appeal, Tab E page 62, line 13
[7] [2005] UKPC 6
[8] [2005] UKPC 35 at 14

hard, inflexible rules from which no departure may ever be tolerated", he said. In that case, however, the conviction was quashed because the failure to give the direction resulted in a miscarriage of justice. The principle was applied again in Edmund Gilbert v R[9] in which the conviction was upheld because the facts of the case made the outcome virtually inevitable notwithstanding the judge erred in not giving the usual direction. The effect of a failure to give the direction will therefore depend on the evidence in the case.

The duty to raise the issue

[18] The Director's point that counsel did not raise the issue of the appellant's good character with the judge was well made. After the judge had concluded his summing up he specifically asked counsel whether there was anything he needed to add and counsel said no.[10] The authorities are clear that the defendant must "distinctly" put his good character in issue: see Teeluck v The State.[11] It is for the defence to establish evidence of previous good character by cross-examining prosecution witnesses or testifying or calling evidence to that effect. As Lord Hoffman stated in delivering the opinion of the Privy Council in Teeluck:

> "(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen, ibid.* "[12]

[19] In Brown v R[13] Lord Carswell stated that the judge "not only had no duty to raise the issue of good character but would have been ill advised to mention the appellant's character unless he was given information from which he could

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[9] [2006] UKPC 15 at paragraph 20
[10] Record of Appeal Tab F, page 94 line 15
[11] [2005] UKPC 14, [2005] 2 Cr. App. R 25
[12] At paragraph 33
[13] [2005] UKPC 18 at paragraph 36

properly and safely do so." The authorities, therefore, firmly establish that it is the duty of counsel to raise the issue both by eliciting the evidence and canvassing the need for a good character direction with the judge.

Raising the issue informally

[20] But what happens in a case such as this when counsel for the defendant does not raise the issue? In Thompson v R[14] Lord Hutton considered a submission that even in a case where defence counsel does not raise the issue of good character it is still the duty of the judge to direct on character in the same way that it is the duty of a judge to direct on a defence that arises on the evidence even when defence counsel does not address on it. Lord Hutton dealt with that argument as follows:

> "However, if it is intended to rely on the good character of the defendant, that issue must be raised by calling evidence or putting questions on that issue to witnesses for the prosecution: see *per* Lord Goddard CJ in *Rex v Butterwasser* [1948] 1 KB 4, 6. Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge. The duty of a judge to bring to the attention of the jury a possible defence not relied on by defence counsel is not analogous, because that duty only arises where evidence which gives rise to that defence has been given in the trial and is before the jury."

[21] The observation in the last portion of that passage is apposite: it is the evidence that is given that determines whether the judge should direct on an issue. In Thompson good character was not raised and there was no evidence as to character. In this case the appellant himself gave evidence that raised the issue of good character. It makes no effective difference that the appellant did not use the exact words - good character or previous conviction. Gilbert makes clear that absence of previous conviction is not synonymous with good character because a person may have no previous conviction and still be a person of bad character.[15]

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[14] [1998] A.C. 811 at 844

[15] At paragraph 21

Good character, therefore, is not raised only by evidence of no previous conviction. Good character is raised by eliciting or presenting evidence of facts that show good character. That is what the appellant did by what he said in evidence. This may be better appreciated by viewing the matter from another angle. When the appellant testified as to the sort of person he was the prosecution became entitled to challenge him on that testimony and, if he did not resile, to confront him with evidence of his previous conviction or other evidence of bad character, if such there was.

[22] In Gilbert it was recognized that while:

> "the defendant may not have formally put his character in issue, … the inference that he had done so was very strong and the trial judge would have been well advised to have asked Mr Gilbert's counsel whether he had intended to do so, in order to clarify the situation, before he decided he was not going to give the usual direction. The direction would not have been a "charade".[16]

[23] That aspect of the decision in Gilbert, it seems to me, points the way in this case. It shows that even where a defendant does not formally put his character in issue he may do so as a matter of inference from the facts that he establishes. In this appeal that is what the appellant did. He did so far more directly, in my view, than did the appellant in Gilbert who did not give evidence on oath and essentially relied on the inference of good character that followed from the fact that he was the archbishop of a church.

The duty of the judge

[24] The decision in Gilbert also settles what is the duty of the judge when good character is raised in such a manner. It is a duty to consider whether to give the usual direction. Lord Steyn explained in R v Aziz[17] that the direction is to be given as a matter of fairness. It is therefore the duty of the judge to give the direction

[16] At paragraph 17. In Gilbert it was held that the failure to give the direction resulted in no unfairness because of the strength of the evidence against the appellant.
[17] [1996] 1 A.C. 41 at 50

unless, in the exercise of his discretion, he decides it should not be given. In the instant appeal the judge failed to consider whether to give the usual direction. On the facts of this case, had the judge considered the question there was no material that would have called for the judge to exercise his discretion against giving the direction.

