

DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No 22 of 1993

BETWEEN:

STEPHEN ALPHONSE

Appellant

and

THE STATE

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice Justice

The Hon. Dr. Nicholas J.O. Liverpool - Justice of Appeal

The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances: Mrs Zena Moore-Dyer for the Appellant

Mr. Julian Eloï for the Respondent

1994: September 20,21;
October 31.

JUDGMENT

SINGH, J.A.

On August 11, 1992, sometime between 2 p.m. and 3 p.m., Francilla Canoville, 15 years old (the deceased), at the request of her mother Clara Canoville, went with her 15 year old brother Jeremiah Canoville and made a telephone call from the home of one Esprit. On their way back home on a street at Belles in Dominica, the appellant ran after them with a cutlass and virtually chopped off the head of Francilla from her body. The evidence disclosed that he inflicted "a transverse incised wound of the back of the neck, almost completely decapitating the body from the head" leaving it attached merely by skin muscles of the anterior part of the neck. He also inflicted a perpendicular incised wound 611 long over the right shoulder blade penetrating to the

apex of the said shoulder blade, a transverse incised wound of the lower lumbar region 8 1/2 long chopping off the crest of the right hip bone and an incised wound of the skin and the muscle of the base of the right thumb. The medical evidence disclosed that Francilla Canoville died from the wound of the neck with the attendant injuries to the spinal cord and bleeding from the left and right carotid arteries.

On June 24, 1993, the appellant was convicted by a Jury before Adams J of the Common Law offence of Murder and was sentenced to "Death by Hanging". He appeals from this conviction on the ground defence and provocation.

On the issue of self-defence, counsel for the appellant contended that the Judge erred when he directed the Jury to apply the objective test. Learned Counsel relied heavily on Beckford v R (1987) 36 WIR 300 in support of her submission and submitted that the true test to be applied was the subjective test. On this issue, two tests are to be applied: (1) the subjective test, when dealing with the issue whether or not the accused had the honest even though mistaken belief that he was being attacked as laid down in R v Beckford and (2) the objective test, when deciding whether what the accused considered as reasonable retaliation was in fact reasonable having regard to all the circumstances of the case. (R v Shannon (1980) 71 CAR 192 (C.A.); R v Whyte (1987) 3 A.B.R.416 (C.A.)). The learned Judge dealt with both limbs in his summation to the Jury and I can find no reason to fault him. The subjective honest belief test was adequately put to the Jury when the Judge gave these directions:

"there is the girl and her father attacking or about to attack him and that bearing in mind that he had been before beaten by this family but he was striking out doing what he perceived, not what you perceived, what he perceived to be reasonable and honest in the circumstances."

and:-

"its his state of mind that you ought to consider when you are dealing with the question of whether what he did was reasonable and necessary."

This ground therefore fails.

On the issue of provocation, the learned trial Judge gave this direction to the Jury:-

"Provocation, Members of the Jury consists or arises where the deceased does an act or series of acts to the accused which would cause any reasonable person and did cause the accused to suffer a sudden temporary loss of self-control which made him subject to such passion as to cause him to retaliate in the way in which he did".

This is the classic Common Law direction to the Jury on the still applies to Dominica. However, the learned Judge continued this direction by defining "reasonable person" to the Jury as:

"Somebody his age and background, taking into account his age, background, humble education maybe..."

Learned Counsel for the Appellant submits that this latter direction is a misdirection of the Common Law position. I do not propose to dwell on the merits or demerits of this submission. In my judgment, it is a direction most favourable to the appellant and a direction which does more justice than injustice to the appellant's cause. This ground also fails.

still on the issue of provocation, the alleged provocative acts relied on by the appellant consist of (1) a previous beating of him by the deceased family (2) the impression that the deceased on the day of the incident reported him to the police (3) a stone thrown at him by the deceased and (4) the deceased's mother and father armed with a cutlass and a stone walking towards him. The law in these circumstances, required the Judge to direct the Jury that on the issue of provocation, their consideration should not be limited to the acts of the deceased only but also to the acts of the deceased's father and mother. *R v Small* (1965) 9 WIR 340; *R v George Thompson* (1971) 18 WIR 51.

At the commencement of his directions to the Jury on the issue of provocation, the learned Judge seemed to have limited those directions to the alleged provocative acts of the deceased only. In the context of this matter where the appellant relies on acts of provocation emanating jointly from the deceased and her father and mother this was an obvious faux pas on his part. However, later in the summing up the Judge gave the proper direction to the Jury when he directed them that they should consider not only the alleged provocative acts of the deceased but also those of the deceased's mother and father and also the previous alleged beating of him by the deceased's family.

Counsel for the appellant contends that faced with those two directions the Jury must have been confused on the issue. I do not disagree. I consider the first direction a misdirection. The issue then is what miscarriage of justice if any, may have occurred as a result of this confusion created in the minds of the Jury. Learned Counsel for the respondent argued in favour of the application of s 38 (1) of the Eastern Caribbean supreme court (Dominica) Act cap 30:02, if the court so found. The relevant part of the section reads: "However, the Court may, notwithstanding that it is of the opinion that the point raised in the Appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred."

The determination of this issue necessarily involves an incursion into the evidence.

