EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCRAP2009/0015

BETWEEN:

KEVIL NELSON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mr. John Carrington, QC	Justice of Appeal [Ag.]

Appearances:

Sir Richard Cheltenham, QC with him Mr. Cosbert Cumberbatch and Ms. Shelly-Ann Seechellan

Mr. Anthony Armstrong, Director of Public Prosecutions with him Ms. Kathy-Ann Pyke and Ms. Shannon Jones

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2012: October 31;
2013: November 11.

Criminal appeal – Murder – Application to adduce fresh evidence – Jury's inference – Implied implantation of scissors – Lucas direction – Public interest defence and self-defence – Whether error in leaving the issue of trespasser before the jury – Breach of prosecutorial role – Whether a trial judge ought to direct a jury that where an accused formed the intention to kill it is not inconsistent with the plea of provocation, thus entitling the accused to the lesser verdict of manslaughter – Sentencing

The appellant, a police officer, was convicted of the murder of Denfield Thomas, the deceased, and sentenced to 22 years imprisonment. At the time of the killing, the appellant and Police Constable Francis had accompanied Nasha Edwards, the deceased's girlfriend, to the deceased's home where she intended to and did retrieve a baby bag

containing miscellaneous baby supplies. A confrontation occurred in the yard between the appellant and the deceased. The prosecution's case, which was based upon the eye witness testimony of Nasha, was that the appellant shot and killed the unarmed deceased, without lawful justification or excuse.

The appellant's case was that he acted in self-defence when he shot and killed the deceased after the deceased charged him with a scissors. He had to act to protect himself and PC Francis from imminent danger. He also raised public interest defence. The defence of provocation was also left to the jury. In a number of photographs taken after the shooting, a pair of scissors appeared near the hand of the deceased, while in other photographs there were no scissors.

Nasha testified that the deceased did not have any scissors at the time of the incident; neither she nor the deceased owned the scissors and there was no such scissors in the house. The jury evidently believed the prosecution's case and found the appellant guilty of murder.

The appellant appealed against both his conviction and sentence on a number of grounds which included that (1) the learned trial judge erred in law when he allowed the prosecutor to address the jury on the issue of the likely implantation of the scissors in the hands of the deceased after his fall; (2) the learned trial judge erred in allowing the prosecutor to put to the jury that the appellant was a trespasser; (3) the prosecutor breached his role as a minister of justice; (4) the learned trial judge erred in his failure to direct the jury that the plea of provocation could succeed even if they found as a fact that the appellant had formed an intention to kill; and (5) the sentence was too excessive in all the circumstances.

Held: allowing the appeal against conviction against murder and substituting a conviction of manslaughter; and allowing the appeal against sentence to the extent that the sentence of 22 years is varied to 12 years with the pre-sentence custody of 41/2 years deducted therefrom, that:

1. The determination of the issue as to whether or not the deceased was armed with a pair of scissors when he was shot was exclusively for the jury to resolve as judges of facts. It was a live issue in the case. Thus, the learned trial judge was quite correct in leaving the evidence to the jury so that they could draw the appropriate inference from the facts that they found. It was eminently a matter for the jury to decide what evidence to believe and what weight or importance they would attach to that evidence. A court may not usurp the role of the jury which is the body charged by law to find facts and determine guilt. By their verdict, the jury accepted Nasha's evidence and would have found as a fact that the deceased did not have any scissors in his hand when he was shot by the appellant.

2. The test for self-defence and prevention of crime is identical. That test is whether or not the force used in each case was reasonable. Therefore, notwithstanding the trial judge's failure to direct on the issue of whether the appellant was a trespasser, the test of whether or not the force used was reasonable would remain. The trial judge properly directed the jury on the issue of reasonable force.

This Court is not of the view that the appellant's defence was undermined in any way.

3. It is not every departure from good practice which renders a trial unfair. The crucial issue is whether there were such departures from good practice in the course of an appellant's trial as to deny him the substance of a fair trial. While some of the language and comments of the Director of Public Prosecutions were high spirited, unnecessary and inelegant, this Court is not of the view that they compromised the fairness of the appellant's trial.

   Randall (Barry Victor) v The Queen [2002] 1 WLR 2237 applied; Alexander Benedetto and William Labrador v R [2003] 1 WLR 1545 applied; Arnold Huggins et al v The State [2008] UKPC 32 applied.

4. In a case where provocation arises, the trial judge must direct the jury that provocation might succeed even if the accused had formed an intention to kill. In the circumstances of this case, in which the jury may easily have found that the accused had formed the intention to kill, it was incumbent on the trial judge to direct the jury that had the intention to kill arose from provocation, the appellant would have been entitled to the lesser verdict of manslaughter. The failure of the trial judge to do so constituted a grave omission on his part and may have deprived the appellant of the verdict of manslaughter, thus resulting in a miscarriage of justice.

   Baptiste v The State (1983) 34 WIR 253 applied; R v Bunting (1965) 8 WIR 276 applied; Attorney-General of Ceylon v Kumarasinghege Don John Perera [1985] AC 200 applied.

5. The primary rule is that in the absence of unusual circumstances a judge should fully credit a prisoner for pre-sentence custody. If the judge seeks to depart from the primary rule, he must state reasons for not granting a full deduction or no deduction at all. The conviction for murder having been quashed and a conviction for manslaughter having been substituted and the benchmark for manslaughter being 15 years, a sentence of 12 years would be appropriate with the 4 ½ years spent on remand to be deducted from the 12 years.

   Shonovia Thomas v The Queen Territory of the British Virgin Islands High Court Criminal Appeal BVIHCRAP2010/0006 (delivered 27th August 2012, unreported) followed; Callachand and Anor v The State of Mauritius [2008] UKPC 49 applied.

JUDGMENT

[1] BAPTISTE, JA: This is an appeal against conviction and sentence for murder. On 24th October 2006 Kevil Nelson, the appellant, shot and killed Denfield Thomas, the deceased. On 30th October 2009 after a trial before a judge and jury

the appellant was convicted of murder and sentenced to 22 years imprisonment on 11th December 2009. The prosecution's case was that the appellant, a police officer, shot and killed the deceased without lawful justification or excuse. The appellant contends that he acted in self-defence when he shot and killed the deceased after the deceased charged him with a scissors. He had to act to protect himself and Police Constable Francis from imminent danger. The appellant also invokes public interest defence. The defence of provocation was also left to the jury. At the time of the killing, the appellant, along with PC Francis had accompanied Nasha Edwards, the deceased's girlfriend, to the deceased's home where she intended to and did retrieve a baby bag containing miscellaneous baby supplies. A confrontation occurred in the deceased's yard between the deceased and the appellant resulting in the shooting death of the deceased.

[2] Three eye-witnesses testified to the shooting of the deceased: Nasha, the appellant and PC Francis. Nasha was the critical witness for the prosecution and her evidence was fundamental to the success of its case. Nasha's evidence relating to the shooting stands in marked contrast to that of the appellant and PC Francis. Critically, Nasha testified that during the altercation in the yard, she did not see any scissors in the deceased's hands, neither she nor the deceased owned the scissors and that there was no such scissors in the house. Interestingly, in a number of pictures taken after the shooting, a pair of scissors appeared near the hand of the deceased. In other pictures, there were no scissors.

Background and evidence

[3] On the night of 23rd October 2006, the deceased put Nasha – his live-in girlfriend, out of his house. Pursuant to a complaint Nasha made to the police by telephone, PC Francis and the appellant journeyed to the deceased's mother's home where Nasha picked up her baby boy. Nasha then requested the police officers to accompany her to the deceased's house to collect a bag containing miscellaneous baby supplies. Nasha testified that on arrival there at about 1:30 a.m., she

entered the yard – which was illuminated only by the lights of the vehicle parked outside, went on the porch and called out to the deceased.

