

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCRAP 2008/006

BETWEEN:

EWART BACCHUS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh Rawlins

Chief Justice

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

Appearances:

Mrs. Kay R.A. Bacchus-Browne for the Appellant

Mr. Colin Williams, Director of Public Prosecutions,

with him Mr. Duane Daniel, Mr. Carl Williams and Ms. McDowell

for the Respondent

2010: January 26;

2011: April 29.

Murder - Appeal against conviction and sentence – Whether Lucas direction required - Whether the judge misdirected the jury on the defence of self-defence – Whether the judge misdirected the jury on the facts relating to a telephone call - Whether the judge erred in permitting demonstration of the use of a telephone when the telephone and its call records were not tendered and admitted - Whether sentence excessive.

The appellant, Ewart Bacchus, was convicted of murder in that he caused the death of Dougal McBurnette (“Dougal” or “the deceased”), who was also known as “Fly”, by an unlawful act, to wit, by shooting. The appellant was sentenced to serve 30 years in prison. He appealed against his conviction and sentence. The appellant admitted that he was involved in a drug transaction with the deceased and 2 other men, Brent Clement (“Brent”) and Coldrick Young (“Young”), who is also known as “Gutts”. The transaction went wrong and resulted in the death of Dougal. He however maintained that he did not shoot Dougal, as the prosecution alleged. He insisted that it was Brent who shot Dougal. The prosecution’s case was based on circumstantial evidence. They depended on the medical evidence, which concluded that Dougal died of 2 gunshots which entered the right side of his body, and on the ballistics evidence. The prosecution alleged that the appellant shot

Dougal while he was alone with the appellant in the appellant's rented jeep, and that at the time of the shooting, the appellant was on the right or driver's side of the jeep, while Dougal sat in the left or front passenger seat.

The appellant appealed on the grounds that the trial judge erred when he did not give a Lucas direction to the jury. He further complained that the judge erred when he gave a misleading direction to the jury concerning a telephone call, which prejudiced him in his trial, when he permitted the demonstration of the use of a telephone without having the telephone or the call records admitted into evidence; by confusing the jury in his summation on self-defence and by giving a sentence which was excessive in the circumstances of the case.

Held: dismissing the appeal and affirming the conviction and sentence:

1. A Lucas direction was not required, and, accordingly, the trial judge did not err in not giving it. No evidence was adduced at the trial that the appellant told lies and the appellant did not admit that he had lied.
2. It is mandatory for a judge to direct the jury on self-defence if that issue arises during the trial from any evidence and materials, whether emerging from the case for the defence or the prosecution. The issue did not arise on the evidence or materials in the case. It arose on a hypothetical scenario provided by defence counsel on an aspect of the evidence which he said amounted to the appellant being kidnapped. The trial judge correctly stopped defence counsel when he pursued it during counsel's address to the jury, and, in his summation, the judge correctly instructed the jury that self-defence did not arise for their consideration. This was particularly so as that defence was incompatible with the appellant's defence that he did not shoot or kill the deceased. The fact that the trial judge still gave a summation on self-defence, out of an abundance of caution, would not have had the effect of confusing the jury thereby prejudicing the appellant, given the trial judge's emphatic direction that self-defence did not arise in the case.
3. The trial judge did not misdirect the jury, thereby prejudicing the appellant, in his direction relating to a telephone call allegedly made by Brent Clement to the appellant, after the transaction, and after Dougal and the appellant had allegedly driven away in the appellant's jeep and Brent and Young left in the car. The full context in which the aspect of the summation that is complained of was given shows that the judge was merely explaining intention in a simplified manner, for the benefit of the jury.
4. This case was based on circumstantial evidence. The dramatization by the demonstration of the possible use of the telephone was unnecessary. However, that demonstration was a peripheral event. The appellant was not prejudiced by the demonstration or because the telephone and the call records were not produced as exhibits. In any event, any possible prejudice was obviated by the direction which the learned trial judge gave. In the end, the members of the jury were entitled to find that the circumstances, disclosed by the evidence, pointed

inescapably to the appellant as the person who shot the deceased. They obviously rejected the appellant's version of the events that led to death as highly improbable in light of the evidence of the trajectory of the bullets through the body of the deceased and the place where fragments were found.

5. The trial judge did not act outside of the ambit of his sentencing discretion either in his sentencing analysis or in the sentence which he imposed, when he ordered the appellant to serve 30 years in prison, with effect from 20th October 2005, the date on which he was first arrested.

JUDGMENT

- [1] **RAWLINS, C.J.:** The appellant, Ewart Bacchus, was convicted of murder contrary to section 159(1) of the Criminal Code.¹ The particulars of the offence are that on 20th October 2005, at Argyle in Saint Vincent and the Grenadines, with malice aforethought, he caused the death of Dougal McBurnette ("Dougal" or "the deceased"), who was also known as "Fly", by an unlawful act, to wit, by shooting. The appellant was sentenced to serve 30 years in prison. He appealed against his conviction and sentence. The amended grounds of appeal, which were filed on 1st October 2009, stated 7 grounds. These were re-stated as 5 grounds at the hearing of the appeal, and are set out in paragraphs 16 and 19 of this judgment. An appreciation of the grounds of appeal and their determination will be provided against the factual background.

Factual Background

- [2] At about 11:40 a.m on 20th October 2005, Dougal was found dead at the side of the road at Yambou, near Argyle in Saint Vincent. The deceased had 2 gunshot wounds: one on the right side of his chest and the other near his right armpit. There were exit wounds on the left side of his back. The surgical pathologist testified that the bullets had travelled from the right side of the deceased's body to the left in a downward direction, rupturing various organs, including the lungs, before exiting at the back on the left side of the body causing death.

