

BETWEEN:

CUTHBERT PHILLIPS - Appellant  
and  
THE QUEEN - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice  
The Honourable Mr. Justice Moe  
The Honourable Mr. Justice Byron (Acting)

Appearances: Dr. R. Cheltenham and A. McNamara for the Appellant  
D. Hamilton, Director of Public Prosecutions for  
the Respondent

1990; Oct. 22, 23,  
1991; Jan. 28.

JUDGMENT

MOE, J.A.

The appellant was charged with the murder of Anthony Hippolyte at Pigeon Point in Gros Islet. He was convicted of manslaughter and sentenced to five years imprisonment. He appeals against both conviction and sentence.

Anthony Hippolyte also known as "Nivan" died from a gunshot to the head which damaged the brain stem. There was an entry wound in the left cheek and the bullet travelled in a straight line to the right occipital portion of the skull or 4 cms behind the right ear. The path of the wound was slightly upwards at 10 degrees. The evidence shows that the bullet was discharged from a gun which the appellant was pointing at the cheek of the deceased and the pathologist gave as his opinion that at the moment of discharge the gun was touching the cheek of the deceased.

Accounts as to the circumstances in which the deceased received the gunshot were varied. The record shows that the appellant's son thirteen years of age and others were playing a game of cricket on the beach at Pigeon Point. The deceased interfered with the game and threw what was used as cricket stumps into the sea. The appellant's son went and complained to him. The son recounted how the deceased had a knife with a blade which went in and out and had put the knife to one of his friend's throat. The appellant went to his van, took out his gun from his brief case and went towards the deceased. Stephen Auguste for the prosecution said the appellant asked the deceased for the bat. While he was quarrelling with the deceased he took the gun out of the case and put it by the

/deceased's .....

friend's throat. The deceased shifted the gun from his throat. The appellant asked for the bat. The deceased walked back about four paces. The appellant walked towards the deceased again and asked for the bat. The deceased said "leave me alone" and opened his arms. The appellant put the gun by the deceased's face and the gun fired. Tony duBoulay another prosecution witness said that as a result of hearing that a fellow was trying to cut a friend's son with a knife and had the knife holding by the neck of another, he went towards the beach. He saw the appellant and the deceased facing each other, the deceased with his back to the witness. He saw all their hands go up in the air and then he heard the explosion. After the hands went up the gap between the two men widened.

A third prosecution witness Randall Vorke said he saw the appellant standing in front of the deceased. They were about 30 ft. from him. The appellant had a weapon in his right hand and something black in his left. There was nothing in the left hand of the deceased. He was not able to see his right hand which was by his side. The weapon was held towards the throat of the deceased. He saw the deceased flash up his hands. His left hand came in contact with the right hand of the appellant causing the appellant's right hand to go upwards. At that time he heard the weapon discharge. He saw the deceased's hand hit the accused's under the wrist.

In a statement given under caution the appellant said:

"Whilst on the beach my son Christian came to me and said 'Daddy a man just held up my friend with a knife. He had the knife right up to my friend's throat. Look, he is going down the beach'. I went to my van took possession of my .357 magnum and went down to the beach with my son. My son pointed out the individual to me. I went up to him and said: 'Why are you holding up the kids with a knife?' He immediately said to me 'man, I don't know what you are talking about' in a very hostile tone. Observing his demeanour, I drew my weapon which was in the back with my belt around it. I cocked it and brought it up to his left cheek and I told him 'man, I am here to tell you don't mess with the kids'. At that moment he immediately threw up his hands, the weapon went off. I do not know the individual. I've never seen him. I had absolutely no intention to do harm to the individual. My action was just to frighten him, I view this as an unfortunate accident."

The appellant in evidence at the trial after recounting the complaint by his son about the interference of the game of cricket and the assaults with the knife, about getting his gun and going to the deceased said:

**"I am facing him and I said to him, not in any rough or violent tone: "My son here has made a report that you held his friend up with a knife. Why are you holding up the kids?"**

/He said.....