[4] Nasha also testified that PC Francis also came on the porch and said "Denfield, Denfield, police, police, open up". She saw the deceased walking towards her from the south side of the house. She walked towards him. PC Francis and the appellant followed her. The deceased had the baby bag over his shoulder and she told him to let her have the baby bag. The distance between herself and the deceased was less than six feet. She could see his hands clearly and he did not have anything in his hands. PC Francis told the deceased that he needed to come to the station for questioning. Nasha asked "Why? Just leave him [the deceased] alone." Then the appellant walked up to the deceased and grabbed both of his hands. The deceased pulled away and said to leave his yard. Nasha testified that she told the officers that she has the baby bag and "Let us just go." The appellant then hit the deceased and the deceased hit him back. When the deceased hit the appellant, the appellant said "you burst my eyes". PC Francis then ran towards the deceased. He and the deceased fell to the ground. The appellant at that time said three times to PC Francis "watch yourself". PC Francis moved away and as the deceased was getting up from the ground the appellant walked up to him and shot him.

[5] Nasha further testified that she enquired of the appellant why did he shoot the deceased to which he responded, "You don't see he almost burst my eye? What you want me to do?" PC Francis and the appellant at that point pushed her out of the yard. Nasha testified that neither she nor the deceased owned a pair of yellow-handed scissors; furthermore, she never saw the deceased put his hands into his pocket.

[6] The appellant gave evidence denying Nasha's account of the events that transpired in the yard. He testified that they went to the deceased's house to pick up the baby bag at Nasha's request. On arrival, the house was in darkness. Nasha came out of the vehicle and called out to the deceased. The appellant said

PC Francis alerted the deceased to the presence of the police officers. It is here where the prosecution's story and the defence's story differ significantly. The appellant testified that just as they were about to leave, the deceased approached them and that's when he saw the deceased push an object in his pocket. The deceased said to the officers, "Come out of me yard. Come out of me effing yard" in an aggressive manner. The appellant stated that from the glare of the vehicle you could see that it was a shiny object that the deceased put in his right pants pocket. The appellant said that PC Francis tried to hold onto the deceased's left pants pocket in an attempt to search him. The deceased violently pushed him in the chest and they both fell. The deceased had a bag on his shoulder and when he pushed PC Francis, he threw the bag to the ground. Nasha picked up the bag and ran out of the yard. The deceased at some point hit the appellant in the eye. The appellant testified, "I seriously believed that we were in danger because of the way he was coming on on us. I had to do something to save myself and partner. I became very fearful for my life." He further testified that, "I am finish now. Like this man want to finish me."[1]

[7] The appellant filed an application to adduce fresh evidence of Shawn Greenidge, an EMS Technician. The Court granted the application pursuant to section 45 of the Eastern Caribbean Supreme Court Act.[2] The nature of the fresh evidence was that he took a call from the appellant that the deceased had been shot and when he arrived on the scene and turned the deceased's body, he saw a pair of scissors lying under the deceased's hands.

[8] The appellant contends that this piece of evidence would have been strongly supportive of his defence of self-defence and was capable of introducing a

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[1] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 71, lines 15 to 19.

[2] Cap. 143, Revised Laws of Antigua and Barbuda 1992.

"45. Without prejudice to the generality of the preceding section of this Act (Supplementary powers), where evidence is tendered to the Court of Appeal under that section, the Court shall, unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise its power under that section of receiving it if–

(a) it appears to it that the evidence is likely to be creditable and would have been admissible at the trial on an issue which is the subject of the appeal; and

(b) it is satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure to adduce it."

reasonable doubt in the minds of the jury. The impact of the fresh evidence will be considered later in the judgment.

Grounds of Appeal

Issue of implantation of scissors in deceased's hands

[9] Sir Richard, QC submits that the learned trial judge erred in law when he allowed the prosecutor to address the jury on the issue of the likely implantation of the scissors in the hands of the deceased after his fall, which was not directly canvassed in the trial or put to the appellant in the course of cross-examination. Sir Richard, QC asserts that it was incumbent on the trial judge to withdraw from the jury the question of the likely implantation of the scissors in the hands of the deceased subsequent to his death. The failure of the trial judge to guide the jury on how to treat and determine this issue was a major non-direction which resulted in unfair prejudice to the appellant.

[10] Sir Richard, QC argues that owing to the major conflict in the parties case as to the presence of the scissors in the deceased's hands before he was shot the learned trial judge ought to have identified and addressed this conflict and guide the jury in its resolution of the matter. Sir Richard, QC contends that the material issue which arose in respect of the scissors is the so-called issue of implantation, namely, whether subsequent to the deceased's being shot the scissors was planted in or about or beneath his hands. Sir Richard, QC claims that this issue was surreptitiously and deviously introduced to the jury by means of hints and suggestions. It did not form any part of the explicit theory of the Crown case's at the outset or during the trial, yet it was addressed in closing and became a plank of its case.

[11] Sir Richard, QC asserts further that the prosecution had an obligation to put the defence as well as the jury on notice that the implantation theory was part of its case, as the clear implication that arose from the hints and suggestions was that one or other of the members of the police force engaged in a cover-up for a fellow officer. The further implication was that that accounted for the seeming

discrepancies in the evidence, for instance, the question of why the scissors was visible in some photos and not in others. Sir Richard, QC contends that prosecutorial propriety does not admit of trial by ambush. He asserts that it was a blatant breach of the rule in Browne v Dunn.[3] Sir Richard, QC argues that the appellant was never confronted with the issue of implantation so that he could deny the allegation and plead his innocence of any involvement in implantation.

[12] Ms. Pyke on behalf of the Crown submits that there was no need for the learned trial judge to withdraw the hint or suggestion of implantation of the scissors in the hands of the deceased as an issue in the case. Ms. Pyke asserts that this ground appears to be inviting the trial judge to take away from the jury evidence which they had before them and which fell for their determination. Further, the ground of appeal appears to conflict with the appellant's application to adduce the fresh evidence of Shawn Greenidge, whose sole and primary purpose is to say that he saw the deceased with a shiny chrome object clenched in his hands.

[13] Ms. Pyke further argues that it is unreasonable to assert that the implantation of the scissors was not an explicit part of the prosecution's case in the trial. Furthermore, the question whether the deceased had the scissors in his hands at the time of the shooting was relevant to the issue of self-defence raised by the appellant at the trial. As such, the 'scissors issue' was a critical issue for the jury in order for them to come to a reasonable verdict. Ms. Pyke contends that given the nature of the evidence it was a matter of inference for the jury and as supreme judges of the facts the jurors are entitled to draw inferences from the evidence presented at the trial and in this case the implantation of the scissors in the hands of the deceased was one which the jurors could have reasonably drawn taking into account the evidence presented at the trial. I agree.

[14] Ms. Pyke points to the evidence in the photographic albums which could have supported the inference of implantation; the evidence being found in the photographs taken at the scene of the murder by a police photographer. In a

[3] (1893) 6 R. 67.

number of the photographs there is no sign of scissors close to the hands of the deceased. However, in other photographs the scissors appear and the hands of the deceased had changed position. There was also the evidence of Dr. Leon Cox, who, when shown the photographs, said that that was not the position he found the deceased's body and in particular the hands of the deceased. Dr. Cox had arrived on the scene before the police photographer.

[15] Ms. Pyke argues that it is an untrammelled principle that where the prosecution in pursuit of its case relies on evidence of circumstances evincing conduct, motive and opportunity on the part of the defendant, it need not prove beyond a reasonable doubt every fact in issue, once the critical facts on which the ingredients of the case admit of the reasonable and inescapable inference. In support of this contention, counsel cites the Jamaican case of R v Melody Baugh-Pellinen.[4] Ms Pyke submits that any withdrawal of this issue would constitute an impermissible usurpation of the jury's function.