The evidence discloses that on this fatal day the appellant in cutting a coconut tree caused the telephone lines leading to the deceased's parents home to be disrupted. Thinking that the deceased reported him to the police, he accosted her on the road. Her brother who was with her ran away. The appellant told her "I am going to kill you". The deceased told him "don't call no police :for you I am sorry." Eye witness for the prosecution Crusoe Andrew asked the appellant to "leave the girl alone." The appellant replied "move I going to kill her". Andrew then testified that a lady nearby also asked the appellant to "leave the girl alone" and he replied "I just waiting :for when Kenneth (deceased's father) come :for me to cut the girl neck in :front of him". Another eye-witness Jennifer Defoe saw the appellant hold the deceased and tell her to "kneel down so he could cut off her neck" and that "if I see your :father coming I will kill you". The deceased tried to hold the cutlass but it cut her hand. The appellant chopped the deceased on her waist. The deceased screamed "Daddy, Daddy". The deceased's parents were now at the scene and were about 40 feet away when the appellant told the father of the

deceased "if you come closer I will cut her neck". The appellant then chopped off the head of the deceased.

Another Prosecution's eye-witness testified that she asked the appellant for the cutlass. He did not give it to her but pointed to the distance between them and told her if she came within that distance "he would kill Francilla". This witness then saw the deceased's father approaching with a cutlass and a stone in his hand. She heard the appellant tell the deceased's father "don't come closer, if you come closer, I am going to kill her". The father did not stop. The appellant ran to the

deceased, lashed her with the cutlass around her lower back and her shoulder and then chopped her neck.

The evidence of the deceased's father was that the deceased's brother having returned home and spoken to him he left with his cutlass "in order to rescue our daughter". From about 160' away he saw the appellant chopping her. From about 60' away he heard her shout "Daddy, Daddy", he then saw the appellant "cut her with the cutlass on her neck" and ran away. He did not throw any stone on the appellant. The evidence of the deceased's mother supports that of the father. She testified that the only time the deceased's father ran after the appellant was after the appellant finished chopping the deceased and she then heard the appellant say "come all you coming, I going :for my gun to kill all you mother ass".

In his unsworn statement from the dock, the appellant said the deceased teased him, threw a stone at him, he ran after her, they started fighting, he released her. He then saw the deceased's father coming with a stone and a cutlass. The appellant approached the deceased's father up to about 5' away from him and then turned and ran. The deceased threw a stone after him. She was in front of him and her father at his back and "I make a blow after". He said "I was afraid Kenny beat me because he family had already beat me before".

This summary of the evidence disclosed the relevant mens rea in the appellant to kill or cause grievous bodily harm to the deceased because she reported him to the police and the actus reus on his part of actually killing the deceased. From this evidence can it be said that this mens rea was created, activated or motivated as a result of provocation or for that matter self- defence? The evidence is very strong that even before the deceased's father came on the scene, the appellant had, on more than one occasion, expressed his intention to kill the deceased and that all that happened before he struck the fatal blow was that the deceased's parents were on their way to rescue her and she threw a stone at him. Given these circumstances, I do not see the self defence relied on by the appellant and am of the view that when the learned Judge left that issue for the consideration of Jury he must have done so only ex abundante cautela.

On the issue of provocation, in *Lee Chen Chien v Reginam* (1963) 1 ALL E.R. 73 Lord Devlin in Her Majesty's Privy council said at p.79:

"Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct."

at p.78 the learned Privy councillor observed:

"A Judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit. Their Lordships are not therefore much influenced by the fact that there was no suggestion at the trial that this issue should be withdrawn from the jury. Counsel may well consider that if the question is open to any serious or prolonged argument, a Judge is likely to say that it is better to take the verdict of the Jury".

Lord Devlin continued:-

"The duty of an appellate court in the present case is to assume that the accused evidence, in so

far as it can be reconciled with the unchallenged evidence of the injuries inflicted, is substantially true and to ask themselves whether it disclosed some material suggesting provocation".

In my judgment, viewing the evidence most favourably to the appellant, there is no sufficient evidence or credible narrative capable of satisfying the three undetached elements mentioned earlier, necessary to constitute provocation in law. Even if it can be said that there was a provocative incident or that there were provocative acts, I consider the retaliation by the appellant so cruel and severe that it far outweighed whatever acts of provocation there may have been. In my considered opinion, the appellant's actions on that fatal day were his conscious vengeful actions against the deceased because he thought she reported him to the police and nothing else. He decided he would kill her for what he thought she did and no other act on the part of the deceased or her parents provoked or induced that desire. One prosecution witness did say "he was in a rage. He looked possessed by demons. He was real vex, mad" • In my view this behaviour is not inconsistent with a vengeful state of mind and is more so consistent especially when the appellant does not himself say or give any evidence to suggest that he may have lost his self control.

In Ibrams (1981) 74 CR.APP. R 154 The Court of Appeal of England cited with approval the following statement of Devlin J in Duffy: at 932N:

"circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation."

For these reasons I would hold that despite the misdirection on provocation alluded to earlier in this judgment, there has been no miscarriage of justice and that had the Jury been properly directed they would inevitably still have convicted the Appellant of the offence of Murder. I would•therefore dismiss this appeal and affirm the conviction and sentence.

SATROHAN SINGH
Justice of Appeal

I concur.

SIR VINCENT FLOISSAC
Chief Justice

I concur.

NICHOLAS J.O. LIVERPOOL
Justice of Appeal