

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 10 & 11 OF 2001

BETWEEN:

**CLIVE CASTELLO
and
RAWLSON STRAUGH**

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Ephraim Georges

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

First Appellant unrepresented, Ms. Kay Bacchus-Browne for 2nd Appellant
Mr. Roger Gaspard Director of Public Prosecutions with Ms. S. Bollers Assistant
DPP for the Respondent

2002: April 8,
July 17.

JUDGMENT

[1] **GEORGES, J.A (Ag.):** This is a consolidated appeal which concerns two appellants who were both convicted on 22nd October 2001 on a charge of manslaughter of St. Clair Davy (the deceased) at Biabou in St. Vincent and the Grenadines and were each sentenced to twelve years imprisonment.

[2] The Crown's case is that about 2:30 am on the 22nd October 2000 Al Johnson was at his home in Biabou when he heard his brother the deceased calling him and shouting for help. On going to his assistance the witness said that he found the

deceased “down by the road lying on his back with his two hands and feet in the air like struggling.”

- [3] On inquiring of him what was wrong the deceased did not tell him anything but asked for some water which he gave to him and again asked him what was wrong whereupon the deceased told him “Shabba, Running Things and the boy for Shibby burn him.”
- [4] The appellant Castello testified that he was also called “Running Things” and that he knew the appellant Straugh as “Shabba”. The appellant Straugh admitted that he was also called “Shabba.”
- [5] Sylvia Samuel, the deceased's sister testified that around the aforementioned time and place she saw the deceased lying by the road calling his brother Al. He asked Al to call one Lorraine Stephenson and requested a glass of water. Lorraine told him that before she gave him the drink of water he would have to tell her what was wrong whereupon she heard the deceased say to Lorraine that it was Shabba, Running Things and Shibby's boy who had burnt him adding that he was sitting by the Computer Centre when the three of them gave him a lash then held him and carried him down to Miss Ellis Robinson's residence at the downstairs, threw gas on him and lit him. He managed thereafter to get out and roll on the grass and beat out the fire.
- [6] Sergeant Calbert Straker, the investigation officer testified that around 3.00 a.m on the 22nd October, 2001 after receiving a telephone report he left Baibou Police Station and went to an area called Old Pasture where he saw the deceased lying by a house close to the road. He (Sergeant Straker) spoke to him and he told him that Shabba, Run Things and Shibby's son had thrown gas on him and lit him afire in the vicinity of the Biabou Library.

- [7] At the time of these utterances by the deceased Sylvia Samuel, Al Johnson and Sergeant Straker testified that they had observed that the deceased's body was almost entirely burnt and his skin was peeling. An ambulance was summoned and the deceased was taken to Kingstown General Hospital where he was examined by Dr. Lennox Adams who found the patient to be suffering from partial and full thickness burns and his entire body except for the proximal thighs, the buttocks and the perineum (i.e. between the genital organs and the anus)
- [8] He was warded and treated for one and a half months. Initially, he responded to therapy but soon began to deteriorate slowly and despite best efforts the patient eventually succumbed to his injuries. In the doctor's opinion death was due to open flame burns to 90% of his total body surface area complicated by sepsis/infections. The chances of survival were extremely slim in such circumstances the doctor opined.
- [9] In the course of his investigations Sergeant Straker caused photographs to be taken of an area of an occupied house opposite the public library allegedly owned by Miss Ellis Robinson which revealed the presence of burnt articles some of which were identified by Gideon Browne as part of his property which had been stored and secured there the day prior to the incident.
- [10] Investigations continued and on 30th October, 2000 Sergeant Straker cautioned and interviewed the appellant, Costello who pleaded an alibi by way of his defence testifying that he knew nothing about the killing/death of the deceased and that at the time the deceased received his injuries he (the appellant) had already returned to his home in the village of Spring. The last occasion on which he had seen the deceased alive he added was around midnight on the night of 21st October, 2000 at which time he (the appellant) was in the company of one Leo, Shibby's stepson. His only witness Glenroy Matthias also call 'Leo' supported his story in some respects.