The Law and Analysis

[16] I am in full agreement with the cogent arguments of Ms. Pyke in opposition to this ground of appeal. There was a stark difference in the evidence of the eye witnesses to the shooting relating to whether the deceased had a scissors when he was shot. The issue of the scissors was a live issue in the case. The appellant's account of what took place that fateful night involved the deceased attacking him with a pair of scissors. The prosecution's case differs. The prosecution's account of the events that night was that the deceased did not attack the appellant with a pair of scissors; did not have any scissors in his hand when he was shot and did not even own the pair of scissors.

[17] The determination of the issue as to whether or not the deceased was armed with a pair of scissors when he was shot was exclusively for the jury to resolve as judges of facts. The jury would be alive to the fact that three eye-witnesses (Nasha, the appellant and PC Francis) testified as to the actual shooting of the

[4] [2011] JMCA Crim 26.

deceased and as to whether he was armed with a pair of scissors. The jury undoubtedly accepted the evidence of Nasha and would have found as a fact that the deceased did not have any scissors in his hand when he was shot by the appellant. It was manifestly open to the jury to so find. From the facts found by the jury, they were entitled to draw inferences with respect to other facts. The jury could not however enter the realm of speculation. In that regard, the learned trial judge directed the jury in the following terms:

> "Now, you are entitled to draw inferences or what we call common sense conclusions from facts that you find proven. In other words, you heard the evidence, you determine what you believe, and what you believe, the evidence you believe becomes the facts of the case. And once they are facts that they may be proved in your mind, then you can draw conclusions from those. However, where there are two inferences of equal weight that can be drawn, you must draw that which is most favourable to the accused."[5] (My emphasis).

[18] With respect to the photographs taken after the shooting, some showing the scissors in or near the hand of the deceased, the jury was entitled to draw the inference of fact that the scissors were placed there after the deceased was shot. That was an inference of fact open to the jury to find on the evidence. Once the jury found as a fact that the deceased did not have any scissors when he was shot, and did not attack the appellant with a pair of scissors, it would be a common sense conclusion that any scissors found in or near his hand would have been put there after he was shot. The jury by their verdict rejected the appellant's version of the events. It was eminently a matter for the jury to decide what evidence to believe and what weight or importance they would attach to that evidence. A court may not usurp the role of the jury which is the body charged by law to find facts and determine guilt. The learned trial judge was quite correct to leave the evidence as led in the case by both the prosecution and the defence to the jury. There would have been no proper basis for the learned trial judge to withdraw the issue of implantation from the jury.

[5] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 11, lines 15-24.

In my judgment, the complaints made against the learned judge are not well founded and are without merit.

Browne v Dunn

[19] The rule in Browne v Dunn is a rule of common law, derived from the civil case of Browne v Dunn. It is essentially a rule of fairness. It requires that unless notice has been clearly given, "it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in the contradiction of his or her evidence, especially where the case relies upon inferences to be drawn from other evidence in the proceedings".[6]

[20] In this case I am not of the view that it was strictly necessary for the prosecution to have put the implantation issue to the appellant in cross-examination. It would have been very clear to the appellant that the prosecution's case was that the deceased was not armed with any scissors when he was shot and that he killed the deceased without lawful justification or excuse. Nasha's evidence was pellucid that the deceased did not have any scissors when he was shot by the appellant. The appellant's defence was that he acted in self-defence and public interest defence when he shot the deceased who was armed with a pair of scissors. In that scenario I cannot conclude that it was procedurally unfair to the appellant in not putting the implantation question to him. In other words it could not be said that he was deprived of an opportunity to explain his evidence, which in this context would amount to nothing more than denying that the scissors was placed in the hands of the deceased after he was shot. It should be remembered that the jury would have already heard his evidence that the deceased was armed with a scissors at the time he was shot. In the circumstances I do not consider that there was any prejudice or unfairness to the appellant.

[6] See Allied Pastoral Holdings Pty Ltd v FCT (1983) 1 NSWLR 1, 16.

Impact of the fresh evidence

[21] It is appropriate at this stage to consider the impact of the fresh evidence. The Court has to evaluate the importance of the fresh evidence in the context of the remainder of the evidence in the case. Shawn Greenidge was not an eye witness to the shooting. He arrived on the scene after the shooting took place and as such could not testify as to whether or not the deceased was armed with a pair of scissors when he was shot dead. Evidently, the jury believed Nasha's evidence that the deceased was not armed with any scissors at the time he was shot and rejected the evidence of the appellant and PC Francis that the deceased was armed with a pair of scissors when he was shot. In my view, the fresh evidence raises no reasonable doubt as to the guilt of the appellant. It cannot be concluded that the fresh evidence puts an entirely new complexion on the case so as to lead the Court to conclude that in light of the fresh evidence the conviction is unsafe. The fresh evidence does not afford a ground for allowing the appeal.

Trespasser

[22] The appellant complains that the learned trial judge was wrong in allowing the learned Director of Public Prosecutions to put to the jury in his closing address that the appellant was a trespasser on the deceased's premises on the night in question. The appellant further contends that the trial judge compounded his error when he stated that:

> "…whether you think that police officers, the Prosecution said that Nasha did not invite him - - invite - - invite - - expressly invite the police officers, and you will consider whether in fact in those circumstances the police entry into the premises there was some tacit invitation to escort her in."[7]

Sir Richard, QC argues that whether or not the appellant was a trespasser was a matter of law and it rested on the trial judge to direct the jury accurately and correctly on that position.

[7] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 27, lines 24-25 and p. 28, lines 1-4.

[23] Ms. Pyke submits that it was clear from inception that the Crown's case was based on the actions of the appellant being unlawful not only insofar as the ultimate shooting of the deceased but also in relation to their presence on the deceased's property. In addition, that the jury was required to come to findings of fact as to what actually transpired in the yard and who was the aggressor.

Discussion

[24] The appellant had put forward both a public interest defence asserting that he was on the property on behalf of Nasha and in the execution of his police duties and self-defence. He submitted that in the lawful execution of his duty the deceased resisted arrest. In addressing the jury the learned trial judge said:

> "Prosecution, however, said that they had no business on the premises at all. Prosecution says that when you look at the evidence in its totality and that there was nothing that transpired that could possibly have given the police officers any lawful reason for being on the premises."[8]

The judge went on:

> "Well, a report had been made earlier that night and the Prosecution's witnesses have said, the report says that this - - Nasha called and complained of choked and beaten. When you look at all the circumstances of what transpired that night and when they arrived at the house, it is really a matter for you whether you think that the police officers, the Prosecution said that Nasha did not invite him - - invite - - expressly invite the police officers in…"[9]

[25] I regard it as fanciful to view the appellant's presence on the property as being that of a trespasser. While it is true that the purpose of the emergency call to the police had been achieved (the collection of Nasha's child), subsequent thereto, Nasha had requested the police to drop her to the deceased's home to pick up the baby bag. It was about 1:30 a.m. when they arrived there. The police no doubt would also have been mindful of the earlier report made by Nasha. It is true that the trial judge did not direct the jury on the issue of whether the appellant was a

[8] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 27, lines 12-17.
[9] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 27, 18-25 and p. 28, line 1.

trespasser. This Court has to consider whether the appellant's defence was undermined or was likely to be undermined in the circumstances.