He said in a rough tone: "Man I do not know what you are talking about" and his body went on one side with the right hand behind I shifted my body and both my hands grabbed hold of the gun and in one simultaneous motion took off the gun which was cocked. From his demeanour and his body movement I was left with the impression that he intended to do something."

He went on to say

"So when I brought out my weapon and put it near the face of the deceased the individual hit me under the right wrist and the gun went upwards and touched his face and the gun went off and went up. When that move was made both of his hands went up. His left hand was fast and hit my hands upwards. My left hand with the holster went up as well to prevent anything he might have had coming. When his left hand hit under the wrist of my right hand my eyes were on the travelling of my right hand. His hand was fast and very hard coming up. He hit me on the outer side of my right hand.

.....  
I did not know the individual before. I had never seen him and never had problems with him while I was a policeman. I drew the gun because of the guy's demeanour and his movement. Christian made a report and a knife was mentioned and he made the movement. I had no doubt that my life was in danger."

.....  
I drew the weapon because I honestly believed my life was in danger. I did not intend to pull that trigger."

Two twelve year old boys, who were in the game of cricket, in evidence for the defence told of being assaulted by the deceased with a knife. A third witness who heard the complaint to the appellant about the knife said the appellant went to his van, got his firearm and went to the deceased. He stopped the deceased, words were exchanged. The deceased made a movement forward with his body, the appellant moved back and took his gun and held it in the direction of the man. The deceased's arm went up. The appellant's hand with the gun also went up and she heard a shot. Another witness said he saw the deceased and the appellant facing each other, or two feet apart. He saw the deceased with a knife in his right hand behind his back. He saw the deceased put up his left hand and made a movement with his right hand and he heard a shot.

Evidence was also adduced from Lionel Bell, Assistant Superintendent of Police of the Royal Barbados Police and a firearms examiner. He tested the gun which the appellant had. He said he specifically tested it for accidental discharge by which he meant -

"that even though one dropped the firearm from a height of over one foot no less than a dozen times both while the hammer was in the rest and in the cocked position, the firearm could not discharge. Even when the hammer in the cocked position was struck a number of times the firearm could not discharge. That is why I came to

/the conclusion.....

the conclusion that the gun was in a good condition. I also inspected the strut and trigger spring and these were in good condition. If the gun is cocked and somebody strikes your hand it would not go off in the case of this gun in court. I tested it for that."

According to him the firearm did not accidentally discharge during tests. He however expressed the opinion that -

"It is highly unlikely that the gun would go off if the firearm was cocked and it was pushed away from the holder of the firearm and struck an object. If the gun is cocked and the hand is on the trigger and one hits the hand and the gun, touching on another's face, it is unlikely the gun would go off. It is a very vague possibility."

He also said:

"If a man has the gun cocked and his finger on the trigger and he's hit a blow under the wrist, I suppose it would be the involuntary spasm by his finger that causes the gun to go off and not the blow."

Three other witnesses expressed opinion that if a person holds a gun in a cocked position with finger on the trigger and receives a sudden blow on the gun hand and it jolts over something hard it was likely to go off.

The appellant in his defence at the trial stressed accident and self-defence. Before this Court, Counsel for the appellant stated that accident was the primary defence. The learned Judge gave directions on accident, self-defence and provocation. There being an acquittal of Murder, it would seem that the verdict of manslaughter is justifiable on the basis that the jury found either (a) a deliberate firing of the gun by the appellant while taking defensive action but used more force than was reasonably necessary in the circumstances or (b) no deliberate firing of the gun by the appellant who however was committing an unlawful and dangerous act when the gun discharged.

The two main issues fundamental to this appeal were:-

(1) whether the appellant lawfully drew his gun, cocked it and pointed it at the cheek or throat of the deceased. If he was not acting lawfully in so doing, whether the bullet was discharged involuntarily or not by the appellant it would not absolve him from a conviction for manslaughter. On the other hand if he was acting lawfully, in self-defence, a second main issue would have been (2) whether the appellant had by a deliberate voluntary act discharged the bullet from the gun and thereby used more force than was necessary.