¹ Cap. 124 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 1990.

[3] There was no eyewitness to the shooting. Brent Clement ("Brent") and Coldrick Young ("Young") testified of the events immediately preceding Dougal's death. Dougal was Brent's brother in law. Young, who is also known as "Gutts", was Dougal's friend.

The prosecution's case

[4] The prosecution's case is that at or about 9:00 a.m on the 20th October 2005, Dougal drove to Young's home, in a rental white Toyota Corolla rented vehicle. Young told Dougal that he (Young) had a kilo of cocaine. Dougal arranged for someone to buy it. After picking up Young, Dougal continued on to his mother's home in Campden Park, where he picked up Brent, his brother-in-law. He told Brent that they were going to Diamond to meet someone, but claimed to not know the purpose of the meeting. The 3 men arrived in Dairy in Diamond sometime during the course of the morning. They met the appellant, who was alone there. The appellant was in a white rental jeep. Brent and Young gave slightly different accounts of what transpired after this point.

[5] Brent testified that Dougal went to speak with the appellant and then returned to the car, which Dougal had driven, with the appellant. At the car, Dougal removed a packet containing the 1 kilo of cocaine from under the car seat and gave it to the appellant. The latter checked it and said that it was good. Brent said that it was only then he realized what the meeting was about. He testified that the appellant returned to his (the appellant's) black escudo jeep and handed money to Dougal in a clear, vacuum-sealed bag. Dougal gave the bag to Young and he (Brent) asked Young to verify the amount. Young struggled to open the vacuum-sealed bag.

[6] Young's account was that Dougal came out of the car and the appellant joined Brent in the rear seat of the car. He (Young) then took the cocaine out from under the front seat and handed it to the appellant. The appellant knocked it 3 times and said that it was good. The appellant then asked who was coming to collect the money. Dougal told Brent to collect it. Brent and the appellant went to the

appellant's jeep where Brent collected the money. Brent returned to the car and handed the money to Young, whom he asked to verify the amount. Young expected the bag to contain about EC\$9,000.00.

[7] Thereafter, Brent and Young's stories are similar. They testified that Dougal told Brent to go ahead and he (Dougal) would call to be picked up in town. Dougal entered the jeep with the appellant, and left in the direction of the windward side of the island. Brent left in the car with Young, continuing to try to open the vacuum-sealed bag.

[8] Young managed to open the bag just upon leaving Diamond. It was then that they discovered that the bag contained some EC\$2,600.00 and a US\$20.00 bill. The rest of the package contained newspaper cut to the same dimensions as the money. Brent said that the package should have contained at least EC\$18,000.00. Upon this discovery, Brent called Dougal's cell phone but received no answer.

[9] Having failed to contact Dougal, Brent and Young changed their route and travelled towards the windward side of the island in search of the jeep. They drove to Stubbs, where they spoke briefly with one Kerlan Morgan. They then drove into Carapan but still did not find them. Brent and Young therefore returned to the main road. Brent dropped Young home and then returned to Campden Park, where he disclosed the morning's events to his wife, Dougal's sister. He (Brent) accompanied her on an errand later that day. It was while they were on that errand that she received a telephone call which caused them to drive to the windward side of the island. There they saw a police vehicle and a hearse. She was informed that Dougal was found dead in Argyle. She collapsed upon receiving that information.

[10] Brent testified that he did not immediately disclose the events of that morning to the police as he was aware that he had been involved in an illegal activity. On the following day, however, he and Young went to the police and gave the information. He (Brent) subsequently identified the appellant at an identification parade.

[11] The post mortem examination was done by Dr. Ronald Child on 29th October 2005. He concluded, in effect, that Dougal's death was caused by injuries which he received from 2 gunshots. One entered the right anterior chest wall just above the right breast, took an overall path from front to back and downward and exited from his back. The other entered the right armpit, passed through the third intercostals space, perforated the lower lobe of the right lung, and then passed through the right atrium and upper portion of the right ventricle, lacerating the anterior aspect of the tricuspid valve. It then passed through the head of the pancreas and the hilum of the spleen and exited through the left eleventh intercostals space having taken an overall path from right to left and downwards.

[12] Corporal Verrol Massiah, the investigating officer, testified that a search was conducted on the rental jeep in the presence of the appellant and his attorney. A piece of metal was found in the left side door panel of the jeep. According to the officer, a piece of metal was found in the front passenger seat, which had a small hole. These pieces of metal were exhibited at the trial. Corporal Massiah said that he also executed a search warrant at the appellant's home for drugs, ammunition, guns and money, but found none. He interviewed the appellant, who gave a voluntary statement under caution. Corporal Massiah denied that the appellant was threatened, beaten or promised anything in exchange for his statement, as the appellant alleged. He also denied the defence's assertions that he had conducted himself in such a manner during the investigations that he was transferred from his department.