[26] The learned judge, in putting the appellant's defence of public interest defence to the jury, had this to say:

> "Now, I am required to put to you the underpinning of the defense and the accused to you along with any other possible defences that might arise in the evidence, whether the accused, himself, put that defense to you or not. The accused raised through his counsel what you call a public interest defense and he is relying on what is referred to, he said that the police officers that they are carrying out a public duty and if whilst carrying out that duty in either preventing a crime or the lawful arrest, to lawfully arrest somebody, search them, that they had such a right to do so, and that they only lose that right to effect that duty if in fact the force they used is not reasonable. And whether considerations that one would entertain in considering reasonableness."[10]

He continued:

> "Police are entitled to use reasonable force to prevent a crime and in that regard the accused is saying he used reasonable force to prevent a crime, that is, the beating of the accused and himself and PC Francis, search of him, and that he was attacking them. What transpired is a matter for you, determination of the jurors, as to what reasonable force is in this particular defense. It's not a question of the law for the judge, it's a question of fact for the jury. You will decide the point and the reasonableness of the force used by the accused if you find he was preventing a crime at the time of the shooting."[11]

[27] The test used in the prevention of a crime defence is the same as the test in self-defence, that is, whether or not the force used was reasonable. As discussed in Blackstone's Criminal Practice 2012[12] at page 57, paragraph A3.31:

> "Given the fact that in most cases where the accused is acting in self-defence he will also be acting to prevent a crime being committed by his aggressor, it would seem sensible for the test for self-defence and prevention of crime to be identical. Even though the courts have not always formulated the test for self-defence in the exact words … for prevention of crime, there is no evidence from any of the cases that any such differences are matters of substance."

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[10] See Transcript of Trial Proceedings, Volume IV, Judge's Summation p. 26, lines 20-25 and p. 27, lines 1-10.

[11] See Transcript of Trial Proceedings, Volume IV, Judge's Summation p. 28, lines 5-16.

[12] Oxford University Press, 22nd edn.

[28] So the question is, even if a person is a trespasser, was the force used reasonable in all the circumstances? The trial judge properly directed the jury on the issue of reasonable force. I am not of the view that the appellant's defence was undermined in any way.

Breach of Prosecutorial Role

[29] Sir Richard, QC argues that the learned Director of Public Prosecutions expressed his personal opinion to the jury, in a moving and explicit manner that it led to a breach of his prosecutorial role and was so gross and persistent that it amounted to a miscarriage of justice and rendered the trial unfair. Sir Richard, QC points to where the Director of Public Prosecutions said:

> "… so by no stretch of the imagination could it be said that I don't love the police. But what I do love, Mr. Foreman and your members, I do love the police, but I love my conscience more, and I love my God most. So if it is that in carrying out my duty as I see it I am labelled as that, then it's a burden which I'm prepared to carry. It's price that I will have to pay and one which I would willing to do so, but I will not yield any ground.
>
> I will not, Mr. Foreman and your members, make any apology for having done, based on the information before me, then made the decision to have indicted the accused."[13]

[30] Sir Richard, QC contends that rational fact-finding which is the goal and responsibility of the jury, was, in all likelihood, distorted by the opinion of the prosecutor. Sir Richard, QC further submits that the language used by the learned Director of Prosecutions suggested that the defense was based on 'tricks, lies, deceptions, fabrications and was an attempt to mislead and deceive the Jury'.

[31] Ms. Pyke asserts that the comments made were not in excess of the standard expected of a minister of justice and submits that the jury could not have reasonably interpreted the comments to mean that they were to find the appellant guilty.

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[13] See Transcript of Trial Proceedings, Volume III, p. 260, lines 24-25 and p. 261, lines 1-11.

Discussion

[32] The prosecutor as a minister of justice should, in his address, avoid the use of emotive language, calculated to stir up sympathy for the victim or animosity for the defendant.[14] Prosecuting counsel must always be cognizant of his role as a mister of justice who ought not to strive over-zealously for a conviction and must avoid the use of emotive language liable to prejudice the jury against the accused. His role excludes any notion of winning or losing. His function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. This duty is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. In Boucher v The Queen,[15] it was held that Crown counsel violates the rule to be impartial where he uses inflammatory and vindictive language against the accused or where he expresses a personal opinion that the accused is guilty or states that the Crown investigators and experts are satisfied as to his guilt. Boucher determined that such language and opinions cannot help but influence the jury and colour their consideration of the evidence and amounts to a miscarriage of justice. Locke J said, "It is improper, in my opinion, for counsel for the Crown to express his opinion as to the guilt or innocence of the accused."[16] According to Maxwell v Director of Public Prosecutions[17] quoted in Boucher, Lord Sankey LC said in part:

> "It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues."[18]

[33] The proper approach of an appellate court to complaints of conduct conducing to unfairness of the trial is well exemplified by Randall (Barry Victor) v The Queen.[19] In Randall the Board drew attention to the fact that the duty of prosecuting counsel is not to obtain a conviction at all costs but to act as minister

[14] Banks (1916) 12 Cr App R 74.
[15] (1954) 110 Canadian Criminal Cases, 263.
[16] At p. 273.
[17] (1934) 24 Cr App R 152.
[18] At p. 176.
[19] [2002] 1 WLR 2237.

of justice. The Board further held, with Lord Bingham of Cornhill, giving the judgment:

> "… it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.
>
> "The crucial issue in the present appeal is whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial."[20]

[34] This principle was reiterated in Alexander Benedetto and William Labrador v R.[21] Their Lordships agreed with Singh J when he said that there was nothing wrong with a prosecutor delivering a robust but respectful speech. They however held that "there is an obvious difference between a robust speech and one which is xenophobic, inflammatory and seeks to make use of inadmissible and irrelevant material"[22] as the defendant has an absolute right to a fair trial.

[35] In the present case, Sir Richard, QC illustrates his complaints by reference to parts of the transcripts, for example, where the Director of Public Prosecutions said:

> "You know, I love watching advertisement because I'm always interested to see what are these people selling. And there is one which is currently running. It's on Cable…What is the defense selling you? That piece of

[20] At p. 2251, para. 28-29.
[21] [2003] 1 W.L.R. 1545.
[22] At p. 1566, para. 55.

junk with this deceased moving from left to right (demonstrating) in a crouched position with the hand up above?"[23]

Further:

> "Some years ago I used to dabble in some hocus-po - - I look at it now and say it's hocus-pocus really, because the hocus-pocus, sorry to admit, you know, some evolution as to how things came into being. But the more when I get piece of the information I try to fit in with the other piece of information I have, I find say this thing nar work out too good, you know. The thing nar work at all. Right. Can't fit in. If I try to fit it in, after I would be going bad against and me say but what the hell is this? You going believe this crap? But what struck me then, I had to have faith to believe it. And there I have, I said, well, the Bible said God did this thing and that was the end of it. And me say well you know something? If I have to have faith to believe that hocus-pocus business, I similarly have to have faith and believe what God says. God things seems more audible, sensible. So better you have faith and believe what seems sensible than believing the hocus-pocus, so I done with that. So that was the end of that. This is hocus-pocus. Hocus-pocus."[24]

Also:

> "You know, Mr. Foreman, this case isn't about who is defending who, or who is prosecuting who. This case is about what the evidence is. This isn't about no spin doctor. Don't make anybody spin anything pass you. This is not a spin operation. This is about the real hardcore evidence applying your common sense."[25]

[36] While some of the language and comments made by the Director of Public Prosecutions were high spirited, unnecessary and inelegant, I am not of the view that they compromised the fairness of the trial.

[37] In Alexander Benedetto and William Labrador, where prosecuting counsel attacked the credibility of the defendant's witnesses their Lordships held that issues of credibility lay at the heart of that trial and that the prosecutor's failure to deal with them fairly reinforces their decision that Labrador's conviction was unsafe. They held:

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[23] See Transcript of Trial Proceedings, Volume III, p. 267, lines 1-4 and p. 268, lines 4-7.
[24] See Transcript of Trial Proceedings, Volume III, p. 306, lines 21-25 and p. 307, lines 1-15.
[25] See Transcript of Trial Proceedings, Volume III, p. 327, lines 11-16.