/Against....

Against conviction several grounds were argued. Firstly complaint was made that the learned trial Judge in his summation in effect withdrew the defence of self-defence from the jury. Objection was taken to the following passage in the summation:-

"So members of the jury these are the facts on which I invite you to consider self-defence because it was raised by both Counsel. It does not appear to me that there is any question of lawful self-defence, even on the evidence of the accused himself, but as I said, since it was raised, I have explained what the law is on self-defence and you may wish to consider it; so that if you believe that he shot because he was faced with a dangerous attack then you would consider self-defence and whether it was reasonable in the circumstances."

It was also submitted that repeated references later to self-defence during the summation did not cure that error and there is bound to be doubt whether self-defence was considered by the jury.

It will be convenient and useful to set out those other later references at this point. The next reference was in the learned Judge's analysis of the evidence. He said:

"So Members of the Jury if you believe that evidence, then you would see that there is no question of self-defence; if you believe Scooby that Niven did not have anything in his hands and Niven did not attempt to beat Mr. Phillips, and when he fell Phillips came and stood over him with the gun pointing at him."

In his analysis of the appellant's evidence, the trial Judge said:

"So Members of the Jury, you see a semblance of self-defence arising here. Saying he honestly thought, the deceased moved back, put his hand behind his back and was coming to do him harm; so that is why he removed the gun."

And again:

"So Members of the Jury, if you feel that this man honestly believed that the deceased put his hand on his right side, he having heard about the knife, and was about to inflict danger on him and what he did there was in defence of himself then the thing you have to consider is whether that was reasonable. Whether that was necessary. Whether he had to go as far as killing."

He later said:

"Then another semblance of self-defence "I drew the weapon because I honestly believed that my life was in danger. I did not intend to pull that trigger". So Members of the Jury, here a semblance of self-defence. I have told you what self-defence is and it's a matter for you whether you think that, in these circumstances, assuming that what happened on

/that day.....

that day, what the man did, where he honestly believed that the man was about to injure him, his life was in danger, whether it was necessary for him to kill."

It could be observed that the learned Judge did not take kindly to the proposition that the appellant had acted in self-defence and had expressed his view in strong terms. He went on to say later:

"As I said, when you consider self-defence you will consider his honest belief that this man, making the movement, may have been coming with a knife to stab him and intended to shoot, because of that, whether that was reasonable self-defence."

He said further:

"If you find that the prosecution has satisfied you beyond reasonable doubt that this was not a case of accident which is a complete acquittal both of murder and manslaughter then you consider whether what the accused did was self-defence. You consider whether on the evidence the man made him think he was about to attack him and he shot; and whether that defence was reasonable. That is it was not excessive. If you find that he was acting in self-defence, you must likewise acquit him and the same is true if you are in doubt as to whether he was acting in self-defence. Complete acquittal for both murder and manslaughter."

Finally in directing as to the verdicts open to the jury the Judge said:

"If you find that the accused, when he did the act, was in fear of his own life and he did that act and he used reasonable force, then that is self-defence and he is entitled to an acquittal, and if you are in doubt that there was self-defence, there is also an acquittal."

It is commonplace that a summing up must be taken as a whole and in light of the various passages set out the trial Judge cannot be said to have withdrawn the issue of self-defence from the jury.

A second complaint was that the learned trial Judge did not put to the jury the defence fully, especially when he failed to explain to them the meaning and implications of the proportionality rule. The record shows that the learned Judge directed the minds of the jury to section 49 of the Criminal Code which makes provision for the use of necessary force or harm, extending to killing in certain circumstances.

Then to section 55 which deals with the use of excessive force and directed as follows:-

/"Section.....

"Section 55 says that force must be reasonable. What is reasonable force depends on all the facts including the nature of the attack whether or not a weapon is used, and if it is, how and what kind of weapon it is. But you must recognize that the person defending himself cannot be expected to weigh precisely the exact amount of defensive action that is necessary."