[25] The nature and relative strength of the evidence in this case put it in a different category from Balson and Gilbert,[18] in which their Lordships determined the jury would inevitably have convicted because of the strength of the evidence even if they had been given the good character direction. In this case the evidence of the men who were in the company of the deceased directly conflicted with the evidence of the independent eyewitness, the police officer. The prosecution evidence as to how the stabbing occurred, therefore, was far from persuasive and, indeed, the jury's verdict amounts to a rejection of the two men's versions. The weakness of the prosecution's evidence left the appellant's sworn evidence fairly open to being accepted as true. In this situation the appellant suffered undoubted prejudice when he was deprived of the jury's consideration as to whether the appellant, as a person of good character, was likely to have gone armed with a knife and to be telling the truth about how the stabbing occurred.

[26] Although the appellant was acquitted of murder the judge's directions to the jury and the jury's verdict of guilty of manslaughter suggest the acquittal was on the basis that provocation reduced murder to manslaughter. This was the sole basis on which the judge directed the jury to consider a verdict of manslaughter. In passing sentence on the appellant for the crime of manslaughter the judge stated:

> "… it is my belief having regard to the evidence that you armed yourself with a knife, because you had been provoked on occasions before by one of the persons involved in the altercation with you."[19]

[18] See paragraph 17 above
[19] Record of Appeal Tab J, page 10, line 4

There is a strong likelihood that the jury similarly arrived at their verdict on the basis of a finding, among others, that the appellant went armed with the knife. The appellant's propensity to do such a thing was clearly an issue and so was his credibility in saying it was not his knife but the knife dropped by the deceased. Had the appellant been given the benefit of a good character direction the jury may have found it was not the appellant's knife and decided upon a complete acquittal. Therefore, I conclude, the appellant was materially prejudiced by the failure to give the direction.

The other grounds

[27] The remaining grounds of appeal do not require extensive treatment. The principal remaining ground is that the judge misdirected the jury in relation to self-defence. The complaint is that the judge failed to relate the facts of the case to the law of self-defence. Counsel for the appellant contended that the judge failed to adequately explain to the jury how they should apply the law relating to self-defence to the conflicting versions of the facts that had emerged during the case and that the judge engaged, instead, on a theoretical discourse on the law of self-defence.

[28] With respect, there is no merit in this complaint because self-defence arose only on the version of events given by the appellant. O'Brian Gaston gave the only other testimony on the stabbing and he claimed to have seen not the stabbing but the removal of the knife from the chest of the deceased. There was, therefore, no other version of the fact of the stabbing to which the judge needed to relate his directions to the jury on the law on self-defence.

[29] Another ground of appeal was that the learned trial judge erred by directing the jury that they could return the alternative verdict of manslaughter. The submission of counsel is that there was no question of provocation on the facts of this case and therefore the direction that the judge gave to the jury was both unnecessary

and confusing to the jury. Counsel for the appellant contends that the appellant was denied the prospect of a full acquittal because the judge left the issue of manslaughter based upon provocation to the jury. In the course of argument we indicated to counsel that it was easy to imagine the great outrage that counsel would have expressed had the judge done otherwise and not left provocation and manslaughter to the jury.

[30] This is a case in which it is clear there had been a history of acts of aggression by the deceased against the appellant. Coupled with that was the testimony of the appellant, which was supported by the testimony of the police officer, that on the night in question the appellant was set upon and beaten by the deceased and his friends. The blows the appellant received, the punches and kicks, causing him to fall to the ground, could have caused any reasonable person to lose his self-control and were certainly sufficient to provide the foundation for the defence of provocation. Frankly it would have been astonishing if the judge had failed to direct on provocation in these circumstances. In my view there is no merit in this ground of appeal.

[31] A further ground of appeal that counsel for the appellant raised was the one provided by section 48 of the Criminal Code 2004, entitled duress of circumstances. The section provides that where a person does an act under duress of circumstances, that is, if the person knows or believes that it is immediately necessary to avoid death or serious injury to him or another person that he is bound to protect, and if the danger that the person knows of or believes to exist is such that he or she cannot reasonably be expected to act otherwise, then any action taken in those circumstances is not an offence. I do not see that a direction on this defence, in the circumstances of this case, would have added anything to the directions the judge gave on self-defence. For that reason there is no need to consider the submission of the Director that this defence does not apply to the crime of murder. I would dismiss this ground of appeal.

[32] It was also a ground of appeal that the judge erred in not giving the jury a direction on lies. This ground calls for no discussion except to say that it was not established that the appellant told any lies and, therefore, there was no lie in relation to which the judge would have been required to direct the jury. The need for the direction simply did not arise in the circumstances.

[33] The remaining ground of appeal was that the judge was wrong to direct the jury as to the time within which they could return a manslaughter verdict and a majority verdict. I do not think any point would be served by discussing this ground in view of the decision I have reached in relation to the failure of the judge to give the good character direction.

Allow the appeal

[34] In my view, the material prejudice the appellant suffered by the failure of the judge to give the good character direction rendered the trial unfair. This is not a case for the application of the proviso. I would allow the appeal and quash the conviction for manslaughter. Having been acquitted of murder the appellant cannot be retried for murder. In light of the quality of the prosecution evidence[20] I do not think it is in the public interest to order a retrial for manslaughter.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[20] As summarized in paragraphs [7] and [8] and analyzed in paragraph [25], above