- [11] The appellant Straugh alias Shabba testified that both Costello who was also called Running Things and Shibby's son Leo, had visited his home and shop during the early hours of the morning of 22nd October, 2000 and at the material time he also was at his home thus raising an alibi. He further denied being involved in anyway in the burning of the deceased.
- [12] The appellant Costello appealed against his conviction on two grounds namely:-
1. that the evidence of the Complainant (sic) is not supported by any other independent material evidence;
 2. the conviction was unsafe and unsatisfactory.
- [13] In his two grounds of appeal the appellant Straugh contends that:
1. the decision (of the jury) is unreasonable and cannot be supported having regard to the evidence;
 2. the sentence is excessive
- [14] Turning to ground 1 of Costello's ground of appeal it is plain as the learned DPP pointed out that the deceased in this case gave no evidence at this trial as he was dead at the time and so there could have been no complainant. The case for the Crown therefore largely hinges on the utterances allegedly made by the deceased against the appellants and given in evidence by the deceased's sister Sylvie Samuel, Al Johnson, the deceased's brother and Sergeant Calbert Straker whose testimony was supported by and consistent with each other as the learned DPP pointed out. That ground of appeal therefore clearly fails.
- [15] Ground 2 of Costello's appeal namely that the conviction is unsafe and unsatisfactory can conveniently be dealt with Ground 1 of Straugh's appeal which asserts that the decision (of the jury) is unreasonable and cannot be supported having regard to the evidence.

- [16] Ms Bacchus-Browne, Learned Counsel for the appellant Straugh pointed out that when first questioned by his sister Sylvie Samuel and his brother Al Johnson as to what had happened to him the deceased made no reply. The question she therefore canvassed was whether the deceased's subsequent statements (after he had been given water to drink which he had requested) identifying the appellants as his assailants were properly admissible in the circumstances. The learned trial judge she complained did not properly direct the jury on the possibility that the statements could have been concocted or distorted. There was no indication of the basis on which the said statements had been admitted in evidence she submitted. Were the contents of the statements the truth she further queried?
- [17] The truth of the statements made by the deceased would clearly have been a matter for the jury to decide and the learned trial judge did so direct them. On the issue of the inadmissibility of the oral statements of the deceased in evidence which is the central issue of this appeal Ms. Bacchus-Browne referred to **R v. Goddard (1882) 15 Cox CC7** in which Hawkins J. following **Cockburn CJ in R v Bedingfield (1879) 14 Cox 341** held that where the deceased shortly after the occurrence which resulted in her death was found in a fainting condition and apparently dying and it was proposed to give in evidence as part of the res gestae a statement which she then made as to cause of her injuries, such a statement was inadmissible but it afterwards appearing that the deceased had prefaced her statements by words "I'm dying look to my children" he admitted the statement as a dying declaration. It was a fundamental requirement then that to be admissible in evidence as part of the res gestae the dying declaration of a victim had to be made in circumstances where he/she was in a settled hopeless expectation of imminent death thus eliminating or minimizing the possibility of concoction or malice.
- [18] In reply the learned Director of Prosecutions referred to paragraph F16.31 of Blackstone's Criminal Practice 2000 which illustrates that the law relating to the admissibility in evidence of dying declarations as an exception to the hearsay rule

in that they form part of the *res gestae* has come a long way since **Bedingfield** and **Goddard** and today the modern focus is on the probative value of the evidence rather on the question whether it falls within some rigid and artificial category.

- [19] For example in **R v Woodcock** 1 Leach 500 which was cited and approved in **R v Perry (1909) 2KB 697, 701; 2Cr.App.R267** Eyre CB declared that:

“The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death, and when every hope of this world has gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.”

- [20] Lord Ackner in the House of Lords decision of **Andrews (1987) AC 281** later however clarified the law by approving the test for admissibility adopted by the Privy Council in **Ratten v The Queen (1972) AC 378** which was relied on by the Director of Public Prosecutions.