He further directed:

"The classic pronouncement on self-defence states that it is both good law and good sense that a man who is attacked may defend himself. It is both good law and common 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. It may in some cases, only be sensible and clearly possible to take some simple avoiding action. 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 serious so that it puts someone in immediate peril then immediate defensive action may 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."

Here the trial Judge was quoting from Palmer v R - 16 W.I.R. 499 and from those directions it would have been clear to the jury that the nature and degree of the defensive action taken by the appellant must be in relation to the nature of the attack. In this case, as we understand it the nature of the defensive action which the appellant said he took was that he drew his gun and pointed it cocked at the cheek of the deceased. His position is he did not shoot. An essential element in trial by jury is that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. A Judge will not have put a defence adequately if he omits to call the jury's attention to any of its essential features. See David & Watkins v R. 11 W.I.R., 37. It seems to us therefore that it was incumbent upon the learned Judge to put for the jury's consideration the issue of self-defence from the appellant's position, which was whether drawing and pointing the cocked gun at the cheek of the <sup>deceased</sup> ~~appellant~~ was reasonable pre-emptive action in the circumstances. It will be seen from the passages set out above where there are directions on the issue of self-defence that the point of view put for consideration is always in terms of whether it was reasonable in the circumstances for the appellant to shoot or kill. One other reference not set out above, being earlier than the passage which grounded the relevant complaint, may be here stated. Shortly before /that offending.....

that offending passage the learned Judge in seeking to relate the principles to the facts had directed as follows:-

"The accused states that when the deceased turned and put his right hand behind his back having heard already that he had a knife, then he drew the gun./ But he does not go on to say he shot because he thought the deceased was about to attack him. His evidence is that he drew the gun in the event he might have had to use it and he also tells you he would not have shot unless he saw the weapon. And even then, he would have shot only in the arm. So, essentially, he is saying he did not shoot, it was accident. But self-defence is raised and it is not easy for the defence to allege self-defence if he says it is accident; because when it's accident, you don't intend to do it. But members of the Jury since the defence is raised you have to consider it. If you believe, despite what the accused says, he shot because he thought that the person would have caused dangerous or grievous harm to him, then you may have to consider whether he had used excessive force because you are not allowed to use excessive force according to section 55 of the Criminal Code."

In that direction on self-defence, he interposed the issue of accident and then went on to direct from the point of view of the appellant shooting. In summary therefore we do not find that the position as raised for consideration by the appellant on this issue was as finely put to the jury as he was entitled to have it put. Any reference to this aspect by the Judge was neither strong nor full, possibly because of the conclusions he himself had already reached as reflected in the strong comments he made on various portions of the evidence.

Three grounds of appeal were argued which relate to the issue whether the appellant had by a deliberate voluntary act discharged the bullet from the gun. The appellant had raised by his defence that while he had the gun cocked and pointing at the deceased, the deceased struck his hand on the wrist and the gun went off. The appellant complained that opinion evidence on the issue from four witnesses was admitted which would have unduly influenced a determination of the issue. We do not see that the appellant is justified in making this complaint. The record shows that the opinion evidence now complained about was elicited during cross-examination of two witnesses for the prosecution and tendered during examination-in-chief of two witnesses for the defence. Further the opinions concerned were all consistent with the account of events given by the appellant.

Of a different nature is the complaint that the trial Judge erred in law with respect to expert witnesses in that he neglected to  
/explain and.....

explain and define the difference between a lay witness and an expert witness, or to explain how to approach and/or evaluate the expert testimony and suggested to the jury that the weight to be attached to the evidence of the expert witness should be determined on the basis of his demeanour.

The trial Judge in giving the jury directions as to their function did tell them that in order to decide whether or not to accept or reject the testimony of witnesses they should remember their general demeanour. He also in his summation referred to one witness, A.S.P. Bell as an expert. A pathologist also gave evidence but was not specifically called an expert in the summation. Both those witnesses expressed opinions based on their special skills and expertise. But nowhere in the summation is there a direction to the jury as to the basis on which these particular witnesses were allowed to give opinion on the matters concerned and how the jury were to deal with that evidence during their deliberations. In this respect the trial Judge fell into error. He had a duty to direct the jury on these two matters. *Harvey Juman v The Queen*, Cr. App. No. 8 of 1986 (Barbados).

One can say that a possible effect of the omission is that the jury could have been left feeling obliged to accept and act upon the evidence of the expert and therefore one cannot be sure that the omission did not mislead the jury. To determine the significance of the omission we must consider the thrust of the "expert's" evidence.

The witness Lionel Bell, referred to as the expert from Barbados, gave evidence that the gun does not discharge accidentally. On the issue of accident as directed by the trial Judge, Bell's evidence is put against that of other witnesses who, the jury are reminded, are not experts. It is quite possible as said above that the jury may have been misled into accepting and acting upon the evidence that the gun does not discharge accidentally by a convergence of the omission to direct on the evidence of experts and the emphasis placed by the Judge on the evidence that the gun does not discharge accidentally which merely went to show that a certain amount of pressure (a smaller amount if cocked) had to be placed on the trigger for the gun to discharge.

But the issue for the determination of the Jury was not simply whether the appellant put pressure on the trigger but whether, if he did so, it was through a voluntary and deliberate act. That question was a question of fact for the jury. This brings me to the complaint of the appellant that the trial Judge erred in law in that he misperceived the defence of accident as run, and failed to appreciate that the evidence of Lionel Bell to the effect that the gun was unlikely to have discharged.....

have discharged accidentally was irrelevant to the defence's thesis of accident.

When giving general directions on the law relating to accident, the learned Judge directed as follows:-

"The onus rests on the prosecution of disproving accident. The accused must not prove it was accident. The Crown must ~~disprove~~ accident. They must satisfy you, so that you feel sure that there was no accident. If you are in doubt as to whether it was accident or not, you must acquit the accused. Now in considering this evidence, you will have to look closely at the evidence of Assistant Superintendent Bell, the Expert from Barbados, what he tells you and his evidence to the effect that the gun which is in evidence, which you saw, does not discharge accidentally. He tested it. On the other hand, you will have to bear in mind what Tony duBoulay tells you. He is not an expert like Mr. Bell, but he tells you he has a lot of experience to the contrary. You will have to bear in mind what Mr. Marai tells you to the contrary. He also is not an expert but he has experience and you will have to bear in mind what Col. James of the Armoury told you.

In addition to that you will have to consider the evidence of those people who were on the scene. You have people like Scooby; you have people like Pascal Augustin and their evidence which I will relate to you later, is to the effect that there was no accident. And, of course you will have to recall the evidence of the accused himself. In dealing with the evidence of the accused, you will also consider the statement which he made to the police on the night of the 8th April which is different to what he said here, although he told you that he did tell Sergeant Cadet that the deceased's hand touched him on that Sunday; and Sergeant Cadet admitted that. So when I come to the particular evidence, I'll remind you of this defence of accident, but I apprise you so that you look out when I relate the evidence to measure it against the law which I have told you in respect of accident.

Some eye witnesses say it was no accident at all. They gave you evidence to the effect that it was shooting at almost point blank. Accused gives another story. You have to decide whom you believe. Whether you believe Pascal Augustin and Scooby and the others, or whether you believe the accused and his witnesses, like Dawn Floissac and even some of the Crown's witnesses, who tend to support the accused, that it was accident."

It could be said that there the issue as raised by the defence was not finely and clearly put. However the learned Judge gave directions on law relating to manslaughter where he instructed,

"So as regards the alternative verdict of manslaughter the prosecution is asking of you that if you do not believe the accused intended to kill the deceased but he intentionally did him harm and that this harm was unlawful and dangerous and it caused the death of the deceased, you may convict him of manslaughter. Of  
/course....

course, that is based on the evidence that the deceased had no knife, that he did not make any attempt to cause the accused to believe that he was about to do him harm, and that when the deceased gently moved the gun which was pointing to his face, the voluntary act of pulling the trigger caused the death. If, however, you believe the version of the accused that he pulled out his revolver only because of the reaction of the deceased, that reaction of turning around, and he demonstrated that quite vividly; and deceased put his right hand at his back; and he also says all this happened in about 90 seconds; that when he put the gun up it was the deceased's left hand which struck under his wrist and it went up, got into contact with deceased's face and caused the gun to discharge; you may be justified in finding that he was not guilty of manslaughter.

So Members of the Jury if you find that while accused had the gun out, and if it was the deceased's hand that hit up the gun causing it to jolt upwards and it is not the voluntary act of the accused that caused the trigger to be pulled, then, even here, the accused is entitled to an acquittal because he would not have caused the death. In manslaughter, he must also cause the death."

On a whole therefore the appellant's position as to how the bullet came to be discharged was left for the consideration of the jury.

There was a complaint that the learned trial Judge erred in law in that his directions to the jury on the discrepancies in the case were vague, unhelpful and wrong and amounted to a non-direction insofar as he did neither explain to the jury the implications of each version of events for the prosecution's case nor did he address them on how to treat testimony found to be mistaken or lying. We found no merit in this ground. The learned Judge gave clear directions to the jury as to their duty to resolve discrepancies, what they would have to bear in mind and consider in seeking to do so. He also meticulously reminded them of the various discrepancies as he reviewed and analysed the evidence and where relevant he reminded them of the version or account which was consistent with and supported the defence.

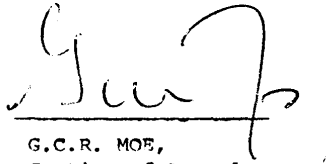
In support of the ground that the learned Judge erred in so far as he misdirected the jury on the question of manslaughter, it was tenuously argued that the learned Judge having mentioned the term "negligence" in explaining what is meant by "unlawful harm" appearing in section 171 of the Criminal Code which sets out two circumstances which may reduce murder to manslaughter, he ought to have defined and explained what negligence meant. The absence of an explanation of what is meant by negligence is of no import for the question of negligence did not arise in the circumstances of this case and instructions on the

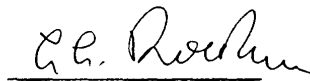
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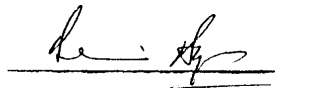
meaning of negligence would have served more to confuse than assist the jury.

Finally there was the ground of appeal that the verdict is in all the circumstances unsafe and unsatisfactory. We have to determine the effect of the deficiency in the summation such as we have found. The appellant's thesis of accident was adequately left with the jury by the learned Judge when he directed them on manslaughter. There the jury were directed to acquit of manslaughter if they found it was not a voluntary act of the appellant that caused the trigger to be pulled. They did not acquit. If following the directions they did not acquit because they had found that a voluntary act of the appellant discharged the gun, then the summation on self-defence was in keeping with such a finding. The most favourable finding on the evidence could still have been that it was not the voluntary act of the appellant. In that event, the finding would have been that the gun went off in circumstances when the appellant was committing an unlawful and dangerous act. The jury would have considered the appellant's conduct without a finding of a deliberate shooting on his part. Consequently the omission to set the appellant's position on self-defence as finely as outlined in this judgment would not have caused any miscarriage of justice. The jury would have found that the appellant was not taking defensive action reasonable in the circumstances when he drew his gun, cocked it and pointed it at the cheek of the deceased.

In the result we would dismiss the appeal and confirm the conviction of Manslaughter. As to sentence we consider all the circumstances of this matter and what was urged by Counsel and we think that three years imprisonment meets the justice of the case.

  
G.C.R. MOE,  
Justice of Appeal

  
L.L. ROBOTHAM,  
Chief Justice

  
C.M.D. BYRON,  
Justice of Appeal (Ad.)