The appellant's case

[13] The appellant gave the statement under caution to the police on 21st October 2005.² He also gave sworn testimony at the trial. He said that he did not know Dougal and had no dealings with him. His only dealings were with Brent from whom he had purchased cocaine on 3 previous occasions. According to the

² It was admitted into evidence as exhibit V.M. 4. See page 201 of the Record.

appellant, Brent arranged to sell him 9 kilos of cocaine at EC\$10,000.00 per kilo on the morning of 20th October 2005. They arranged to meet at Diamond. Brent and his companions pulled up in front of his vehicle at Diamond. He (the appellant), stepped out of his vehicle and Brent told him to come and see what they had. He (the appellant) sat in the right back seat of the car and collected the bag containing the cocaine from Brent. The bag contained the 9 kilos of cocaine. He proceeded to his vehicle (the jeep), followed by Dougal and Brent, whom he gave US\$35,000.00. Brent told him that he was expecting some 20 more kilos of cocaine that evening or the next day. He (the appellant) replied that he had US\$60,000.00 and would like to buy it from him. Brent and the deceased stepped aside to speak. He could not hear their conversation. Brent then returned, pulled out a gun and told him (the appellant) that they wanted the money (the US\$60,000.00). Brent took the cocaine back and told Dougal to ride with him (the appellant). Dougal got into the jeep on the passenger side and placed a gun to his (the appellant's) side and directed him to drive to collect the money. Brent followed in the car.

- [14] The appellant further stated that he asked Dougal to leave him alone and offered to give him (the deceased) money (\$10,000.00 or \$20,000.00) if he could convince Brent to leave him alone. On reaching Yambou, Dougal told him (the appellant) to stop and he would talk to Brent. Brent, who was carrying a gun in his right hand, then came up to the car and asked why they had stopped. Dougal told Brent that they should leave the appellant alone. An argument ensued. Dougal turned slightly towards Brent, gesticulating, with his gun pointing in the direction of Brent, who then attempted to get the gun from the deceased. He (the appellant) slipped out of the jeep and lay on the ground. He then heard about 3 or 4 shots fired. Brent then returned to his car, reversed and drove away. When he (the appellant) returned to the jeep he saw that Dougal was shot and was not moving. He pushed him out of the jeep and drove to his apartment where he collected his passport and ticket. On his way to return the jeep to the rental garage, he met Brent and Young travelling in the opposite direction. They (Brent and Young) turned their car around and chased after him (the appellant). He (the appellant) however

managed to overtake several vehicles and safely arrived at the garage to return the jeep. Leslie Antrobus, from whom he had rented the jeep, confirmed that the appellant looked afraid when he returned the jeep to the garage.

- [15] The appellant stated that he then booked a flight for 8:10 p.m to Antigua. He called one "Stay Cool" for transportation to the airport and told him ("Stay Cool") that Brent had killed a man. "Stay Cool" called a friend, Rodrick, who agreed to take him (the appellant) to the airport. He (the appellant) made his way to the airport's departure lounge, but he was arrested there, and he was subsequently threatened and beaten by the police. He knew Corporal Massiah, as an associate of "Stay Cool". He therefore disclosed all facts to the officer who assured him that he would have taken care of everything.

The grounds of appeal

- [16] The first ground of appeal states that the trial judge misdirected the jury on aspects of the facts that relate to the telephone call which Brent allegedly made to the appellant, after Brent and Young, on the case for the prosecution, parted and left in the car, while the appellant and Dougal left in the jeep.
- [17] In the second ground, the appellant complains that the judge should have given a proper "Lucas direction" but failed to do so. However, Mrs. Bacchus-Browne, learned counsel for the appellant, resiled from this ground of appeal on acknowledging that there was no evidence that the appellant admitted to lying and none was proved. Additionally, no evidence was adduced in the trial that the appellant told lies to bring a Lucas direction into consideration. In the premises, I would dismiss ground 2 of the appeal.
- [18] In the third ground of appeal, the appellant complains that he was prejudiced because the prosecution failed to obtain or disclose the phone records for the telephones of Brent and Young. He further complains that the trial judge erred in that he permitted evidence to be adduced, by way of prosecution counsel's demonstration of the use of a telephone allegedly owned and used by him (the

appellant), to call Dougal prior to the latter's death, in circumstances that were highly prejudicial to him (the appellant). This, contended the appellant, was particularly so because neither the telephone nor the call records were produced.

[19] The appellant complains, in the fourth ground of appeal, that the trial judge dealt with the defence of self-defence in a manner that was unhelpful, confusing and accordingly prejudicial to the appellant. The fifth ground of appeal stated that the sentence was excessive in all of the circumstances of the case.

[20] Having already disposed of ground 2 of the appeal, I shall proceed to determine ground 4 first, and, thereby the question of the manner in which the trial judge dealt with the defence of self-defence. I shall then consider grounds 1 and 3 of the appeal which concern the issues of misdirection on the telephone call and whether the appellant was prejudiced in his trial because of the failure of the prosecution to disclose telephone records, and because the judge permitted the demonstration of the use of the telephone. Finally, if necessary, I shall consider the sentencing issue.

Ground 4 – Self-defence

[21] It is trite principle, often repeated by this court, for example by Satrohan Singh JA in **Donnason Knights v The Queen**,³ that a trial judge is duty bound to provide a direction on self-defence and leave that issue for the jury to consider as long as that defence arises from any evidence or material during a trial. It does not matter whether it emerges from the evidence or material adduced by the defence or by the prosecution.

