TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2005/003

BETWEEN:

DEVIN MADURO

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mde. Ola Mae Edwards — Justice of Appeal [Ag.]
The Hon. Mr. Dane Hamilton, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Paul Webster QC and Malcolm Arthurs for the Appellant
Mr. Terrance Williams, Director of Public Prosecutions and Ms. Christoline Benjamin for the Crown

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2008: June 2.

Criminal law – Evidence – Admissibility - hearsay – res gestae – Admissibility of evidence of accused's previous conduct – Oral confessions and statements – exclusionary discretion of trial judge – Forensic evidence – weight to be attached in light of strong circumstantial evidence

The appellant was convicted on a count of murder, two counts of wounding with intent and a count of aggravated burglary. The case for the prosecution was that the appellant had unlawfully entered the house of Sunday Joseph and Ursuline Joseph where he killed Anderson Paul and wounded Sunday Joseph and Ursuline Paul. On appeal, counsel for the appellant challenged the admissibility of:

(1) the testimony of the father of the deceased that on discovering the body of his son he cried out, "Andy is dead; Andy is dead. The guy killed Andy before he went upstairs";
(2) the evidence of the appellant's previous attacks on his wife; and
(3) the appellant's oral confession whilst semi-conscious and questions put to him by the Police at the hospital.

It was contended further that the conviction for murder was unsafe and unsatisfactory having regard to the fact that it had not been proved that the machete was used in the attack on the deceased. In relation to the count of wounding Sunday Joseph, the appellant appealed his conviction contending that having regard to all the evidence the jury could not reasonably come to the conclusion that he had wounded Sunday Joseph.

Held, dismissing the appeal and affirming the appellant's conviction and sentence:

1. The statements of the father of the deceased were admissible as part of the res gestae. The statements were spontaneous and the events which provoked them were so unusual or startling as to exclude the possibility of concoction or distortion. **R v Andrews (Donald Joseph) [1987] A.C. 281** applied. Further, no objection having been taken by counsel for the appellant at trial, the judge was not called upon to exercise her discretion to exclude the statements on the basis of its prejudicial effect.

2. The testimony of the appellant's wife was relevant to the charge of murder to show the motive of the appellant and to show intent.

   Dominic Joseph Fulcher [1995] 2 Cr. App. R. 251 cited, **Pettnam** (Unreported Judgment, English Court of Appeal, May 2, 1985) applied.

3. The trial judge correctly exercised her discretion in not excluding the oral confession given by the appellant to the constable at the scene of the crime. Having seen and heard the witnesses, the trial judge found that the evidence was very strong in the sense that the appellant was not unconscious, he fully understood what was put to him and his replies were appropriate in the circumstances.

4. The question of whether the appellant had seen the deceased on the morning of the murder was left squarely in the hands of the jury for determination. Although the responses given to the police by the appellant lacked clarity and precision, any prejudice suffered by the appellant was minimized and or cured by the subsequent direction given by the Judge in relation to the issue.

5. The jury was entitled to infer that the deceased had met his death at the hands of the appellant .The fact that the forensic evidence did not show the presence of the deceased's blood on the murder weapon when tested was insufficient to render the verdict unsafe or unsatisfactory in light of the very strong circumstantial evidence and in the absence of any cogent evidence to the contrary.

6. The jury was entitled to conclude that the appellant was guilty on the count of wounding Sunday Joseph having seen the witnesses and heard their testimony. An appellate court cannot substitute its own view of the evidence for that of the jury who as triers of facts have had the benefit of seeing and hearing witnesses and have come to a verdict based on their assessment of the evidence presented.

JUDGMENT

[1] **HAMILTON, J.A. [Ag]:** The appellant Devin Maduro was convicted on the 22nd June, 2005 by a Jury at the Assizes held at the High Court in Road Town, Tortola in the British Virgin Islands of the offences of murder, two offences of wounding with intent and aggravated burglary. He was sentenced on the 23rd June, 2005 to: -

(a) Life imprisonment for the offence of murder

(b) Seven (7) years for wounding with intent

(c) Seven (7) years for wounding with intent

(d) Ten (10) years for aggravated burglary

[2] He appealed his convictions and five grounds of appeal were argued by Counsel Mr. Paul Webster Q.C. who appeared on his behalf. These grounds are set out in his Re-amended Notice of Appeal for which leave to amend was granted. I will not reproduce verbatim the amended grounds as they are set out in the re-amended Notice of Appeal. I will however deal with the arguments advanced on behalf of the appellant in the manner they were dealt with by learned counsel and under the broad headings he gave when so doing.

