

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO: 15 of 1993

BETWEEN:

DANIEL JOHN

Appellant

AND

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice C.M.Dennis Byron - Justice of Appeal
The Honourable Dr. N.J.O. Liverpool - Justice of Appeal

Appearances: Mr. Arthur F. Williams for the Appellant
Mr. Carl Joseph, Director of Public Prosecutions for the Respondent

1993: December 8, 10

JUDGMENT

LIVERPOOL, J.A.

At the close of the arguments, we set aside the sentence and substituted therefor a term of life imprisonment. We also promised to give our reasons in writing later. This we now do.

On 28th July, 1993 the Appellant was found guilty of the murder of George Forbes and sentenced to death. He appealed against his conviction on three grounds, two of which were withdrawn. In the only live ground of appeal exception was taken to the form of the directions by the learned Trial Judge when dealing with the question of provocation.

It is common ground that the Appellant had visited a shop where he found the deceased playing dominoes and accused him of cheating in the game and stealing one of his chickens. Thereafter

a fight ensued outside of the shop during which the deceased slapped the Appellant in his face with a chinese chopper. The fight ended and they went their separate ways.

The case for the Crown was that a few minutes afterwards the Appellant returned to the scene. Shortly thereafter the deceased came along, raised both hands in the air and said, "Skipper, I have nothing against you, if you want to kill me, kill me." Whereupon the Appellant pulled a knife from his side and stabbed the deceased, who turned around and started to run. The Appellant threw the knife at the deceased who turned back, picked up the knife and continued to run. The deceased died shortly afterwards.

The Appellant in his defence said that when the deceased returned to the scene he walked up to the Appellant with his hands in his pants waist and said "Man if you f..... around me I will give you this." The Appellant stated that he knew the deceased to own both a gun and a chinese chopper, and that based on what had transpired between them earlier that night, he understood those words to mean that he would have been attacked with either weapon, although he did not actually see the deceased with them at the time the words were spoken. He continued, "After he came close to me telling me that he will give me this I push him off. After I push him off he pulled his hands from off his waist. I pull knife out the bucket of pig food and fire stab at him. I don't know if knife ketch him yes or no because he start to run. I just stand up there, knife drop on ground."

The learned Trial Judge gave the jury an adequate direction on the law relating to provocation and put the defence of the Accused fairly to them. Learned Counsel for the Appellant, however, complained about the final directions by the learned Judge to the jury. The judge said:

"If (you) find that you do not believe that the question of self defence arises at all and that you find that he was not acting in self defence, then you turn to consider the same evidence as it relates to provocation, whether you

think that Forbes' action from earlier on to the time when he came up to the Accused, whether Forbes was provoking the Accused and in considering the provocation, you consider whether a reasonable person in those circumstances would have been provoked and in determining whether a reasonable person would have been provoked, you relate it to a reasonable person of the community in which the Accused belongs.

If you consider that Forbes..... the facts you have been referred to from the time in the shop, the cheating, the domino game, the fowl, the striking with the chopper, the dragging on the ground and all those other acts, these and all other acts that you have found, if you find that those acts may have provoked the Accused and that he did not have time to cool off but that's not the term used in the legislation but that's what I mean that he acted before he could cool off. Then if you find that he has been provoked or he may have been provoked, then the verdict would be manslaughter because provocation reduces the offence of murder to manslaughter.

So if you (find) that he has been (provoked), it's manslaughter and not murder. If you do not believe that he was provoked or that there was time for him to cool off and that what happened afterwards, that is, the taking of the knife and the stabbing of Forbes, that he was not provoked or that he had time to cool off between the incidents, then the verdict should be that of guilty of murder."

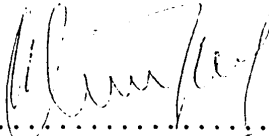
Learned counsel for the Appellant submitted that there were two separate instances where the question of provocation could have arisen. The circumstances leading up to the fight and the incidents which occurred when the deceased returned to the scene and the stabbing took place. He conceded that whereas the

question of a cooling off period could relate to the circumstances leading up to the fight, since thereafter both parties had left the scene and gone their separate ways; there was no opportunity for a cooling off period to arise in respect of the incidents which occurred when the deceased returned to the scene and the stabbing took place. He submitted therefore that by failing to isolate the two instances, and by giving a general direction on cooling time, confusion may have been caused in the minds of the jury, and that the Appellant lost an opportunity to have manslaughter considered specifically in relation to the incidents which occurred immediately prior to the stabbing. And he cited the case of *Baldeo Dihal v R* (1960) 2 W.I.R. 282 in support. The headnote of that case (a decision of the Federal Supreme Court) states in part - "When dealing with the question of provocation, mention should not be made of cooling time if the evidence clearly shows that no time elapsed between the provocation and the retaliation and, more so, where any such mention of cooling time may cause confusion in the mind of the jury".

We think that there is merit in Counsel's submission, and the learned Director of Public Prosecutions quite properly conceded that there was no specific direction on the question of provocation as it related to the incidents immediately preceding the stabbing. In our view the evidence of the Appellant, if believed, showed that no cooling time elapsed between the acts which took place after the deceased returned to the scene and the attack by the Appellant; and the jury may well have been confused into believing that once there was cooling time between the two separate encounters the verdict should have been one of murder.

For these reasons, without either allowing or dismissing the appeal, we would apply the provisions of Section 41 (2) of the

Eastern Caribbean Supreme Court Act, substitute a verdict of manslaughter, and sentence the Appellant to a term of life imprisonment.



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Nicholas J.O. Liverpool
Justice of Appeal



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Sir Vincent Floissac
Chief Justice



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C.M. Dennis-Byron
Justice of Appeal