[22] In his summation, the trial judge noted that defence counsel attempted to raise self-defence while he addressed the jury, but he (the judge) stopped counsel because the defence did not raise it during the trial. The result, said the judge, was that the jury did not have to consider it. The judge then went on to provide a summation on self-defence, expressly out of an abundance of caution. He gave

³ [1996] E.C.L.R. 274, at page 282 C-D.

examples of hypothetical circumstances in which self-defence may arise. At the end of it he stated as follows:

"But if you look at this case this [self-defence] does not arise at all because the accused has all along told us in his defence that he never did any killing. He did not shoot anybody. So for Defence counsel to put to you the issue of self-defence would rather be doing an injustice to his client and I have the responsibility of seeing to it that justice is done in this court I am duty bound to tell you don't consider the issue of self-defence at all because if you do that you will be putting him in a very unfair position, that is the accused. So I hope you take that on board. Do not have any regard to that issue of self defence. It does not arise in this case and I think Defence counsel should never have done what he did. That is as far as I would say."⁴

[23] Mrs. Bacchus-Browne contended that the trial judge should have raised self-defence and explained it to the jury. She insisted that the judge erred when instead he stopped the defence from addressing the jury on self-defence, over the loud protests by the prosecution. Counsel submitted, further, that this, coupled with the judge's misdirection rendered the conviction unsafe and amounted to a serious miscarriage of justice particularly because the summation had the effect of confusing the jury on the issue.

[24] In my view, the learned trial judge did not err in the manner in which he directed the jury on self defence. That defence did not arise in the appellant's case. It was never the appellant's case that he shot or killed Dougal at all. He did not at any time maintain that he shot or killed Dougal while he (the appellant) was trying to defend himself from Dougal or anyone else. At all times the appellant insisted that someone else shot Dougal. To this extent it is helpful, in my view, to reproduce fully the relevant aspects of the appellant's caution statement, verbatim. It states:⁵

"Yesterday 20th October 2005 I wake up. I began to water the plants. My cellular phone rang. I answered same about 10 to 9:00 or 10 past 9:00 a.m. The person who called me gave his name as Fly. He told me to hold the phone, Brent want to talk to me. Brent told me he nah ready as yet, he would call me back because he has already made plans to sell me 9 kilos of cocaine at \$10,000 EC per piece. While waiting for Brent to call

⁴ See the Record of Appeal, from page 383, line 14 to page 384, line 2.

⁵ See from pages 202 line 9 to 204 line 22 of the Record.

me back some friends came by me. Their names are "Cool", "Chips" and "Cotree". Brent call me back and told me I must call him back because he have no credit on his phone. I called him back about 9:45 a.m. We made plans to meet at Diamond. My girlfriend was by me. She left leaving me and the three guys there. I leave the house at 10:45 a.m. for Diamond and was there waiting for them. Then I called back Fly phone and asked them where they is. They told me they dey Prospect coming. They parked their vehicle, a white Toyota PL 625 OR P 625 in front my vehicle next to the Farmers Market. I came outside my vehicle and I proceed towards their vehicle. When I get to Brent came and he told me to come in to see what they have. I took a seat to the right back of the car. They gave me a black bag. I noticed 9 kilos of cocaine were in the bag. I collected the said bag with the cocaine and proceed back to my vehicle with it. Brent and Fly were following me back to my vehicle. On reaching back to my jeep Brent was to the driver's side and Fly was to the passenger side. I have thirty five thousand (\$35,000) U.S. dollars in the jeep. I handed that money to Brent. Brent further told me he expected twenty more kilos of cocaine the said evening or today 21.10.05. I told him I have sixty thousand U.S. dollars and I would like to buy them from him. Brent call Fly from the passenger side. They went aside and were talking. I did not hear what they were saying. After the conversation finish Brent came back to me and pull a grayish and black gun at me, and placed it at my head and said, "Boy we want that money." I told them the money bury under the sand by me in the back bedroom downstairs. The cocaine were between my legs on the floor at the driver's seat. Brent took back the cocaine and told Fly to ride with me because they want the rest money. Fly get into my vehicle the passenger side and place a gun to my side pointed to my left side. Fly told me to drive the vehicle for them to go and collect the money while Brent were in the car behind following. I drive through Carapan onto Mespo Road. While travelling I was talking to Fly by telling him to leave me alone. I told him I would give him about \$10 to \$20 thousand for himself over and over. On reaching Yambou public road going into Argyle Fly told me stop, he would talk to Brent. I saw Brent came out of the said white car with his gun in his right hand. He went to Fly side and stood. I heard Brent said to Fly, "Why all you stop? What is the problem?" At that time Fly still had the gun at my side. I heard Fly said to Brent, "Man, we already get the man money and we don't get the dope, so why we don't leave the man alone." They were arguing for a while. Fly removed the gun from me and he and Brent were still arguing but turn slightly to Brent with the gun pointed in the direction of Brent. Brent try to get the gun from Fly. After I saw that I opened the jeep door and lay down on the ground. Upon opening the door I heard one shot fired. After that I heard two or three more fired. I did not run because I don't know if the guy in the car had a gun. I saw Brent walk back to the car and went in. I saw the car reversed from where we came from and went out of sight. I got up from where I was and went back into the jeep. I saw Fly the same place seated with two shots to his chest with blood

running from one of the shots. He was not saying anything nor moving. Having seen how he look I pushed him out of my vehicle and lead off with one speed for my home. As I got home I collect my passport and plane ticket. Upon getting into the jeep I noticed blood was on the said seat where Fly was seated. I used a piece of cloth that I accustom to wash the vehicle and was trying to clean the blood from that seat. After I proceed to Kingstown to deliver the jeep to Leslie. I traveled from Argyle through Biabou, Mespo, Fountain and back to town. On reaching Adams Apartments I met the said car travelling in the opposite direction. They saw me. They made a "U" turn in the road and was trying to follow me but I overtake several vehicles and go through Murray Village and parked the vehicle by Lennox garage."