> "There was more than a hint of xenophobia in the methods which he [prosecuting counsel] used to develop this attack, as he sought to align himself with the local jury against these American witnesses: eg "We who have been brought up in the British tradition of justice" will not tolerate any disrespect by anyone "no matter who it may be or where they come from" to the laws and morals of "our country" (p 45); referring to Tisha Neville: "This woman is playing with our grey matter. She figure that they can come from their big country and fool people here" (p 91); referring to Labrador's statement, in answer to a question from the jury, that he was not angry when he discovered that Plante had given the police a statement: "If that is the American way, we in the West Indies know it is different" (p 96); asserting that it was the jury's job to decide whether Plante was speaking the truth, "Not any American witness who has her own agenda" (p 102).
>
> "(2) He began his attack on Labrador's credibility by referring to an incident during the trial when the judge had occasion to rebuke Labrador's sister for gesturing to him while he was giving evidence (pp 45-46). She denied that she was gesturing, but the judge insisted that she was. Having reminded the jury of this exchange, aligning himself once again with the jury against the Americans by using the words "we" and "our", he said: "We have respect for our judges and no one is going to come and tell our judge he is a liar. And later on I am going to show that lying is a natural tendency of the Labradors." This remark, which was the subject of a rebuke by the trial judge, was improper. Labrador's sister was not a witness and the exchange between her and the judge was not part of the evidence."[26]

The comments of the Director of Prosecutions in no way compare to the comments made by prosecuting counsel in Alexander Benedetto; comments which the Privy Council determined were gross and prejudicial.

[38] In Arnold Huggins et al v The State,[27] their Lordships again noted the proper standards of decorum and courtesy in prosecuting counsel's conduct of the case, their treatment of the witnesses and the presentation of their addresses to the jury. This case concerned allegations of prosecutorial misconduct. The Board held that prosecuting counsel overstepped the mark on a number of occasions, and it would have been preferable if the judge had pulled him up earlier and made it clear that such behaviour was unacceptable. They went on further to say, "The issue is

[26] [2003] UKPC 27, para. 56.
[27] [2008] UKPC 32.

whether his departure from propriety was of such a nature as to deprive the appellants of a fair trial."[28] Their Lordships then agreed with the view of the Court of Appeal of Trinidad and Tobago where they held that the corrective statement by the judge removed a good deal of the potential unfairness. The Court of Appeal had in that case described prosecuting counsel as "somewhat high spirited in his address" and overplaying the dramatics, but considered that the judge had taken adequate steps to correct any major errors to which the Board agreed. The Board held that:

> "Applying the standard in Randall v The Queen, their Lordships have concluded that counsel's departure from good practice, although very reprehensible, falls short of being so gross, persistent or prejudicial as to require them to condemn the trial as unfair. The convictions accordingly should not be regarded as unsafe on this ground."[29]

[39] The case of Arnold Huggins has some applicability to the present appeal. In the case at bar, during the trial, counsel for the defendant interrupted prosecuting counsel and called on the judge to intervene. The learned trial judge agreed with defense counsel's objection to the prosecution's reference to the defense being junk:

> "MR. CUMBERBATCH: My Lord, to refer to that as piece of junk itself is improper, My Lord. I think counsel knows that. To suggest that the defense - -what the defense posit is a piece of junk is improper, Your Lordship.
>
> "THE COURT: Yes. I suppose there is more forensic terminology. Yes, Mr. Armstrong. Unless - -
>
> "MR. ARMSTRONG: My Lord, my learned friend, you know, takes it to a higher level than I expected. I mean, it's I'm using an analogy in the ad, My Lord, so I'm not saying, My Lord, that it is; what I'm saying, Mr. Foreman and your members, I'm saying that the evidence that the defense is trying to sell you is poorly incredible. It's not real. It can't be real. I'll take my time trespassing my patience with the greatest of respect to say that that cannot be real."[30]

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[28] At para. 32.
[29] At para. 34.
[30] See Transcript of Trial Proceedings, Volume III, p. 268, lines 8-24.

[40] In my view, applying Arnold Huggins, the damage that might have been done by that statement was neutralized by the learned trial judge's intervention. It cannot be said that the comments had such an impact so as to result in the appellant having an unfair trial. Even considering that the Director of Public Prosecution's reference to the defence as junk was deplorable, his impugned comments cannot be seen as being so gross, persistent or prejudicial so as to lead to the conclusion that the trial was unfair. As stated by Lord Bingham of Cornhill in Randall:

> "it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction."[31]

Failure to give direction on lies

[41] Sir Richard, QC recognises that Nasha's testimony was at the heart of the prosecution's case and complains that the learned trial judge erred in not explaining the law as it relates to lying if they found that Nasha was lying. He further erred in not advising the jury to view Nasha's evidence with caution as coming from a doubtful source and that they should bear this in mind when assessing her credibility. Sir Richard, QC points to occasions where Nasha's evidence contrasted with the defense's case and even the prosecution's witnesses. An example is where Wendy Thomas-Gordon, the deceased's sister, denied that the deceased's pants were ripped prior to the altercation with the police as claimed by Nasha and Nasha's evidence that the pants were torn before and that she had undertaken to sew the pants but never had.

[42] Sir Richard, QC contends that the learned trial judge, though he properly recognised a need for a direction on lies, misdirected the jury when he said:

> "If, however, you are of the view that any particular witness or witnesses was being deliberately untruthful, seeking to mislead you, then you would

[31] [2002] 1 WLR 2237, para. 28.

be entitled to reject such untruthful part or parts or even the totality of such witnesses because the facts are entirely for you."[32]

…

"… If you conclude that the witness was deliberately trying to mislead you on an issue or some issues and that was the reason for the inconsistent statement, then can you trust the rest of his or her evidence? Can you believe the rest of his or her evidence in that case? A deliberate lie on an issue or a number of issues may take [sic] all a witnesses' evidence. That's a matter for you entirely. And if that is so, then you will have to reject the evidence of that witness. On the other hand, you may not consider it significant enough to take the rest of the witness' evidence. This is a matter for you."[33]

…

"…And if you are not sure, you will be entitled to reject the evidence of the witness. If you are sure of the witness' evidence, on the other hand, you are entitled to rely on it."[34]

[43] Sir Richard, QC asserts that the trial judge's formulation gave the jury a discretion if they found that Nasha was lying with the intention of misleading them. Sir Richard, QC contends that if the jury found Nasha to be deliberately lying they had an obligation to reject her evidence.

Discussion

[44] In Abdulla and Others v The State[35] the Court of Appeal of Guyana said:

"In certain cases, a witness's testimony may be so contradictory to his previous statement as to be enough to destroy his credit so as to render his evidence valueless, and if he were the only witness called to testify as to the acts of an accused person an acquittal should be inevitable. But there may be cases where the contradictions are so insubstantial that the marrow of the witness's testimony remains unaffected."[36]

[32] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 5, lines 6- 11.
[33] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 9, lines 20-25 and p. 10, lines 1-6.
[34] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 17, lines 13-16.
[35] [1971] 17 WIR 266.
[36] At p. 273.

[45] In the present case, the learned trial judge said:

> "Counsel for the defense, for instance, had put to Nasha that she lied to the police when she told them that she went to work at Amyrillis on the night of the 23rd, public transportation, when in fact she had gone home with - - she had gone to - - sorry - - when she told them that she had gone home that afternoon from her first job by public transportation, when in fact she had been dropped home by Dr. Jay or Mervin Lindsey. She admitted that. She admitted that it was a lie and said that that was because she was not being questioned by the police about the incident. She gave a reason. Is this an issue in the matter, first of all? Is this lie otherwise significant enough for you to discount to entirely discredit her evidence or any of it? Does it discredit her? These are questions for you. Sometimes people do lie for innocent reasons such as to hide an embarrassing fact, sometimes they do lie for sinister reasons."[37]

Further:

> "So that Nasha's evidence in court that she had previously told the police that she went on public transportation, but in fact she would, without more, would have been a previoius inconsistent statement which goes to her credibility. She however - - sorry - - she made a statement, previous statement would not have been able to accept it as the truth for its truth. But in this particular case, she actually admitted to the Court that that was said before in that statement as not true; what she said here is in fact the truth."[38]

The learned judge further directed the jury:

> "... inconsistencies may arise innocently in that a witness is basically a truthful witness, but he or she is making a genuine mistake in respect of a certain bit of evidence, a genuine mistake with regard to a time or to distance, or any other aspect of facts of the case. And if you find that the mistake has made and that the inconsistency or contradiction arises innocently because of a genuine mistake, then you may find yourselves saying, well, I think that this is wrong on this particular issue where he or she made a mistake, but I believe the witness on the rest of what he or she has said. In such a case it is open to you to reject that part of the witness, evidence in respect of which you conclude that he or she has made a genuine mistake on a minor issue and accept, it you feel sure of it, other aspects of his evidence or her evidence.

