

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 1 & 2 of 1992

BETWEEN:

PATRICK RUPERT HENRY
JANICE EMMANUEL

Appellants

and

THE QUEEN

Respondent

Before:

The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Hon. Mr. C.M. Dennis Byron - Justice of Appeal
The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances:

Dr. Fenton Ramsahoye, S.C. Mr. John Fuller and
Mr. Justin Simon with him for the Appellants
Mr. James, D.P.P. (Ag.), Mr. Keith Thom with him for the
Respondent

1993: June 8,
November 22.

JUDGMENT

SATROHAN SINGH, J.A.

In an alley by Tinning Village Road in Antigua, the second-named appellant, a rastafarian and other rastafarians including one Jennifer Hill, cook food for sale. The first-named appellant lives in a common law relationship with the second-named and is a quiet working person. Walterfield Adams (the deceased) was a "Cocaine smoking troublesome bully", also of the rastafarian sect who walked about with a bottle of acid in his pocket. On June 19th, 1991 there was an altercation between the deceased and the appellants resulting in the deceased receiving a wound from a cutlass at the back of his right leg from which he died. On January 20, 1992, the appellants were convicted by a Jury before Redhead J of the offence of Murder, contrary to the Common Law and they were both sentenced to death. This appeal is from these convictions and sentences.

The evidence for the prosecution shows that prosecution witness Jennifer Hill in her attempt at discouraging the second-named appellant from cooking her pot in that alley, paid the deceased to harass this appellant. The deceased in executing this assignment, on June 18, 1991, plastered faeces on a wall in the vicinity where this appellant did her cooking and spat in this appellant's pot. The appellants became aware of these acts of the deceased and formulated a plan "to just chop he and not stop chop he (the deceased) if he say he pit in a we pot" or to "just chop he, chop he till he dead" if "Pidgeon (deceased) only say aye".

The case for the prosecution was that in pursuance of this joint enterprise, the first-named appellant on the morning of June 19, 1991 went to the alley. This appellant as is his custom, had with him his cutlass wrapped in cloth. He used this cutlass to chop wood every morning for the second-named appellant to cook with. The first-named appellant first satisfied himself from what prosecution witness Rowan Francis told him that the deceased did spit in their pot. He then approached the deceased and asked him why he spat in their pot. Prosecution witness Sweeney did not hear what the deceased told him but both appellants in their statements to the police which formed part of the case for the prosecution, said that immediately before the altercation the deceased told them:

*"We go show are you me spit in a you pot yesterday
and me come today for show you me spit in day
again."*

And in their presence "he do um" again. This appellant then attacked the deceased.

The prosecution called four alleged eye-witnesses. Two of them, Jennifer Hill, who was not on speaking terms with the second-named appellant, and her twelve year old daughter Lakeisha Nanton gave evidence which tended to show a merciless attack by the appellants with a cutlass on the deceased with

each of them individually cutting the deceased with the cutlass on the same spot on his right leg after firing several chops at him. The other two "eye-witnesses" gave evidence to show that the first-named appellant having attacked the deceased with the cutlass, the deceased over-powered him without this appellant inflicting any wound on the deceased. As a result, the second-named appellant having been told of this turn of events, came on the scene and inflicted one wound on the deceased right leg with the cutlass. Dr. Lester Simon testified that the deceased only received one wound and that was the wound at the back of right leg from which he died. The investigating officer also saw only this one wound on the deceased.

The first-named appellant elected and said nothing at his trial. His case, as can be gleaned from the statement he gave to the police under caution and which forms part of the case for the prosecution was that on that fatal day, the deceased cursed him and told him:

" 'me dab shit all round the wall where are you a sell'. He hail out to me saying 'me put shit all round way are you do you little business' then he say 'the shit move, but me go show are you me spit in a you pot yesterday and me come today fo show you me go spit in day again, and he do um'."

The deceased then spat in his pot. This appellant then rushed him and they had a scuffle. During that scuffle the deceased was trying to open a bottle containing acid which he had in his hand. The deceased got the better of the appellant and the second-named appellant intervened.

