GRENADA

IN THE COURT OF APPEAL

CRIMINAL. APPEAL. NO.8 OF 1997

BETWEEN:

SHEVON GAY

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron — Chief Justice [Ag.]
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Albert N.J. Matthew — Justice of Appeal [Ag.]

Appearances:

Mr. R. Anthony for the Appellant
Mr. M. Holdip, Director of Public Prosecutions and
Ms. N. John for the Respondent

1997: November 28;
1998: January 12.

Criminal Law – Murder conviction – Sentence to be detained at Her Majesty's Pleasure in such place and under such conditions as the G-G may direct – Appeal against conviction and sentence – Appellant and deceased both 15 years old at the time of the incident – Prosecution evidence raises issues of provocation and pre-meditation – Admissibility of evidence of a conversation alleged to have been made by appellant five days before the incident, which evidence was of prejudicial effect – Whether the evidence was evidence of bad character as to make section 52, Evidence Act applicable – Requisite intent on a charge of murder – Hazel Emmanuel v The Queen Criminal Appeal No.5 of 1989 [St. Lucia] referred to – Burden of proof when provocation is an issue – Consideration of the respective strengths of the case for prosecution and for defence, in determining whether, had the jury been properly directed on the issue of provocation, the verdict would have been the same – Degree/standard of proof on the essential elements of a charge of murder. Murder conviction quashed. Conviction for manslaughter substituted.

Arguments and judgment on the question of the appropriate sentence in such a case adjourned.

MATTHEW, J.A. [AG.]

Fifteen year old Junior Wharwood met his death on February 21, 1996 at Granby Street in the town of St.Georges as a result of a chest wound 3.5cm in length by 1.5cm wide, situated slightly towards the midline of the left nipple and 3cm above, which penetrated through the left lung and the right ventricle of the heart and exited on the left posterior wall of the right ventricle.

Dr. Rukmini Jayaram, the attending pathologist, was of the opinion that the injury would have been caused by a sharp instrument with a long blade, administered with quite a large degree of force.

The Prosecution called four witnesses in the persons of Presley Gilbert, David Francois, Joshua Thompson and Dave Calliste who all testified to seeing a confrontation between the Deceased and the Appellant who was himself fifteen years old at the time. Gilbert stated that the Deceased had on three occasions bounced the Appellant and just before the third occasion asked the Appellant if he was ready for him now. The next thing Gilbert heard was “bup” and he saw the Appellant standing with a knife in his hand holding it upright with a blade of about six inches. The Deceased said “What he did?”, walked a few footsteps away and fell down slowly.

David Francois lived at Grand Anse Housing Scheme and that was the same place Presley, the Appellant and the Deceased lived at the time in question. He stated on the day in question he was with Presley Gilbert and Junior Charles leaning on a vehicle talking. Junior Wharwood, Damion, Rennie and others were near to them leaning on another vehicle. He said the Appellant, known as Red Mice, was walking on the sidewalk towards Kentucky coming from Market Square. He heard Rennie say “We have to beat up Red Mice tonight”. Junior did not say anything but he, Rennie, and

Junior left and went in the Market Square, Junior saying they going and smoke a nigger which he understood to mean to get rid of a person.

Francois stated that Presley called the Appellant and the Appellant came speaking to him. Then Junior Wharwood came across and bounced Appellant shoulder to shoulder and asked him if he ready for it now. The Appellant moved off and Junior came and bounced him again with his shoulder. The Appellant had his hands down by his side. When Junior bounced him he fired a cuff at Junior. Then he told Appellant to cool himself. He stated that when Appellant fired the cuff at Junior, Junior stood up straight and asked him what he did. Rennie then ran behind Appellant with a knife and while Appellant was running he saw a knife in the Appellant's hand and when he turned back he saw Junior lying on the ground, on his back, with his head turned and his chest pumping.

Joshua Thompson said he saw Appellant pulled out a knife and stabbed Junior in his chest. Junior stood up. Appellant ran and Junior fell.

Dave Caslliste saw the Appellant and the Deceased speaking but he was not listening to what they were saying. After a short while Shevon fired a cuff at Junior's chest. Junior went back. Junior asked if he wanted shit. Junior after a short while fell on him and Appellant ran around a car.