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[37] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 10, lines 7-27.
[38] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 15, lines 12-21.

> "Now, mistakes or contradictions may also arise because of a more sinister reason you may find. There may not be a genuine innocent explanation for them. First of all, you have to consider whether the witness may have been making a genuine mistake in recollecting the events of 2006, October 2006, whether he or she was deliberately trying to mislead you. If you conclude that the witness was deliberately trying to mislead you on an issue or some issues and that was the reason for the inconsistent statement, then can you trust the rest of his or her evidence? Can you believe the rest of his or her evidence in that case? A deliberate lie on an issue or a number of issues may take all a witnesses' evidence. That's a matter for you entirely. And if that is so, then you will have to reject the evidence of that witness. On the other hand, you may not consider it significant enough to take the rest of the witness's evidence. This is a matter for you."[39]

[46] The judge referred to the evidence of PC Francis who stated that he went down to Table Hill Gardens area and met Nasha at the football field standing next to a green pickup speaking with someone inside the pickup. The learned judge reminded the jury that although Nasha denied that, the accused and one Dr. Jay said it happened. The learned judge told the jury that the defence was urging on them that Nasha was not a witness of truth and instructed that it was a matter for them to consider whether that was sufficient to negate her entire evidence or just that piece of evidence.

[47] In my judgment, Sir Richard, QC's complaints are not well founded. A survey of the summation shows that the learned judge dealt fully and accurately with the issues complained of. The directions given by the learned trial judge on lies, inconsistencies or contradictions were unremarkable. With respect to consistencies and lies, the learned judge gave full directions combing practical guidance on the evidence and examples of inconsistencies in Nasha's evidence. In his summation, the learned judge pointed out parts of the evidence where other witnesses alleged that something was said and Nasha was the only person denying that it was said. Further, the inconsistencies did not go to the marrow of Nasha's evidence. The trial judge explained to the jury how they should treat the

[39] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 8, lines 22-25, p. 9, lines 1-25 and p. 10, lines 1-6.

witness's evidence if they found that the witness told a deliberate lie or tried to mislead them. The trial judge also explained to the jury that there were many reasons why a witness may lie. Where the trial judge said to the jury that they will be entitled to reject the evidence of the witness, he was merely reminding them of what they could do. It is within the exclusive competence of the jury to decide issues relating to reliability and credibility of a witness and to decide whether or not they accept or reject all or part of the evidence of a witness. The trial judge's direction did not run foul of or undermine that position.

Directions on treating Nasha's evidence with caution

[48] Sir Richard, QC further submits that Nasha's testimony ought to have been viewed with caution by the jury and the judge ought to have so directed them. The basis for that submission is that human experience would suggest that because Nasha was the deceased's common law wife, and was responsible for calling the police which resulted in his death she could have been concerned that people may have blamed her for the deceased's death. As such, she would have had reasons to present the deceased in a favourable light. Sir Richard, QC submits that the learned trial judge's failure to give a direction pertaining to this issue was a material non-direction.

[49] In the case of R v Makanjoula[40] Lord Taylor of Gosforth CJ said at page 1351:

> "Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and

[40] [1995] 1 WLR 1348.

> what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content. (My emphasis).

[50] It is a matter for the judge's discretion to decide what, if any warning, he considers appropriate in respect of any witness in a case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. An appeal court will not interfere with the exercise of the judge's discretion unless the exercise of that discretion was Wednesbury unreasonable. Taking these considerations in mind, I find no basis for impugning the exercise of the judge's discretion. There is no merit in this ground of appeal.

Lucas Direction

[51] Sir Richard, QC criticises the learned trial judge for failing to direct the jury on the issue of the alleged lies of the appellant along the guidelines of R v Iyabode Ruth Lucas,[41] thus leading to a miscarriage of justice. The appellant gave a pre-trial interview to the police which was put into evidence. Some of the appellant's evidence before the jury was inconsistent with the answers given in the pre-trial statement. Sir Richard, QC states that the judge put the inconsistencies squarely before the jury as a matter which they ought to consider when assessing the appellant's evidence and his creditworthiness. Sir Richard, QC complains that in the circumstances there existed the danger that the jury would have regarded the inconsistencies in the evidence as supporting or bolstering the prosecution's case and also as reducing the creditworthiness of the appellant.

[52] In what circumstances is a Lucas direction required? In Burge and Pegg,[42] the court stated that where the Crown seeks to show that something said was a lie and to rely on that lie as evidence of guilt in relation to a charge, a Lucas direction

[41] (1981) 73 Cr App R 159.
[42] [1996] 1 Cr App R 163.

would usually be required. Such a direction would also be usually be required even if the Crown did not adopt that approach, in cases where the judge reasonably envisaged that there was a real danger that the jury might do so. The court also stated that a Lucas direction is not required in every case, even if the jury may conclude that a defendant has lied in relation to some matters. The warning is only required if the jury might regard that conclusion as probative of guilt. In R v Ronald Middleton[43] the court stated that the purpose of a Lucas direction is to guard against the forbidden line of reasoning, that the telling of lies equals guilt. Flowing from that, where there is no risk that the jury might follow such a line of reasoning, there is no need for such a direction. In deciding whether such a direction is appropriate in any given case it will usually be more useful to analyse the question in the context of the individual case.[44]

[53] In the present case, the prosecution did not rely on any lies told by the appellant as supporting its case. The prosecution asked the jury to assess the inconsistencies in the appellant's previous statement as a matter of credibility. In my judgment, there was no need for a Lucas direction in this case.

Public interest defence

[54] Sir Richard, QC contends that although the trial judge acknowledged that a public interest defence was raised by the appellant (as he was acting as a police officer in the course of duty) the judge erred in law in not giving the jury sufficient guidance or properly explaining the meaning and implications of that defence. Sir Richard, QC asserts that the learned trial judge may be seen as having cast doubt on the applicability and relevance of the public interest defence when he told the jury that self-defence is not the same as public interest defence.

[43] [2001] Crim LR 251.
[44] See Treacy LJ in Edmond Selywn Williams and Regina [2012] EWCA Crim 2516, para. 85.

[55] Ms. Pyke submits that the learned trial judge addressed the jury on the appellant's defence and emphasised that the factor of paramount importance was whether the force used, given all circumstances, was reasonable.

Discussion

[56] Where an accused is relying on the prevention of crime defence, the use of the force must be reasonable.[45] Moreover, Lord Lloyd of Berwick in R v Clegg[46] said:

> "The second question is whether there is any distinction to be made between excessive force in self-defence and excessive force in the prevention of crime or in arresting offenders. In Attorney-General for Northern Ireland's Reference (No. 1 of 1975) [1977] AC 105 Lord Diplock said, at p. 139, that the two cases were quite different. But I do not think it possible to say that a person who uses excessive force in preventing crime is always, or even generally, less culpable than a person who uses excessive force in self-defence; and even if excessive force in preventing crime were in general less culpable, it would not be practicable to draw a distinction between the two defences, since they so often overlap. Take, for example, the facts of the present case. The trial judge held that Private Clegg's first three shots might have been fired in defence of Private Aindow. But he could equally well have held that they were fired in the prevention of crime, namely, to prevent Private Aindow's death being caused by dangerous driving. As is pointed out in Smith & Hogan, Criminal Law, 6th ed. (1988), p. 244; 7th ed. (1992), p. 255, the degree of permissible force should be the same in both cases. So also should the consequences of excessive force."