The second-named appellant relied on her statement she gave to the police, which statement also formed part of the case for the prosecution. In that statement she said she saw the wall plastered with stool and that the deceased told her:

" 'me plaster the whole place with shit. Me spit in are you pot yesterday and you still nar stop sell round ya. Today a de last you a go sell round ya' and with that, he hark and spit in a me pot. And at the same time he tried to open the bottle with acid. About two weeks he a walk around with the bottle

saying he have fo burn off them old rusty beard of me husband, because he old and he can't bang me. At the same time when he a try fo open the bottle a acid, me boyfriend/husband rush on him and the two of them dey wrestle with the bottle and me see he got the upper hand ah me husband, because the boy big and strong, and when me see he got the upper hand me just tek me cutlass and just touch him pan he foot. Just last he cross the foot."

There was some evidence from the prosecution of the presence of a bottle containing acid on the person of the deceased at the time of this altercation.

From these facts, it can be seen that at least four witnesses for the prosecution support the evidence of the defence that only one wound was inflicted on the deceased, and that at least two prosecution witnesses support the theory of the defence that it was as a result of the deceased overpowering the first-named appellant that the second-named appellant came on the scene and inflicted the wound on him.

The real questions the jury had to decide were (1) whether the attack on the deceased was as a result of a joint enterprise of the appellants to kill or cause grievous bodily harm to the deceased in which case it will be murder; (2) whether the joint enterprise attack could have been the result of provocation in which case it would be manslaughter; (3) whether, despite the idea of the joint enterprise, the deceased first initiated an attack on the first-named appellant with acid, had overpowered this appellant and then the second-named appellant came to his defence in which case it would have been self-defence attracting a verdict of acquittal, or (4) whether when the first-named appellant attacked the deceased as a result of the joint enterprise and failed in that attack, the second-named appellant then chopped the deceased in defence of the first-named appellant, and not in pursuance of the joint enterprise, in which case it would again attract a verdict of acquittal.

The arguments of Learned Queen's Counsel for the appellants though not formulated in specific grounds of appeal centered on the following issues:

1. The effect of the medical evidence supporting the case for the defence.
2. Joint enterprise and self-defence
3. Provocation
4. Verdict unsafe or unsatisfactory

1. THE MEDICAL EVIDENCE

The submission of Dr. Ramsahoye was that the medical evidence led by the prosecution of one wound on the deceased, having contradicted the evidence of prosecution witness Jennifer Hill and Lakeisha Nanton, who testified as to more than one wound, that the trial Judge should have directed the jury to discard the evidence of these two witnesses as being more prejudicial than probative especially when the case for the defence was that only one wound was inflicted. The learned Director of Public Prosecutions replied that for the judge to so do would have been to usurp the functions of the jury.

The trial judge did not so direct the jury in his summing up. The trial judge, having referred to the conflicting evidence within the evidence of these witnesses for the prosecution on the issue of the wound, left the issue squarely with the jury for their determination. This is how he dealt with the issue:

"If you are satisfied about this evidence, of these two witnesses to the extent that you feel sure then of course you will find that both accused inflicted the injury to the right foot of the deceased. If you have any reasonable doubt, then you must resolve that doubt in their favour. Of course, you will have evidence of Dr. Lester Simon which I have just reminded you about. Dr. Lester Simon, the Pathologist, told you that there was only one injury to the back of the foot. Dr. Simon is what is called an expert witness. You must have due regard to his expertise. But of course you would have assessed his evidence in the same way you assessed the evidence for the other witnesses. You have seen the photograph of the injury and will have to make up your minds about the injury. The learned Director of Prosecutions when he addressed you this morning was urging

that there were more than one chop inflicted on the same spot. You will decide. The other eye witnesses tell you that they only saw No.2 inflict the wound to the deceased. I have told you in assessing the evidence of the witnesses, look to see whether any of the witnesses has any motive to serve, in order to determine whether he/she is a truthful witness. That is, whether you can rely on the testimony of that witness."

We can find nothing legally wrong with those directions. We agree with the submission of the learned Director of Public Prosecutions that for the Judge to have done what learned Counsel for the appellants submitted would have been a usurpation of the functions of the Jury. In *R v Lanfear* (1968) 1 A.E.R. 683, *Diplock L.J.* in delivering the judgment of the Court of Appeal of England illuminated this issue. In that case it was held that:

"The evidence of a doctor giving medical testimony at a criminal trial should be treated, as regards admissibility and other matters of that kind, like that of any other independent witness, but, though a doctor may be regarded as giving independent expert evidence to assist the court, the jury should not be directed that his evidence ought therefore, to be accepted by the jury in the absence of reasons for rejecting it (see p.685, letter A and F, post)".

This argument accordingly fails.