There is conflict in the prosecution evidence as to what actually happened immediately before the Deceased got injured but if there were any doubt that it was the knife of the Appellant that caused the injury to the Deceased resulting in his death that must be dispelled for in his unsworn statement at the trial the Appellant alleged that the Deceased ran straight at him to do him something and he ended up running straight into the knife and when that happened he ran in the opposite direction towards Melville Street.

Damion Williams also gave evidence for the Prosecution. He did not see the injury to the Deceased. When Joshua Thompson called him he only saw a crowed of people around with Junior Wharwood lying on the ground face up with a red substance on his chest.

But Williams gave evidence that on Friday February 16, 1996 the Appellant was at his aunt's home at Lucas Street and they were speaking in the presence of two of his cousins. The Appellant had his knife with him which he said he had brought from Miami. One cousin asked the Appellant what was the knife for and he replied that it was for Junior and that anytime Junior harass him, he will do something with the knife, because Junior is going around calling him faggot.

Williams described the knife as one with a brown handle with white stripes, sharp edges on the top, a curved blade and sharp edges on the bottom at the back.

Substantially on the basis of the evidence outlined above the Appellant was tried before Alleyne J and a Jury and on July 1, 1997 he was found guilty of murder and sentenced to be detained at Her Majesty's pleasure in such place and under such conditions as the Governor General may direct.

On July 16, 1997 the Appellant gave notice of appeal against his conviction and sentence and there he listed only one ground of appeal. At the hearing his Counsel obtained leave to argue additional grounds of appeal. Counsel argued before this Court : the following grounds of appeal:

[1] The learned trial Judge misdirected himself by admitting evidence of conversation alleged to have been made by the Appellant on February 16,1996.

[2] The learned trial Judge misdirected himself and the Jury on the essential element of intent on a charge of murder.

[3] The learned trial Judge misdirected the Jury on the burden of proof when provocation is an issue.

[4] The learned trial Judge erred in law when he failed to adequately instruct the Jury on the degree of proof on the essential elements of the charge of murder.

ADMISSIBILITY OF EVIDENCE

This ground of appeal relates to the evidence of Damion Williams whose cousin is alleged to have asked the Appellant what he had the knife for and the Appellant replied it was for Junior.

Learned Counsel for the Appellant argued that the evidence was prejudicial and the prejudicial effect would outweigh the probative value. Counsel referred to section 52 of the Evidence Act of Grenada which states:

> "In criminal proceedings, the fact that the person accused has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant".

I would not consider the evidence pertaining to what the Appellant said on February 16, 1996 to be evidence of bad character. I am of the further view that the evidence was relevant and indicative of the intention of the Appellant.

I would not fault the learned trial Judge for admitting the evidence in question.

THE INTENT

The learned trial Judge dealt with the essential ingredient of intent to kill at great length. He began by telling the Jury that in a case of murder, the intention is intent to kill and no less intention will do and that if they found that the accused intended not to kill but merely to cause harm, serious or otherwise, they could not convict of murder.

Then he went on to explain intent from the provisions of the Criminal Code without specifically saying so. He dealt with intent from belief, intent from purpose and intent presumed. He

also used the formula pronounced by , Sir Vincent Floissac in the Court of Appeal in Hazel Emmanuel v The Queen, Criminal Appeal No.5 of 1989 St.Lucia, and went on to clarify or give illustrations of the formula. In Emmanuel's case Sir Vincent stated:

> "An Accused's criminal intent or intention in relation to his voluntary act or a consequence thereof is basically subjective to the accused. The accused's intent or intention is an inference drawn from his act and its relevant surrounding circumstances viewed collectively. Those surrounding circumstances include [1] the emotion or emotional motive [e.g. hatred, jealousy or greed] which prompted the accused to commit the act [2] the accused's reason or purposive motive for committing the act or the ultimate purpose [object or consequence] which the accused sought to achieve by committing the act [3] the accused's desire for the consequence of the act [4] the accused's subjective foresight or foreseability of or subjective belief in the degree of probability of the consequence – which degree may range from a bare possibility to a certainty or near certainty and [5] the accused's subjective honest or actual belief in the existence of certain circumstances [e,.g. consent or danger] which motivated the act ".