[57] Indeed in Beckford v The Queen[47] Lord Griffiths said that, "the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another." Whilst his Lordship was primarily concern with the question of mistaken belief in this case, his dictum supports the view that the rules governing the use of force in self-defence and prevention of crime are now identical.

[58] In the present case the learned trial judge said to the jury:

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[45] See para. 27 of this judgment.
[46] [1995] 1 AC 482, p. 496.
[47] [1988] AC 130, p. 145.

> "The accused raised through his counsel what you call a public interest defence and he is relying on what is referred to, he said that the police officers that they are carrying out a public duty and if whilst carrying out that duty in either preventing a crime or the lawful arrest, to lawfully arrest somebody, search them, that they had such a right to do so, and that they only lose that right to effect that duty if in fact the force they used is not reasonable. And whether or not that force used was reasonable are the same considerations that one would entertain in considering reasonableness. Force, when you come to consider self-defence, will explain to you now will apply here."[48]

Further:

> "Police are entitled to use reasonable force to prevent a crime and in that regard the accused is saying he used reasonable force to prevent a crime, that is, the beating of the accused and himself and PC Francis, search of him, and that he was attacking them. What transpired is a matter for you, determination of the jurors, as to what reasonable force is in this particular defense. It's not a question of the law for the judge, it's a question of fact for the jury. You will decide the point and the reasonableness of the force used by the accused if you find he was preventing a crime at the time of the shooting. And apply the considerations, as I said I would give you in relation to the use of reasonable force in self-defense.
>
> "Self-defense is not the same defense as in public interest defense. Self-defense is not restricted to using reasonable force to prevent a commission of a crime, for instance, as defined in the public interest defense, it is broader."[49]

[59] In my judgment, the learned trial judge properly explained to the jury the appellant's public interest defence as well as self-defence. The jury could not have been misled or be unaware of the appellant's defence. The complaints made against the learned trial judge are not justified. What was of paramount importance was whether the force used was reasonable in the circumstances. That is the case whether the force was used in self-defence against personal violence; in self-defence of another or in public interest defence. The jury are the ones to determine the reasonableness of the force used by the appellant. In

[48] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 26, lines 24-25 and p. 27, lines 1-11.

[49] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 28, lines 5-23.

Attorney General of Northern Ireland's Reference (No.1 of 1975), Re[50] Lord Diplock stated:

> "What amount of force is "reasonable in the circumstances" for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a "point of law" for the judge."

[60] The learned trial judge in the present case correctly left the issue of the reasonableness of the force to the jury when he said that:

> "So there are two main questions for you to answer. Did the defendant believe or may he have honestly believed that it was necessary to defend himself?"[51]
>
> "… So if you believe that he - - if you decide that he may have been acting in the belief that it was necessary to defend himself, he believes so, then you go on to the second question which is this. Taking the circumstances as the defendant believe them to be - - and you will recall the evidence, circumstances…"[52]
>
> "Sir Richard Cheltenham, he set out all the circumstances for his case for you as he said the defendant believe them to be. If you accept the evidence of the accused and or that of PC Francis of the events that night and even of the event in the yard alone, it is entire - - in its entirety, then I commend the content of the defense counsel submission to you on the circumstances as the accused believed them to be."[53]
>
> "It is for you the jury to decide whether the force used by this defendant was reasonable."[54]

I find no merit in this ground of appeal.

Self-defence

[61] Sir Richard, QC complains that the learned trial judge in dealing with the defence of self-defence – either as a private or public interest defence which was being run simultaneously, failed to adequately explain to the jury the principle and relevance of the proportionality rule as it related to the use of a gun by the appellant in the face of what he honestly believed to be a deadly weapon in the hands of the

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[50] [1977] AC 105.
[51] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 30, lines 18-21.
[52] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 31, lines 22-25 and p. 32, lines 1-2.
[53] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 32, lines 14-21.
[54] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 33, lines 13-14.

deceased. Sir Richard, QC says further that the learned trial judge had an obligation to explain to the jury that if Nasha's evidence was accepted by them, the deceased's reaction bore no relation to the appellant's acts such as to make the issue of self-defence as raised by the appellant unavailable to him in the ensuing violence. Sir Richard, QC submits that these errors of law vitiated the conviction. Sir Richard, QC relies on the case of Palmer v R[55] where it was held that:

> "Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is so serious that it puts someone in immediate peril then immediate defensive action will be necessary. If the moment is one of crisis for someone in immediate danger he may have to avert the danger by some instant reaction."[56]

[62] Ms. Pyke submits that the learned trial judge gave the correct direction to the jury on the issue of self-defence, bearing in mind that there is no set of words that he was required to use. Ms. Pyke relies on the case of Palmer as well.

Discussion

[63] The matters which should be taken into account in directions on self-defence were fittingly stated by Lord Morris in Sigismund Palmer v The Queen and Derrick Irving v The Queen:[57]

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. … Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been

[55] (1971) 55 Cr App R 233.
[56] At p. 241.
[57] [1971] AC 814.

> attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in the De Freitas case (1960) 2 W.I.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected."[58] (My emphasis).

[64] The learned trial judge properly reminded the jury of the appellant's evidence that the deceased was advancing towards him with shiny object evidence. The appellant's evidence was that PC Francis moved to search the deceased as they saw him push a shiny object into his pants pocket. The deceased pushed PC Francis on the ground and he, the accused, put his hand on the shoulder of the deceased. The deceased hit his hands away. The appellant's evidence was then that the deceased hit him two blows to his eyes. He said, "the deceased was uncontrollable. He beat both of us and I was getting afraid." The accused further said "I was getting afraid… he came up on his feet and came to us like a raging bull…I seriously believed that we were in danger because of the way he was coming on us. I had to do something to save myself and partner. I became very fearful for my life. I am finish now. Like this man want to finish me."

[65] The learned trial judge in his summation gave adequate and proper directions on self-defence:

> "The law is that force used in self-defense is unreasonable and unlawful if it is set out, if it is out of proportion to the nature of the attack or if it is in excess of what is really required of the defendant to defend himself. If it

[58] At p. 831-832.

for you the jury to decide whether the force used by this defendant was reasonable."[59]

He continued:

> "You must judge what the defendant did against the background of what he honestly believed the danger to be. If he honestly believed that he was being attacked or could have been further attacked by the deceased, his actions are to be judged in that light. If you believe that he honestly believe - - if you find that he honestly believe that he was being attacked or could have been further attacked by the deceased, his actions are to be judged in that light.[60]
>
> "Even if you find as a fact that this threat and attack or actual attack pose little danger, his failure to sufficiently retreat, to run away or to otherwise prevent the deceased threat by any other means when he say he was being attacked, and again that's if you believe the accused was being attacked at the time he shot the deceased…A person is not under an obligation to retreat in the face of an attack. A person can use force to ward off an anticipated attack provided it is anticipated as imminent."[61]
>
> "You must bear in mind that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary. The more serious threatened attack upon him, the more difficult the situation will be."[62]

[66] The learned judge correctly stated the law on the issue of self-defence, inclusive of proportionality and retreat. It was also clear from the summation that the appellant was entitled to a pre-emptive strike. The complaints made against the learned judge are not justified.

Illness of appellant

[67] The appellant twice fell ill and collapsed during the trial and on each occasion the trial had to be adjourned to the following day. The contention here is that there

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[59] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 33, lines 9-14.
[60] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 35, lines 1-10.
[61] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 35, lines 11-24.
[62] See Transcript of Trial Proceedings, Volume IV, Judge's Summation, p. 35, line 25 and p. 36, lines 1-5.

was a danger that the jury, if not assisted by the trial judge, could have speculated about the illness and wonder whether the illness resulted from a sense of guilt or whether the appellant was really ill. It was further contended that the trial judge's failure to warn the jury against attaching any weight to the incidents where the appellant fell ill was a serious omission tantamount to a non-direction, which could have impacted the jury's decision and deprive the appellant of a fair trial.

