IN THE SEYCHELLES COURT OF APPEAL

Daniel Hoareau — Appellant

v.

The Republic — Respondent

Criminal Appeal No. 4 of 1989

Mr. K. Shah for appellant
Mr. D. Lucas

JUDGMENT

This is an appeal from a verdict and sentence of the Supreme Court of Seychelles (Mr. Justice Georges sitting with a Jury) dated 20th March 1989 - Criminal Side No. 34 of 1989.

The appellant was charged with having murdered one Andre Adela on the 1st day of January 1989.

On the 30th March 1989 the Jury, by a majority of eight to one, returned a verdict of guilty of murder whereupon Mr. Justice Georges sentenced the appellant to life imprisonment which is the prescribed sentence for murder - Section 193 of the Penal Code refers.

There are three grounds of appeal.

The first deals with a point of procedure in connection with the failure by the Presiding Judge to "convict" in accordance with the verdict of the Jury.

The same ground of appeal was argued during this session before this Court in the matter of Bernard Larue and another v The Republic(Appeal Nos. 1 and 2 of 1989). For the same reasons that have been given by this Court in that appeal we have reached the conclusion that there is no merit in this ground.

The second ground reads:-

"The Presiding Judge failed to direct the Jury that although the Prosecution did not have to prove motive, the absence of any motive for the shooting of his friend by the accused supported his statement and evidence that the shooting was not done on purpose and therefore lacked

the necessary malice aforethought to constitute murder."

At the hearing Counsel for the Appellant made the following points:

1. He readily conceded that in law the Prosecution did not have to prove any motive.

2. No evidence was tendered to show what caused the appellant to shoot his friend.

3. Immediately after the shooting the Appellant, according to Appellant's evidence, which stood unchallenged and uncontradicted on this issue, the deceased told the Appellant: "Hoareau you did this to me" and Appellant replied "Excuse me, I did not make it purposely.,"

The argument of Counsel for the Appellant is that since it is not denied that the immediate reaction of the Appellant was that he had not done it purposely, it was essential for the Jury to consider as well whether the absence of motive did not in fact indicate that indeed the shooting was unintentional.

It is not in dispute that the Presiding Judge did not refer to the absence of motive as a support for the Appellant's statement that he had not done it purposely.

Can this omission have materially affected the verdict of the Jury?

The Presiding Judge explained to the Jury on several occasions that they could return one of three verdicts. If they found that the shooting was purely accidental (due to no fault of appellant) ~~accidental~~ they should acquit. If they found that the shooting was neither accidental nor intentional but was the result of gross negligence on the part of the Appellant the verdict should be manslaughter. Lastly if they are satisfied that the shooting was not the result of pure accident or of gross negligence but the result of Appellant's intention to kill then they should return a verdict of murder.

However in practice the position was slightly different. The Accused in his statement to the Police and in Court as well as in his Counsel's address submitted that this was a case of pure accident and that he should be acquitted.

In this connection we refer to Presiding Judge's direction

at page 12 of the summing up:

> "The Republic says that this shooting or this killing was no accident as the accused is trying to tell you. It was cold deliberate murder."

In our view the Jury was alive to the absence of evidence of motive for the shooting but nevertheless discarded the absence thereof to find the appellant guilty of murder. We find that the omission by the Presiding Judge to refer specifically to the absence of evidence of motive as an indication that the Appellant had no intention to kill was not material.

Ground No. 2 fails.

We will now deal with the third ground of appeal which reads:-

> "The Presiding Judge in his summing up made several comments inter alia on the behaviour of the accused after the incident which amounted to mere surmise but would influence the Jury unfairly against the accused's case that the shooting had not been done on purpose."

Addressing us on this ground Counsel for the Appellant submitted that:-

(i) no two persons reacted in the same way and the Presiding Judge was wrong to have placed before the Jury what he thought should have been the conduct of the Appellant in the circumstances if indeed he had not shot at the victim on purpose.

(ii) The Presiding Judge expressed his opinion on inferences and not on facts.

(iii) he made some references to facts which were not correct as for example when he stated that "there is no evidence anywhere to show that he (the Appellant) has expressed sorrow or contrition or regrets."

As regards the first and second points, we are of the

view that the summing up which was quite lengthy and exhaustive should be read as a whole and that no particular passage should be read in isolation.

The issue of intention to kill is always a delicate one. The Presiding Judge made references to hypothetical situations which would allow the Jury to form an opinion as to whether in the circumstances of the present case the shooting was intentional or not. Further he has on several occasions reminded the Jury that it was for them to decide the issues of fact and of inferences to be derived therefrom and that they were not bound by his expression of opinion or those of Counsel unless they could adopt them as their own.

As regards the third point, here again, the summing up must be read as a whole. Counsel referred us to passage 22 of the summing up. The Presiding Judge is reported as having said: "There is no evidence anywhere to show that he has expressed sorrow or contrition or regrets." That per se is an incorrect statement or a slip of the tongue. Immediately after, the Presiding Judge continues: "He (the Appellant) said he told the deceased "Excuse me I did not do it on purpose."

We have therefore reached the conclusion that the Presiding Judge was not unfair in his comments and that his report of the facts and circumstances of the case could not have caused any prejudice to the Appellant in the decision of the Jury.

Ground No. 3 fails.

The Appeal is dismissed.

A. Mustapha
President

Justice of Appeal

Justice of Appeal

26th October, 1989

Judgment delivered.