In my view there is absolutely no merit in this ground of appeal.

PROVOCATION

I think learned Counsel is on firmer ground here. In his summing up to the Jury the learned trial Judge stated:

> "Now, I need to tell you in all cases where the burden lies, that is not like Prosecution so that you feel sure but only so that you believe that what he claims is more likely than the alternative. In other words, the proof of provocation is on the accused but the accused does not have to prove provocation in the same way that the Prosecution has to prove the offence. The defence has to prove provocation only to the extent that you believe it is more likely that what he is saying is true than what he is saying is not true and of course, other defences need only raise a doubt in your mind".

For the learned trial Judge to state that the burden of proof on the issue of provocation was on the Appellant was a clear

misdirection which the learned Director of Public Prosecutions readily conceded at the outset. But he submitted that the case against the Appellant was so strong that the Jury would have inevitably come to the same conclusion had they been properly directed.

It therefore becomes necessary to look at the respective strengths of the case for the Prosecution and for the Defence. There is evidence by Damion Williams to the effect that five days before the incident the Appellant said he had the knife for Junior. Certain inferences would have to be made here as to whether the Junior referred to then was the Deceased.

Assuming it was the Deceased if that evidence was believed by the Jury it could be that they might regard the Appellant's stabbing as an act of premeditation. The Criminal Code sets out examples of non-extenuating provocation and one such example is premeditation. The relevant provision states that notwithstanding proof on behalf of the Accused person of such matter of extreme provocation his crime shall not be deemed to be thereby reduced to manslaughter if it appears, either from the evidence given on his behalf or from evidence on the part of the Prosecution, that he acted wholly or partly from a previous purpose to cause death or harm or to engage in an unlawful fight, whether or not he would have acted on that purpose at the time or in the manner in which he did act but for the provocation.

In that event the misdirection might not have interfered with the verdict for his act would not be considered as being caused by provocation within the law. But there is no way of knowing whether the Jury believed the evidence of Damion Williams. If they did not believe him they would of necessity have to consider the evidence of provocation in the case.

The learned Director of Public Prosecutions also conceded that there was some evidence of provocation in the form of the three bounces to the body of the Appellant by the Deceased, the

assumption of an aggressive posture by the latter and an invitation to the Appellant to fight him.

We are not able to say that if the Jury were properly directed on the issue of provocation what their verdict might have been. We think the Appellant lost the opportunity of having his crime reduced to one of manslaughter, as a result of the misdirection.

STANDARD OF PROOF ON ESSENTIAL REQUIREMENT OF INTENT TO KILL

The thrust of the complaint here was that the learned Judge failed to mention to the Jury that the standard of proof required in the essential ingredient of the law of murder, the intent to kill, is proof beyond reasonable doubt.

In answer to this complaint the learned Director of Public Prosecutions could only point to the beginning of the summation on the second page where the learned trial Judge was giving general directions on the burden of proof in criminal trials. There he correctly told the Jury that the burden lies on the Prosecution who must satisfy the Jury beyond a reasonable doubt that the Appellant is guilty of the crime and if the Crown fails so to satisfy them they must acquit. But not much else was said about the burden and standard of proof in the course of the summing up and in particular the Jury were not directed that they had to be satisfied beyond reasonable doubt that the Appellant intended to kill the Deceased.

The complaint here was justified.

In view of my findings articulated above I think the conviction for murder is unsafe and unsatisfactory. I would quash the conviction for the offence of murder and substitute a conviction for the offence of manslaughter.

I am in a quandary as regards the appropriate sentence. If the result of his appeal is that the Appellant should be convicted for a lesser offence he ought not to suffer a severer punishment. After

his conviction for murder he was ordered to be detained at Her Majesty's pleasure and from a reading of the last page of the record he was kept at the Richmond Hill prison for "some time prior to his release". There is no suggestion as to where the Appellant is kept presently.

I am going to order that he remains wherever he is until the next sitting of the Court in Grenada when we shall invite learned Counsel for the Appellant and the learned Director of Public Prosecutions to address us on sentence.

ALBERT N. J. MATTHEW
Justice of Appeal [Ag.]

I Concur.

C. M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

A. J. REDHEAD
Justice of Appeal