[68] Guidance as to the court's approach in circumstances such as the present is obtained from Evanson Mitcham v The Queen.[63] It is entirely within the discretion of the trial judge as to how he approached the appellant's illness and this Court would only interfere with his decision if it were satisfied that the decision was wrong and that the trial was unfair and as a consequence the conviction unsafe. Lord Carswell remarked that it is always relevant for an appeal court to bear in mind that the trial judge had the advantage of knowing the atmosphere of the case and the way in which the matter complained of appeared in court at the time. In this case the trial judge had a range of options open to him. He could elect to say nothing on the basis that the appellant's illness was insufficient to create a degree of prejudice which would make the trial unfair and that to refer to it in his summation would only draw attention to it. He could at an appropriate stage or stages warn the jury to disregard the appellant's illness if he considered that that would be sufficient to minimise any prejudice and prevent the trial from being unfair. Finally, he could decide to discharge the jury, if he decides that there is prejudice which could make the trial potentially unfair and that warnings would not diminish it to a sufficient extent.

[69] The trial judge in the exercise of his discretion would have decided that in the circumstances of the case it was better not to mention to the jury or remind them that the appellant had fallen ill during the trial. I can find no fault in the manner in which the learned trial judge exercised his discretion. It cannot be said that he wrongfully exercised his discretion. The trial judge would undoubtedly have considered that the appellant's illness was insufficient to create a degree of

[63] [2009] UKPC 5

prejudice which would render the trial unfair and the conviction unsafe. Referring to the illness in his summation would only draw unnecessary attention to it. I am not persuaded that the jury would have attributed a guilty mind to the appellant simply because he fell ill or even believe that he was 'faking his illnesses' and thus attribute guilt to him. This ground of appeal is without merit.

Failure or neglect to give directions on lies with respect to manslaughter

[70] The complaint here is that the trial judge failed and or neglected to tell the jury that even if they were to consider the apparent lies told by the appellant as having some degree of probative force, they ought to consider to what issue were the lies relevant in the sense of murder or manslaughter. As a general proposition, Sir Richard, QC submits that whenever manslaughter is a live issue for the jury to consider and lies are relied upon by the prosecution or may be relied upon by the jury to prove guilt, the trial judge must identify the issue which the lies are capable of supporting for the jury. Sir Richard, QC relies on a number of cases including R v Andrew Ronald Manuel Richens,[64] Rv Woodward[65] and R v Basharath Miah et al.[66]

[71] The Crown does not take issue with the learning emanating from these cases but observes that where the inconsistency emanates from lies told by the accused, on which the crown relies in proof of its case, particular directions must be given in tandem with the dicta in Lucas. However, in the instant case, the inconsistencies relate to credibility and were not of a kind relied on as an element of its case against the appellant. In the circumstances the learned judge did not err.

Provocation and intention to kill

[72] Sir Richard, QC complains that the learned trial judge committed a grave error by failing to direct the jury that the plea of provocation could succeed even in

[64] (1994) 98 Cr. App. R. 43.
[65] [2001] EWCA Crim 2051.
[66] [2003] EWCA Crim 3713.

circumstances where the appellant was found as a fact to have formed an intention to kill.

The learned trial judge at page 38 of his summation said:

> "Before you can convict the accused of murder, the Prosecution must make you sure that he was not provoked to do as he did. Provocation has a special meaning in this context, which I'll explain to you in a moment. If the Prosecution does make you sure that he was not provoked to do as he did, he will be guilty of murder. If on the other hand you conclude either that he was or that he may have been provoked, then the defendant would not be guilty of murder but guilty of the less serious offence of manslaughter."

[73] In R v Bunting,[67] it was held that:

> "In a case where provocation arises as a defence to a charge of murder it is proper and indeed necessary for the trial judge to tell the jury that murder is not established unless an intention to kill or to cause grievous bodily harm is proved; but the converse proposition, namely that the accused is guilty of murder if such an intention is proved, is not necessarily correct. For where the intention to kill or to cause grievous bodily harm results not from premeditation but solely from the loss of self-control induced by provocation the accused is guilty not of murder but of manslaughter."

In Attorney-General of Ceylon v Kumarasinghege Don John Perera[68] Lord Goddard stated at page 206 that the defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm if the intention arises from sudden passion involving loss of self-control by reason of provocation.

[74] In Baptiste v The State,[69] the Court held that in cases where accident, self-defence and provocation are pleaded, the trial judge must direct the jury that while an intention to kill negated a plea of accident; self-defence or provocation might succeed even if the accused had formed an intention to kill.

[75] Applying the above principles to the circumstances of this case - in which the jury may easily have found that the appellant had formed the intention to kill, it was

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[67] (1965) 8 WIR 276.
[68] [1985] AC 200.
[69] (1983) 34 WIR 253.

incumbent on the trial judge to direct the jury that had the intention to kill arose from provocation, the appellant would have been entitled to the lesser verdict of manslaughter. The failure to do so constituted a grave omission on the part of the trial judge and may have deprived the appellant of the verdict of manslaughter, thus resulting in a miscarriage of justice. It would not be right in the circumstances to apply the proviso. I am accordingly of the view that the conviction for murder is unsafe and I will allow the appeal in relation to the offence of murder to the extent that the conviction for murder is set aside and substituted with a conviction for manslaughter.

Disposition

[76] Having regard to the conclusion above, I allow the appeal against conviction, quash the conviction for murder and substitute a conviction for manslaughter.

Sentencing

[77] The murder conviction having been quashed and a conviction for manslaughter substituted, the sentence of 22 years for murder accordingly falls away and the appellant now falls to be sentenced for manslaughter. The benchmark for manslaughter is 15 years imprisonment; the Court has to weigh the aggravating and mitigating factors. I consider the use of a gun in the circumstances to be an aggravating factor albeit that the appellant was authorised to carry a gun. There were several mitigating factors including his very good character, his remorse and his socio economic background. I further note that the appellant spent 4 ½ years in pre-sentence custody.

[78] In his sentencing judgment, the learned judge stated: "I have considered and taken into account time already served in arriving at the appropriate sentence that in all the circumstances fits the crime". Notwithstanding that pronouncement, there is no indication as to how the judge took into account the time spent on remand. It appears to me that no credit was given for pre-sentence custody. The primary rule is that in the absence of unusual circumstances a judge should fully

credit a prisoner for pre-sentence custody. If the judge seeks to depart from the primary rule, he must state reasons for not granting a full deduction or no deduction at all. In Callachand and Anor v The State of Mauritius[70] the Board stated at paragraph 9:

> "It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."

[79] As stated by this Court in Shonovia Thomas v The Queen:[71]

> "In the absence of exceptional circumstances real credit has to be given to the time spent on remand. The sentencing exercise must demonstrate how the time spent on remand is taken into account in order to give efficacy to it, thus redounding to the actual benefit of the prisoner. This conduces to transparency, avoids uncertainty or ambiguity and eliminates or reduces the risk of injustice occasioned by an error in principle."

[80] Having reviewed the mitigating factors and the aggravating factor I have no doubt that the mitigating factors far outweigh the aggravating factor. In all the circumstances of the case, I am of the view that a sentence of 12 years would be appropriate. The 4 ½ years spent on remand is to be deducted from the 12 years.

Conclusion

[81] The appeal against the conviction for murder is allowed to the extent that the murder conviction is quashed and a conviction for manslaughter substituted. The appeal against sentence is allowed to the extent that the sentence of 22 years is

[70] [2008] UKPC 49.

[71] Territory of the British Virgin Islands High Court Criminal Appeal BVIHCRAP2010/0006 (delivered 27th August 2012, unreported).

set aside and a sentence of 12 years substituted. The 4 ½ years spent in pre-sentence custody is to be deducted from the 12 years.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise E. Blenman
Justice of Appeal

I concur.

John E. Carrington, QC
Justice of Appeal [Ag.]