[25] The appellant's evidence at the trial mirrors his statement. Self-defence does not arise as an issue on either his caution statement or that evidence. Neither does it arise on the prosecution's case. It was not a part of their case that the appellant killed Dougal at all or in self-defence. However, defence counsel raised self-defence in his address to the jury, notwithstanding that there was no evidence on which to ground it. Defence counsel stated as follows to the jury then:⁶

"I am asking you to believe the defendant that he was being kidnapped. So I am saying to you that even if you were to believe the proposition put forward that he shot --- I personally don't accept that --- that's not our case --- but if you were to believe the proposition that he was shot by the defendant I am asking you to find that that was in self-defence because the defendant was kidnapped. ... Well, the only evidence you have as to why is that he was kidnapped. The evidence, the only evidence before you as to why McBurnette went with him is that he was kidnapped. And if he was kidnapped and in the process of being kidnapped and being driven wherever he took a gun and shot him because he was being driven – he was driving but he was at gunpoint."

[26] The record shows that the prosecution objected at this point, correctly, in my view, to the introduction of self-defence. The learned trial judge agreed with counsel for the prosecution. After a few exchanges, defence counsel said that it was just a proposition.⁷ In effect, it was a hypothetical proposition given the evidence and the case presented by either side. It could have had the effect of confusing the jury as to the appellant's own case. His case was not that he shot or killed Dougal

⁶ See page 372 of the Record from line 5.

⁷ See page 373 lines 10 and 11.

in self-defence but that he did not kill Dougal at all. In the circumstances, it was incumbent on the trial judge to direct the jury as he did on this issue, particularly to focus their attention on the appellant's defence. It was unnecessary, in my view, for the judge to have explained self-defence to the jury out of an abundance of caution. However, that explanation did not prejudice the appellant in his trial. Rather, the explanation may have had the effect of further dispelling from their minds that self-defence arose for their consideration. In these premises, I would dismiss ground 4 of the appeal.

Ground 1 - The misdirection on facts relating to the telephone call

[27] This ground of appeal, as amended, states, in effect, that the trial judge erred by failing to direct the jury properly, and, in fact, misdirected the jury when he said on page 385-386 of the Record:

"There was a phone call from Brent Clement about this money and from the time the accused heard this phone call and realized the game was up he decided McDougal (*sic*) had to die. That is the Prosecution's case."

The appellant asserted, in ground 1 that this was not the prosecution's case. He pointed out that the evidence was that when Brent tried to contact Dougal and the appellant by telephone there was no answer. This is correct.

[28] Learned counsel for the appellant submitted that it was a quantum leap for the trial judge to have said that there was a telephone call about money and the appellant made up his mind to kill as soon as he heard the phone call. Counsel insisted that the words used by the trial judge in the summation were untrue and prejudicial to the appellant. She referred to paragraph D23.30 of **Blackstone's Criminal Practice 2005**, which is under the rubric: "Misdirection on Facts".

[29] The passage under reference from **Blackstone's Criminal Practice** states that a misstatement in summing-up of evidence that was given in a case, may be relied on as a ground of appeal, if the appellant can establish that the jury may have been misled and may not have returned the verdict that they did had the evidence been correctly stated. In these cases, the approach as stated by Scarman LJ in

Ernest Leslie Allan Wright⁸ is, first to determine whether there was a misstatement, and, second, to determine whether the error was a significant one which might have misled the jury. The court would only quash the conviction as unsafe if it has a lurking doubt that the conviction was unsafe and unsatisfactory. The error must “loom sufficiently large” for an appellate court to intervene.

[30] Learned counsel for the prosecution submitted that there was no misdirection because the clear evidence in the case was that no telephone conversation took place at the time. It was established that the telephone rang but there was no answer. This is uncontroverted evidence.

[31] In my view, it is necessary to put the direction, which is complained of, into its full context. The judge was in the process of explaining intention to the jury. He stated as follows, in the final aspect of that explanation:⁹

“... [T]his is how you determine intention because you can't know what is going through my mind now and I don't know what is going through your minds now. So the only way you can infer intention or determine somebody's intention is what the person did or did not do; or what the person said or did not say and the effect that would have on the circumstances before you. And you should look at his actions before, at the time of, and after the offence which is in this case murder and that these things may shed light on his intentions at the critical time.

“Now, the Prosecution only has to prove that the defendant had the necessary intention at the time of the alleged offence. It need not have been a long-standing intent. It is sufficient for it to have been formed in a matter of seconds, say in a sudden flash of temper. So that what this is saying is that the intention to kill need not have been something that was formed maybe two days ago before the 20th October. It could have been formed right there and then on the spot when they were driving. The Prosecution is saying they were driving the vehicle, there was a phone call from Brent Clement about this money and from the time the accused heard this phone call and realized the game was up he decided McDougal (*sic*) had to die. That is the Prosecution's case. I am only using that as an example, as an illustration. So that is how you determine the intention.

“In this case what the Prosecution is saying is that the accused formed his intention some time before the killing. It may have been five

⁸ (1974) 58 Cr. App.R. 444, at page 452.