Background Evidence

[3] The evidence led at the trial revealed that the appellant was married to one of the complainants Urlene Paul Maduro on the 31st March, 2004. The marriage lasted three months during which his relationship with his wife can be best described as stormy and abusive. Among other things, he threatened to kill his wife. On June 9th, 2004 his wife sought refuge at her mother's [Ursuline Paul Joseph] home at Major Bay. Having made a report to the police, Urlene Maduro applied to the court on the 13th July, 2004 for a protection order and was granted a temporary order which was made final on July 22nd, 2004. The appellant was present in court on that date and was heard to comment "they can't annul my marriage".

[4] In the early morning of the following day July 23rd, 2004, the appellant burgled and entered the home of Ursuline Paul Joseph where his wife was staying. Entry was effected by ladder unto the upper balcony. The evidence led by the Crown suggests that on entry, the appellant first made his way downstairs. He was armed with a machete, a shot gun containing one round of ammunition, a flashlight, a piece of cord and a leatherman (an implement which can be used as a pliers and a knife.) Anderson Paul, the brother of Urlene Paul Maduro was downstairs in the living room watching television. He was later found with injuries to the body, that is to say, a stab wound to the front of the neck and one to the chest which the pathologist confirmed were consistent with having being inflicted with a knife type sharp object or a machete. Anderson Paul died from his injuries.

[5] The Crown's case was that the appellant having first gone downstairs into the living room where he inflicted the injuries on Anderson Paul then made his way back upstairs to the bedroom his wife was occupying and attacked her with the machete inflicting an injury to her side and to her head. He was masked. Adele Paul, the sister of Urlene Paul Maduro was awakened by screaming sounds. She looked out of her bedroom window into the neighboring yard and seeing nothing, returned to bed. She then heard a sound, got up, went to the door of the study and looked out through a window of the door. She saw a masked person dressed fully in black coming up the stairs. This person had a long object in his hand. She ran to her mother's bedroom and shouted "mommy open the door." The door was opened, facilitating entry by her, then locked. She then explained to her mother Ursuline Paul Joseph what she had seen and her mother and stepfather Sunday Joseph left the mother's room.

[6] Both Ursuline and Sunday Joseph entered the bedroom Urlene Maduro was occupying. There they saw the intruder. Ursuline Joseph was armed with a pipe wrench. They both rushed the intruder. Ursuline struck the intruder on the head with the pipe wrench. Sunday Joseph started struggling with the intruder who according to him was still armed with a cutlass. They both fell on the bed, and then rolled unto the floor. Sunday Joseph discovered that he was bleeding from a deep cut in his

shoulder. The cutlass fell from the intruder's hand and was picked up by Ursuline Joseph who inflicted several blows on the body of the intruder, who was then subdued. The mask was then removed from his face, revealing the intruder to be the appellant.

[7] The police were summoned and upon arrival the appellant was found lying on the floor in the bedroom of his wife Urline Maduro. He was suffering from injuries. He was searched by Constable Sean McCall and the items previously mentioned along with a grey bag were recovered. Paramedics were summoned. Whilst they were attending to the appellant, Constable McCall heard shouts "Andy dead! Andy dead!" He cautioned the appellant and asked him where Andy was. The appellant replied that Andy was downstairs. Constable McCall asked him what he did to Andy and the appellant responded: "I stab him in his chest with the machete". The appellant was arrested and taken to Pebbles Hospital for treatment.

[8] The appellant was later charged with the murder of Anderson Paul, the wounding of Sunday Joseph and Urlene Maduro and aggravated burglary. At his trial he did not give evidence neither did he call any witnesses. In relation to inflicting the fatal stab on Anderson Paul, his case as put in cross examination was a denial of having gone downstairs. In relation to the wounding of Sunday Joseph, his defence was that it was Mrs. Ursuline Paul Joseph who chopped her husband with the machete during the struggle in the bedroom and that he never chopped Sunday and was in no position to do so given the injuries inflicted on him by Ursuline. No positive defence was advanced on his behalf in respect of the wounding of his wife Urlene Maduro. The same being the case for aggravated burglary.