- [21] In **Ratten v The Queen**, Lord Wilberforce described the rule under which spontaneous statements are submitted in the following way at pages 389-390:

“A hearsay statement is made either by the victim of an attack or by a bystander – indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae*. A classical instance of this is the much-debated case of **Bedingfield (1879) 14 Cox CC 341**, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the

time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their lordships' opinion this should be recognized and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

- [22] Lord Wilberforce's reasoning led him to doubt the correctness of the decision in *Bedingfield*, in which the statement of a woman whose throat had been cut a few moments before was rejected, on the ground that it was made after the act to which it related was done. Of this, Lord Wilberforce said (at p.390) that 'there could hardly be a case where the speaker's words carried more clearly the mark of spontaneity and intense involvement'. In *Andrews* the House of Lords overruled *Bedingfield*, on the ground that it was inconsistent with the true principles as laid down by Lord Wilberforce in *Ratten v The Queen*. *Bedingfield* had previously been approved by the Privy Council in *Teper v The Queen* [1952] AC 480 and *Christie* [1914] AC 545, per Lord Reading, and Gibson (1887) 18QBD 537. These

and other statements of the law involving the application of the discredited test are now regarded as no longer authoritative.

[23] In **Andrews** the House of Lords accepted and applied the law as stated in *Ratten v The Queen*. A was charged with the murder by stabbing of M, who was attacked by two men in his own home. Within minutes neighbours called the police, who arrived promptly, whereupon M made a statement identifying his attackers. The trial judge admitted the statement and, in a ruling regarded as 'impeccable' both by the Court of Appeal and the House of Lords, he held that there was no possibility in the circumstances of concoction or fabrication of the identification, and that the injuries sustained by M were such a nature as to drive out any possibility of his being actuated by malice. He also took account of the fact that M correctly identified the other attacker as O, who had subsequently pleaded guilty to manslaughter.

[24] Lord Ackner summarized the position which confronts a trial judge when faced in a criminal case with an application under *res gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated. He said (at pages 300-301):

"1. The primary question which the judge must ask himself is – can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instructive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event which provided the trigger mechanism for the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the concoction or distortion. In the instant appeal

the defence relied on evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neil and the appellant because, so he believed, O'Neil had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not the admissibility of the statement and is therefore a matter for the jury. However, here again may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double limit for driving a motorcar. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. If such circumstances the trial judge must consider whether he can exclude the possibility of error."

- [25] Prior to the decision in *Andrew*, it had been held, in *Nye* (1977) 66 Cr App R 252, that the possibility of error by the maker of the statement was an 'additional factor to be taken into consideration' when determining admissibility. It is now clear from the extract from the speech of Lord Ackner in *Andrews* set out above, that the risk of error bears on the question of admissibility only in cases having 'special features,' e.g., an identification in difficult circumstances or by a person with defective eyesight, or by someone who had been drinking. In *Nye*, one Lucas was driving his car when it was struck from behind by another vehicle in which the accused, N and L, were traveling. One of the accused then got out and punched Lucas in the face, while the other tried to put a stop to the assault. Shortly afterwards, when the police arrived, Lucas spontaneously identified L as the man who had hit him. It was argued that Lucas might have made a mistake as to which of the accused had attacked him. On these facts the Court of Appeal considered that there was no chance of an error, stressing in particular that: 'anyone who has been assaulted usually has good reason for remembering what his assailant's face looks like'. It is therefore unlikely that, applying the test in *Andrew*, special circumstances such as the great stress immediately after a motor incident, will be held to affect the admissibility of evidence. The fact that the maker of the

statement had been drinking, though capable of being a 'special feature', does not necessarily lead to exclusion. In *Andrew* the deceased had 'drunk to excess' and in *Edwards* [1992] Crim LR 576 of the Divisional Court held that a spontaneous allegation of theft of a wallet made against E by A, who was drunk, was admissible.