⁹ See from page 385 line 5 to page 386 line 11 of the Record of Appeal.

minutes before the killing, two minutes before the killing, or it may have been when he left home going to Diamond to do the business transaction with the drugs, the pharmaceuticals as I call them, alright. He may have formed the intention that if anything goes wrong I'm going to kill him because initially what the Prosecution is saying is that he set out, that is the accused, with the intention of duping the person, that is McBurnette, the person he was transacting the business with. So you have to consider that issue very carefully." [I provided the highlight]

[32] Given this context, it seems to me that there was no error on the facts. The trial judge was not deviating from the prosecution's case and the evidence that was adduced in the case. He was merely trying to explain intention in a simplified manner, for the benefit of the jury. He did not mislead them with respect to the telephone call thereby prejudicing the appellant in his trial. In the circumstances, I would dismiss ground 1 of the appeal.

Ground 3 – The phone records and demonstration with the telephone

[33] The appellant complained, in the original ground 3 of the appeal, that the verdict is unsafe and unsatisfactory having regard to the facts and circumstances of the case. The appellant was given leave to amplify this ground. The way in which the amended complaints were framed is hereby reproduced. They state as follows:

1. The prosecution failed to obtain/disclose "authenticated" phone records of the appellant, Brent Clement and Coldrick Young bearing in mind they made the phone records an integral part of the prosecution's case and whether or not the name of "Fly" was actually recorded from the phone records in the appellant's phone.
2. The learned trial judge erred in law when he permitted the prosecution to refer to and rely on and to make demonstrations with the phone alleged to be that of the appellant, yet failed to put it into evidence for the jury and the defence to examine. See page 425 (of the Record). This admonition to the jury was too late as the damage was already done.

3. The failure of the prosecution to produce the appellant's cell phone in the circumstances was a material omission and caused prejudice to the appellant.

[34] Learned counsel for the appellant referred to no authority in support of the complaint in the amended ground 3(1) of the appeal. I am not aware of any basis on which this ground may be sustained, particularly when this was not put in issue at the trial by defence counsel.

[35] With respect to ground 3(2), the demonstration of the telephone came when the appellant was cross-examined. The appellant stated that while he met "Fly" for the first time on 20th October 2005 and did not know him before that date, he knew Brent and did business with him before that date.

[36] As the appellant's cross-examination continued, the appellant said that on the morning of 20th October 2005 he was watering plants when he received a telephone call. The person whom he answered gave his name as "Fly" and asked him (the appellant) to hold the line for Brent. He (the appellant) was not able to say whether the call originated from Fly's or Brent's telephone.¹⁰ The court admitted the appellant's vehicle rental agreement into evidence, without objection from counsel for the appellant. The appellant then agreed that a telephone number on the agreement was his. He stated that that was the telephone on which he received the call, and that Brent called him back on that same telephone and asked him (the appellant) to return the call. The appellant said that he had Brent's telephone number saved in his (the appellant's) phone, but he did not have Fly's number. He (the appellant) had his (the appellant's) telephone when the police apprehended him and they took it from him. It was a pre-paid phone. The appellant insisted that he did not know Fly and did not have Fly's telephone number saved in his phone. He would have Brent's number saved in it. The prosecutor was by then holding a cell-phone. He went through it apparently

¹⁰ See pages 270 to 271 of the Record.

identifying names and numbers on it and questioning the appellant. Defence counsel then observed that the phone was in police custody for some time and there was no evidence that it was not tampered with. The trial judge responded that it was a matter on which he (the judge) would address the jury and that counsel would also have had the opportunity to do so as well.¹¹

[37] Counsel for the prosecution then questioned the appellant on names that counsel alleged were saved in the telephone. The appellant agreed with prosecuting counsel that such cell-phones have a place for received calls, and, accordingly, a place to check such calls. He said that if the name "Fly" was in the received section that would surprise him.

[38] For the purpose of determining the context of the complaints contained in ground 3(2) and in ground 3(3) of this appeal, I think that it would be helpful to fully reproduce the subsequent cross-examination. It is recorded as follows:¹²

"Q. I asked you a question. If there is a name stored under the received calls on this phone--- your phone ---- will that surprise you?

A. Yes.

Q. Options. Call time. 10-20-2005 ----10:57 a.m. Satisfied? You have seen it? Let me pass it up to you because you have seen it. Pass it up to His Lordship. My Lord, I would be grateful if your Lordship would take the phone before it is shown to the witness.

THE COURT: Show it to accused.

MR. DUANE DANIEL: Now, before you show it to the accused, my Lord, you admit, ---- would you want to conduct a test with my phone calling that phone to prove to yourself that it is your phone? I am quite happy to allow you to facilitate that because you might have thought that I would have used some ----

THE WITNESS: That won't be necessary.

MR. DUANE DANIEL: I insist. I insist

THE COURT: To call which phone?

MR. DUANE DANIEL: Sorry?

THE COURT: To call which phone? That phone?

MR. DUANE DANIEL: His phone

THE WITNESS: You already did that.

¹¹ See from page 272 to 277 of the Record.

¹² From page 280, line 9 to the end of page 286. "Q" denotes questions asked by Mr. Duane Daniel, prosecuting Counsel. "A" denotes answers by the appellant.

MR DUANE DANIEL: No, but I don't want you to think I am tricking you. You know the number. Use my phone and call it so when you hear it ring you will know whose phone it is.

[Phone rings]

MR DUANE DANIEL: Okay, you know the number, you see.

THE WITNESS: Yeah, well I have the number in front of me

MR DUANE DANIEL: But it is your phone, you know the number. Now pass the phone to him now.

BY MR. DUANE DANIEL: Q. So can you properly identify this as being your phone? Ah?