Grounds of Appeal

Hearsay

[9] This ground of appeal was directed to the testimony of Augustine Paul the father of the deceased Anderson Paul. His evidence was that he had just returned from work in the

early hours of the morning of the 23rd July, 2004 when he received a telephone call from his daughter Angeline Braithwaite, as a result of which he made his way to the Joseph's house at Major Bay. There he met police officers and a house which was in disarray with blood stains almost everywhere. He saw the appellant in Urlene Maduro's bedroom and he spoke with Ursuline Joseph concerning his son. As a result of this conversation he raced downstairs and on his arrival he saw his son Anderson lying on his back motionless in a pool of blood. He observed three wounds on his body. He cried out "Andy is dead; Andy is dead". "The guy killed Andy before he went upstairs". He began to scream.

[10] Learned counsel for the appellant challenged the admission of the words uttered by Augustine Paul. These words he said were hearsay. They were not uttered in the presence of the appellant who at the time was lying on the floor of Urlene Maduro's bedroom upstairs. These words according to him were highly prejudicial and there was no evidence that the appellant heard them. Counsel argued that Augustine Paul drew an inference and in a sense concocted it.

[11] In his response, the learned Director of Public Prosecutions argued that what Augustine Paul said on discovering the body of his son was admissible as part of the *res gestae* and that in fact, the person who made that statement was called as a witness. Further, that the evidence was never challenged by Counsel who appeared on behalf of the appellant. He submitted for consideration of the Court two authorities: **Teper v. R**[1] and **R v. Kearley**[2]**.**

[12] In **R v. Andrews (Donald Joseph)**[3] Lord Ackner speaking for their Lordships in the House of Lords reviewed the authorities on this aspect of the law. He stated that the primary question which a trial judge must ask himself is:- can the possibilities of concoction or distortion be disregarded? The answer he posits lies in the circumstances the particular statement was made. The judge should satisfy himself or

[1] [1952] 2 A. E. R 447
[2] [1992] 2 A. E. R. 345
[3] [1987] A.C. 281

herself that the event was so unusual or startling or dramatic as to dominate the thoughts of the person uttering the statement so that his utterance was an instinctive reaction to the event thus giving no real opportunity for reasoned reflection. It is the duty of the trial judge to ensure that there is no possibility of concoction or distortion and that the statement was made in conditions of approximate but not exact contemporaneity; that the statement must be closely associated with the event which excited the statement and that the mind of the declarant must be dominated by the event. Further, the possibility of error in the facts narrated in the statement due to ordinary fallibility of human recollection must be taken into account and ruled out.

[13] Applying these principles to the instant case, it is clear from the evidence that although both Adele Paul and Sunday Joseph stated in evidence that they had seen a black shadow either ascending or descending the stairs which led downstairs to the living room, no one in the house seemed to have given thought to the whereabouts of Anderson Paul during the tumult of the appellant's intrusion and the arrival of the police. There is no evidence that Anderson Paul was discovered by anyone prior to the arrival of Augustine Paul. In a sense it can be said that the process of discovery of the breadth of the appellant's rampage was yet to be completed. The appellant was still lying injured on the floor upstairs in his wife's bedroom under the supervision of Constable McCall who in turn heard some parts of the statement made and whose instinctive reaction was to caution the appellant and inquire of him the whereabouts of the deceased.

[14] It can clearly be stated that the events were so spontaneous and startling to Augustine Paul having seen the blood everywhere on his entry into the house and having seen the appellant upstairs, that he said those words and started to scream. There was no possibility of concoction, and rather than distort what he saw, drew the only conclusion available on the state of his then knowledge that the appellant was responsible. In these circumstances, it is the view of the Court that the statement made by Augustine Paul was admissible in evidence as part of the *res gestae*. Further, no objection

having been taken by Counsel the judge was not called upon to exercise her discretion as to the issue of prejudice to the appellant.

Previous Attacks Made by the Appellant on his Wife

[15] The appellant's wife Urlene Maduro gave evidence of two previous attacks made on her person by the appellant on June 22nd and July 8th, 2004 during the extremely short span of their marriage. As I understand learned counsel for the appellant, this evidence was admissible and relevant to the count on the indictment which charged him with wounding his wife with intent to do grievous bodily harm. However, it was not admissible on the count of murder, that is to say, that he murdered Anderson Paul. Counsel argued that that count was a complete and different charge and that the appellant having been found in the house, no question of identification arose and it was no evidence of motive. Further, that the learned trial judge ought to have given the jury an explicit direction not to take that evidence into account in considering the charge of murder.

[16] The Director of Public Prosecutions to the contrary argued that this evidence was part of the background or history relevant to the offences charged to show the motive of the appellant and to show intent. Moreover, it was presented to the jury to show the context and the circumstances within which the offences were said to have been committed. The trial judge instructed the jury to consider the case for and against the appellant on each count separately. It was further argued that although the evidence was different in some regard, the fact that each count was to be considered separately on its merits did not mean that all of the evidence of background circumstances should be ignored.

[17] This issue was the subject of the dicta in the case of **Pettnam**[4] as reported in the submitted case of **Dominic Joseph Fulcher**[5]**.** In the latter case, Kennedy L.J having stated the principle that in an ordinary prosecution for murder one can prove the

[4] Unreported Judgment, English Court of Appeal, May 2, 1985.
[5] [1995] 2 Cr. App. R 251 at 258

previous acts of the accused to show that he entertained feelings of enmity towards the deceased as evidence of malice and of the fact that he killed the deceased quoted Purchas L.J in **Pettnam** (above cited) which the Court of Appeal accepted to be the law and I quote:-

> "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the Jury would be incomplete or incomprehensible, then the fact that whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself ground for excluding the evidence".

A fortiori, the fact that the accused is charged with the commission of another offence will not make a difference. The evidence in this case was relevant to show the motive behind the appellant's violent assault on the household at Major Bay, without which the evidence would have been in- complete and incomprehensible. This of course is always subject to the power of the court to exclude such evidence on a finding that it was prejudicial. The evidence was never challenged or objected to and in the end the trial judge correctly directed the jury to consider the evidence on each count separately and on its merits, not necessarily ignoring evidence of background circumstances. Accordingly this ground of appeal has no merit.

Conviction for Murder Unsafe or Unsatisfactory

[18] I have already dealt with the question of hearsay and the previous attacks made by the appellant on his wife. These form part of the mix upon which learned Queens Counsel sought to urge the Court along with others which I will set out hereafter, renders the verdict of murder unsafe and unsatisfactory.

The Oral Confession

[19] Learned counsel for the appellant argued that the learned trial judge ought to have exercised her discretion to exclude from the evidence statements made by the

appellant to Constable McCall whilst he was lying on the floor injured in the bedroom of his wife Urlene Maduro. These statements as narrated by Constable McCall were that he heard shouts downstairs of "Andy is dead! Andy is dead!" That he at once cautioned the appellant and asked him what he had done to Andy. He then asked the appellant "where is Andy?" The appellant replied "downstairs", "he done dead already". The appellant further stated "I stab him in the chest with the machete". It should be noted that Kinnell Turnbull a trainee emergency medical technician was present in the room treating the appellant's injuries and he gave evidence to a like effect supporting Constable McCall.

[20] *A voir dire* was conducted by the trial judge. The appellant gave no evidence. The trial judge exercised her discretion and admitted the confession into evidence. Learned Queens Counsel argued that given the nature and extent of the appellant's injuries and the obvious pain the appellant was in, the judge ought to have excluded the confession. It has not been shown that the trial judge having seen and heard the witnesses exercised her discretion unreasonably. There is nothing in the record to show that the judge made an incorrect assessment of the evidence which was led. On the contrary, the trial judge did find that the evidence was very strong in the sense that the appellant was not unconscious, he fully understood what was put to him and his replies were appropriate in the circumstances. There was no evidence given capable of contradicting these findings by the learned trial judge.

The Oral Statement Made by the Appellant to Inspector Calvin James

[21] The Record disclosed that on July 31st, 2004 at approximately 2:15 p.m. Inspector James along with WDC Berry visited the appellant at Pebebles Hospital. After identifying himself and WDC Berry and stating the purpose of his visit which was investigating the burglary of Ursuline Paul Joseph's home and the murder of Anderson Paul, he cautioned the appellant and asked him if he had seen Urlene Paul Maduro or Anderson Paul on the morning of Friday 23rd July, 2004, to which the appellant replied

"yes". He further asked him where? To which he replied: "I can't remember". He then charged him with the offences which were the subject matter of the indictment.

[22] The learned trial judge in her summing up told the jury that those answers which he gave Inspector James were important because it showed that he saw Andy that morning. The answer which was given by the appellant to Inspector James certainly lacked clarity and precision. However, any prejudice the appellant suffered was minimized and or cured by the subsequent direction given by the judge in relation to that issue. In very clear terms she told the jury that the appellant said he did not go downstairs, but admitted that he was upstairs and that he knew nothing about Andy. She left that issue squarely in the hands of the jury for determination.

Forensic Evidence

[23] The machete which the appellant had on the night of the assault was tested by Mr. Robert Arney at the Forensic Science Service Laboratory in London to determine whether the bloodstains on it matched the blood sample taken from the deceased Anderson Paul. It was reported negative. It must be remembered that this cutlass was used in the assault by the appellant on Urlene Maduro, and Sunday Joseph and by Ursuline Joseph on the appellant all of whom sustained wounds. This evidence by itself could not be conclusive as to whether or not the appellant inflicted the injuries on the deceased given the abundant circumstantial evidence presented by the Crown. There was no evidence that another armed intruder entered the house that morning. The jury had evidence from which they could infer that it was the appellant who was seen by Adele Paul coming up the stairs after she was awakened by screams. The person who inflicted the injuries was the masked person dressed in black with a long object in his right hand.

[24] Sunday Joseph also gave evidence that he saw a masked intruder coming up the stairs and that he struggled with this intruder in Urlene (Abigail) Maduro's bedroom. When this intruder was subdued and the mask removed, it was the appellant. The jury

was entitled on the face of this evidence and in the absence of any cogent evidence to the contrary to infer that Anderson Paul met his death at the hands of the appellant who was not only armed that night with a machete but also with a leatherman. The forensic evidence on the lack of Anderson Paul's blood on the machete when tested was neither here nor there in the absence of any other intruder. The irresistible inference was that the appellant killed Anderson Paul with a sharp cutting instrument.

[25] In all of the circumstances detailed above there can be no lurking doubt which renders the verdict of guilty of the offence of murder unsafe and unsatisfactory. In the result, the appellant's appeal against his conviction for murder is dismissed.

Conviction for Wounding Sunday Joseph

[26] Could the jury reasonably come to the conclusion that the injury sustained by Sunday Joseph was inflicted by the appellant when Sunday Joseph went to the rescue of Urlene Maduro? The evidence given by Sunday Joseph was that along with his wife he rushed the intruder. His wife struck the intruder on the head with a pipe wrench, and he started struggling with the intruder who was still armed with the cutlass. Importantly, he said that after he noticed that he was bleeding from the shoulder the cutlass fell from the intruder's hand, he then noticed that his wife was using the cutlass to cut the intruder's feet. This is evidence from which the jury could draw the inference that Sunday Joseph sustained the wound to his shoulder prior to the cutlass falling from the appellant's hand. In directing the jury on this issue, the learned judge clearly instructed the jury to resolve any doubt as to who injured Sunday Joseph, whether it was the appellant or Ursuline Joseph. The jury had seen the witnesses and heard their testimony on this aspect of the case. In the result, it cannot be said that the verdict of guilty was one which they could not reasonably have arrived at. It is well settled that an appellate court cannot substitute its own view of the evidence for that of the jury who as arbiters of the facts having seen the witnesses conclude thus. This ground of appeal is dismissed.

Result

[27] The appellant's conviction and sentence are hereby confirmed.

Dane Hamilton, QC
Justice of Appeal [Ag.]

I concur

Denys Barrow, SC
Justice of Appeal

I concur

Ola Mae Edwards
Justice of Appeal [Ag.]