2. JOINT ENTERPRISE AND SELF-DEFENCE

The submission of learned Counsel for the appellants was that the alleged plot being to harm the deceased if he "admitted" he spat in the pot, that the No.1 appellant went outside of that plan when he purported to attack the deceased without getting such an admission from the deceased. In these circumstances, Counsel argued that the learned trial judge should not have left joint enterprise with the jury and that when he did so he caused the minds of the jury to be clouded on the issue of self-defence. We find no merit in this submission. On the facts, the evidence for the prosecution which included the statements given to the police by these appellants, show that the first-named appellant did get such an admission from the deceased (already set out in this judgment) before he attacked the deceased. We therefore also see no merit in the submission that the Jury's mind was clouded on the

defence of self-defence. In any event, the learned trial judge in his summation to the jury, adequately dealt with the issue of joint enterprise and self-defence and did leave with them the consequences of one appellant going outside of the plan. We find his directions fair and correct. This ground also fails.

3. PROVOCATION

Counsel for the appellants argued that there was "very much provocation" and that even if there was a previous plan, that such plan was aggravated by provocation. We agree that the evidence discloses extreme provocation. But, there is also some evidence of cooling time, during which the plot to harm the deceased was formulated. The jury had to consider the issue whether the appellants, having planned to harm the deceased, having set out to inflict that harm, and having in fact inflicted harm on the deceased, can now be heard to say that when they did so they were provoked, provocation being a sudden and temporary loss of self-control in an ordinary man which cannot be planned or anticipated. We find the learned judge's directions to the jury on this issue ample, extremely fair, accurate and faultless. The judge left with the jury all the material necessary for their consideration and clearly said everything which could possibly have been said in order to alert the jury to the difficulties of the case. The jury had the advantage of seeing and hearing witnesses. They found Murder.

4. VERDICT UNSAFE OR UNSATISFACTORY

Given these circumstances where no aspect of the trial can be faulted and where all the rules of procedure have been followed, on the issue of provocation, can we say that the verdict of the jury was unsafe or unsatisfactory?

Court (Antigua and Barbuda) Act No. 26 of 1969 gives this Court the power to allow an appeal against conviction if it thinks that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. In the Court of Appeal in England, *Widgery L.J.*, in the case of *Sean Cooper* (1969) 55 CR.APP. Reports 83 at p.86, gives this meaning to the phrase "unsafe or unsatisfactory":

"That means that in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it".

R v Wallace and Short (1978) CR. APP. R. 291 at P.298 *Roskill L.J.* in delivering the judgment of the Court of Appeal in England said that *Lord Widgery* in that statement in *Cooper* was not "talking about a reaction based on inadmissible evidence; he was talking about a subjective reaction which this Court after appraising admissible evidence in the end felt on its own appraisal of all the circumstances of the case."

In *Robert William Lake* (1977) 64 CR.APP.REPT.172 the Lord Chief Justice of England on this same issue said at p.177:

"... these questions are not solved by rules of thumb. Once you have decided that the rules of procedure were followed and there remains the only residual question of whether there is a lurking doubt in the mind of the Court, such doubts are resolved not, as I say by rules of thumb and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them..."

Applying this learning to the instant matter and having done an appraisal of all the circumstances as disclosed from the admissible evidence in its entirety, including the motive alleged by the prosecution for the attack, the deceased not only admitting spitting in the appellant's pot but in their presence did so again as disclosed in the uncontradicted statements given to the police by both appellants which statements formed part of the case for the prosecution, and the fact that the obvious believable evidence showed only one

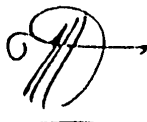
wound, we have a general feeling of unease about this case that has created a lurking doubt in our minds as the accuracy of the jury's verdict of Murder. Because of this we have given earnest thought whether it is a case in which we ought to set aside the verdict of the jury, notwithstanding the fact they had every advantage and, indeed some advantages at the trial which we did not enjoy. After due and anxious consideration of all the circumstances, we have decided we regard the verdict of Murder to be unsafe and unsatisfactory. We would accordingly quash that verdict and substitute a verdict of Manslaughter with respect to both appellants.

The appeals are allowed and the convictions and sentences quashed. A conviction of Manslaughter and a sentence of eight years imprisonment are substituted therefor with respect to each appellant.

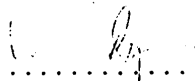
.....

 SATROHIAN SINGH
 Justice of Appeal

I concur.

.....

 SIR VINCENT FLOISSAC
 Chief Justice

I concur.

.....

 C.M. DENNIS BYRON
 Justice of Appeal