A. [No audible response.]

Q. Before you sta ---- okay, check through it. Can you identify it as being your phone?

A. Like I said before -----

Q. Check through a couple of the names in the book, in the phone book. You must know what names that you stored in there. I can't possibly know those names. You see those names? Does that look like the phone book list that you had on your phone? Yes or no?

A. Yes.

Q. Yes. When was the last time you saw this phone?

A. The last time I saw him use the phone was in police custody with Officer Massiah.

Q. Now go to the received calls, received calls.

A. Yes.

Q. Do you see a name "Fly" in there?

A. [No audible response.]

Q. F-L-Y?

A. Yes.

Q. Use the options.

A. Yes.

Q. Do you see a date and time recorded as to when the call was received?

A. Yes.

Q. But it surprises you that Fly's name is on this phone?

A. Yes.

Q. And it would further surprise you that Brent's name is not on your phone.

A. Hold on. Now, Brent called me from various numbers. When he do call me I save the numbers to my phone.

Q. But you have Fly's name ---- but you said you don't know Fly.

A. The only time I met Fly is the said day in question.

Q. And you didn't save his number on your phone?

A. How am I to know if the number is Fly's or if it is Brent's?

Q. Well I am putting it to you Sir, you are a liar.

A. No, Sir, I am not lying.

Q. You never knew Brent until that day.

A. [No audible response]

THE COURT: Yes.

BY DUANE DANIEL

Q. You have to answer you know.

A. Yes, the first time I met Brent is at Colours Bar at Arnos Vale. He was there with two young ladies and a next individual.

Q. All I asked you is whether or not you knew Brent that day. You knew Fly before.

A. Yeah, well I thought I would be given a chance to show I know Brent.

Q. Did you know Fly before that day?

A. No, that's the first time I met Fly.

Q. But you saved his name to your phone.

A. I did not save Fly name to my phone.

Q. It is on your phone. You saw the date on that phone.

A. Yes.

Q. Is it a coincidence that his name is down on a received call on a phone that you identified as your own?

A. For the name to be saved in my phone and the number obviously it was instructed from Brent for me to save the number in my phone as a number for me to reach him. But apart from that I never met Fly before.

Q. You said you never had his name on your phone.

A. I just explained to you, Sir. For me to have the number saved in my phone obviously I was instructed by Brent for me to save that number to my phone.

THE COURT: You never said that any time through your evidence until now.

THE WITNESS: Yes, but I am telling him now.

THE COURT: You never said that when you received the phone call first time from Brent and he said he was not ready he asked you to save that phone number. You didn't say that.

THE WITNESS: No, I didn't say so, my Lord. I said the first time they called I received a call from a gentleman who gave his name as "Fly". He told me to hold the line for Brent.

BY DUANE DANIEL:

Q. Your recitation is of no use now, Sir. You are a liar. You are a liar. But for inspiration at 3:00 o'clock in the morning you might ah get away with it. We will move on from the phone. Now you admit though that according to you I'll accept your version for a little while, Brent always came alone. Unh?

A. Yes.

Q. But I will tell you that that was "Fly" who you accustomed dealing with to come alone and you expected that – Fly to come alone.

A. No, I am accustomed to doing business with Brent. Like I said before it was the first time I met the individual by the name of Fly.

Q. Alright, but that day you were only expecting to be doing business with one person, right?

A. I was looking for ---- on that day I was looking for -----

Q. Brent or whomever. Whether Brent, whether the Pope, whether whomever, you expected to be doing business with one person that day.

A. Yes.

Q. Good. And the money you had was in a vacuum sealed bag. Ah?

A. Yes.

Q. But lo and behold, when you met up with the persons you met three people, not true?

A. Yes.

Q. You didn't expect three people?

A. Well, I didn't know -----

Q. Did you expect three people?

A. I did not know what to expect, Sir

Q. You said you expected to do business with one person just now.

A. Doing business with one person and meeting three different persons is two different things, Sir.

Q. Well, we will split hairs on the semantics. You met three people, you expected to do business with one. Satisfied?

A. Yes.

Q. You hand over the money in a vacuum sealed package. Correct?

A. Yes.

Q. You collect your drugs. Correct?

A. I collect my drugs before I gave them the money.

Q. I am not con ---- this is a murder trial, Sir. This counsel might be concerned about the drugs matter --- this is a murder trial. I am not concerned whether drugs passed first and money passed second. This is a murder trial. You handed over the money, you collected your drugs, yes?

A. Yes."

[39] Defence counsel did not refer to this aspect of the evidence in his address to the jury. In his address counsel for the prosecution stated as follows:¹³

"The defendant says that he got calls. He can't remember from who[m] ... that Brent's number he had on his phone because he was accustomed to being in contact with Brent, but Fly, no. I don't know Fly. I don't have his number in my phone. I am saying to you that that is a lie. I am saying to you that this defendant sought to place the blame on Brent as the murderer rather than him[self]. He sought to erase the fact that he had a previous relationship with Fly instead of Brent because ... of the wily ways of the defence he is attempting to remove motive. He is trying to say to you, why would I kill this stranger? This is a man I have never met before. What reason could I possibly have or had to try to kill him? We have proved that he had knowledge enough or rather I take that back, we have

¹³ See from page 343, line 14 to page 344, line 6 of the Record.

proved that he has lied in respect to his knowledge of Fly. He knew him. He made the arrangements with him. Even in his evidence he said he called back the number that Brent had given him trying to say that this is the first time he ever know the number for Fly. But we will move on, man. We will get to the scene.”