- [26] The event which generates the statement admitted under the rule stated above, must be the commission of the offence in question. This is implicit in both *Ratten v The Queen* and *Andrews*, and is expressly stated by Lord Normand in *Teper v The Queen* [1952] AC 480, who said (at p. 488): "for identification purposes in a criminal trial the event with which the words sought to be proved must be connected as to form part of the *res gestae*, is the commission of the crime itself, the throwing of the stone, the striking of the blow, the setting fire to the building or whatever the criminal act might be'. A *res gestae* statement will typically have been made by the victim of the offence, or by a bystander, but may also, if the conditions of inadmissibility are satisfied, be made by the accused himself.
- [27] In **Andrews** Lord Ackner said that where a 'spontaneous' statement has been admitted in evidence as part of the *res gestae* the judge must make it clear to the jury:
- (a) that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them;
 - (b) that they must be satisfied that the declarant did not concoct and distort to his advantage or the disadvantage of the accused the statement relied on, and where there is material to raise the issue, that he was not activated by any malice or ill-will;
 - (c) where there are special features that bear on the possibility of mistake then the jury's attention must be invited to these matters.

[28] And this is precisely how the learned trial judge directed the jury when at page 56 of the appeal record line 18 et seq of her summing up she stated:

“Now Mr. Forman, Ladies and Gentlemen of the Jury, I admitted the statements in evidence, but it is for you to decide what was said to be sure that the witnesses that is Sylvia, Al and Sergeant Straker were not mistaken in what they believe have been said to them. Further, you must be satisfied that St. Clair Davy did not concoct or distort this to his advantage and to the disadvantage of these two accused men and these statements are being relied upon so you have to consider this, that he was not activated by malice or ill will. I will repeat this to you Mr. Foremen, Ladies and Gentlemen of the Jury, it is for you to decide what was said and to be sure that the witnesses were not mistaken in what they believe had been said to them, so you have to be sure that Sylvia Samuel, Al Johnson and Sergeant Calbert Straker were not mistaken in what they believe have been said to them, you have to be satisfied that there was no concoction to the advantage of the deceased and to the disadvantage of these two accused men.

Mr. Foreman, Ladies and Gentlemen of the Jury, both Sylvia Samuel and Al Johnson are related to the deceased, Sylvia is his sister, Al is his brother, you will consider whether these two people have an interest to serve and hence the reason why they come and say this here to you.

The prosecution however has placed for your consideration that both these accused men have told you; you heard them in cross examination that they had no problem with Sylvia not Al nor Sergeant Straker and they had no trouble with the deceased. Accused No. 2, that is Runthings, told you that Sylvia and Al and the deceased are his relatives. And, Accused No. 1 that is Shabba told you that he bought things from St. Clair Davy when he was selling things.

Mr. Foreman, Ladies and Gentlemen of the Jury, the Prosecution has further placed for your consideration, the evidence of Sergeant Straker. These people told you, these two accused men that they had no confusion with him and we have not been told in this evidence by either of them or any one else that Sergeant Straker is any relation to the deceased, not Sylvia, not Al.

[29] The jury could not in my view have been left in any doubt as to how they were to approach the evidence on this crucial aspect of the case. Implicit by their verdict they evidently ruled out any notion or possibility of concoction or distortion and adaptation on the part of the deceased when he purported to identify and name

his assailants or any notion or prospect of uncertainty concerning the exact words used by him in describing them and the circumstances surrounding the infliction of his mortal injuries or any suggestion or possibility of unreliability concerning his identification of his said assailants at the material time. In my judgment the verdict of the jury could not therefore in all the circumstances be held to have been unsafe and unsatisfactory as canvassed in Ground 2 of the appellant, Castello's grounds of appeal and in Ground 1 by the appellant Straugh. Implicit by their verdict also is the jury's rejection of the appellants' defence of alibi which was properly put to them by the trial judge. Both these grounds of appeal accordingly fail. And further the learned judge's directions to the jury on the live issues of the case the burden and standard of proof etc were in my view comprehensively and comprehensibly put to them by the learned judge.

[30] Having regard to the gravity of the offence and the serious nature of the deceased's injuries and all of the surrounding circumstances the sentence of twelve years imprisonment imposed on each appellant cannot in any way be regarded as excessive. Both appeals are accordingly dismissed and the respective convictions and sentences are affirmed.

Ephraim Georges
Justice of Appeal

I Concur

Sir Dennis Byron
Justice of Appeal

I Concur

Albert Redhead
Justice of Appeal