[40] In his summation, the trial judge stated as follows:¹⁴

“Certain questions were put to him (the appellant) in this court pertaining to phone calls he received that morning of the 20th October 2005 and from whom he received those calls. You heard all the questions and answers put to him. It is for you to consider who you want to believe. Remember the cell phone that was used here is not in evidence. You didn’t even see it. So base your deliberations just on the answers that he gave. He maintains it was Brent he had dealings with. Brent denies that. Young also supports Brent. Young says the arrangement was with Dougal.”

[41] Before us, Mrs. Bacchus-Browne insisted that the trial judge should have stopped the prosecution from demonstrating the possible use of the telephone without putting the telephone and the call records into evidence. Leaned counsel argued that the demonstration was highly prejudicial because the prosecution was trying to convince the jury that the appellant knew “Fly” by having them to believe that “Fly’s” telephone number was in the appellant’s telephone. Counsel said that the prosecution had the telephone for 2 years but did not disclose the matters that were raised in the cross-examination with the defence. Counsel insisted that the prejudice occasioned by the demonstration in these circumstances was not cured by the summation, which came too late.

[42] Learned counsel for the prosecution submitted, in response, that the telephone records were not a central issue in the case. However, said counsel, the existence of the telephone itself was not known to the prosecution until the Crown closed its case. He indicated that the information which was on the telephone was disclosed to the defence prior to the demonstration. It seems to me that that could possibly explain why the defence permitted it to continue after their initial objection. However, submitted counsel, the appellant admitted that he had spoken

¹⁴ See page 425 of the Record, lines 8-14.

with "Fly". In any event, submitted counsel, the telephone calls came only as a prelude to the events that were the immediate cause for Dougal's ("Fly's") death, and, accordingly, the demonstration with the telephone was not a central focal point in the trial. In my view, given this, the dramatics which surrounded the demonstration of the telephone were unnecessary.

[43] Learned counsel for the prosecution submitted that the focal point of the events which led to the death of Dougal were the occurrences that took place after Dougal and the appellant left the scene of the transaction together, in the appellant's jeep. The appellant was in the driver's seat on the right front of the vehicle. Dougal was in the left front passenger seat. It was not long after that time that Dougal's body was found at the side of the road. The appellant admitted that he pushed the body out of the jeep and left it there. The medical evidence concluded that death was caused by 2 bullet wounds which entered the right side of Dougal's body and exited on the left back side. The evidence of the investigating officer, as to the trajectory of the bullets and where the projectile fragments were found, not only corroborates this but further suggests that at the time of the shooting Dougal was sitting inside the jeep and his door was closed. Counsel for the Crown noted that the appellant admitted that he was on the scene at the time of the shooting, although he denies that he did the shooting. His account is that Brent shot Dougal. On the other hand, argued counsel, Brent, whose evidence Young corroborated, said that neither he nor Young was present at the time of the shooting. Learned counsel asked us to find that these were the central considerations, and that they conduce to one conclusion that the appellant killed Dougal.

[44] This case was based on circumstantial evidence. Notwithstanding my view that the dramatization by the demonstration of the possible use of the telephone was unnecessary, notwithstanding the answers which the appellant gave during that demonstration. In any case, this was a peripheral event, in my view. I do not think that the appellant was prejudiced by the demonstration and by the fact that the telephone and the call records were not tendered in evidence. In my view, any

possible prejudice would have been obviated by the direction which the learned trial judge gave.

- [45] In the end, I agree with counsel for the respondent that the members of the jury were entitled to find that the circumstances, disclosed by the evidence, pointed inescapably to the appellant as the person who shot Dougal. They obviously rejected the appellant's version of the events as highly improbable in light of the evidence of the trajectory of the bullets through the body of Dougal and the place where fragments were found. In the foregoing premises, I would also dismiss ground 3 of the appeal.

Ground 5 – The sentence

- [46] It is trite principle that the discretion in sentencing resides in the trial judge. An appellate court would not interfere with the exercise of that discretion unless the trial judge erred in exercising it by applying wrong sentencing principles, and, accordingly, acting outside of the ambit of the discretion.
- [47] The appellant was convicted on 29th November 2007. The sentencing hearing was adjourned to 12th December 2007, then to 17th January 2008 and finally to 25th January 2008 to receive the psychiatric and social inquiry reports concerning the appellant. On 25th January 2008 Dr. Amrie Morris-Patterson produced the psychiatric report and presented in court, while Mr. Cammie Matthews, the Director of the Family Affairs Division of the Ministry of Social Development produced and presented the social inquiry report. Counsel for the appellant was invited to cross-examine them. Counsel made submissions in mitigation on behalf of the appellant. The learned Director of Public Prosecutions made no submissions. The sentencing judge carried out the sentencing analysis.¹⁵
- [48] In my view, there is nothing in that analysis which indicated that the judge acted outside of the sentencing discretion either in that analysis or in the sentence which he imposed, in ordering the appellant to serve 30 years in prison, with effect from

¹⁵ See from pages 443 to 446 of the Record.

20th October 2005, the date on which he was first arrested. I would accordingly dismiss the appeal against sentence.

Order

[49] In the foregoing premises, I would dismiss Mr. Bacchus's appeal against conviction and sentence and affirm the conviction and sentence.

[49] I hereby apologize to the parties for the delay in the delivery of this judgment, which was caused by an overly demanding administrative workload and illnesses over the period since the hearing of the appeal.

Hugh A. Rawlins
Chief Justice

I concur.

Janice M. Pereira
(formerly **Janice George-Creque**)
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal