IN THE SUPREME COURT OF SEYCHELLES

PAUL THELERMONT APPELLANT

V

THE REPUBLIC RESPONDENT

Criminal Appeal No. 23 of 1993

Mr. A. Derjacques for the appellant
Mr. A. Fernando State Counsel for the Republic

JUDGMENT OF THE COURT DELIVERED BY ADAM JA

The appellant was convicted of murder and sentenced to life imprisonment in accordance with the provisions of the Penal Code. In his Notice of Appeal of 7th December 1993 he appealed to this Court against his conviction and sentence. In the Memorandum of Appeal filed on his behalf with the leave of this Court, Mr. Derjacques decided to pursue six of the grounds lodged.

The particulars of the offence alleged were that on the 27th May 1993 at Machabee, Mahe the appellant murdered Astovio Beaudouin.

The appellant's first ground of appeal is that the trial Judge erred in principle in not properly addressing the jury on self-defence. Mr. Derjacques criticised the example given to the jury of a police officer who in attempting to apprehend a dangerous criminal is fired at and a return shot fired from the police officer's gun kills the dangerous criminal. Mr. Derjacques asserted that this type of an example was favourable to the prosecution.

The second ground of appeal concerned the trial judge's direction that the same weight may be given to an out of court statement produced in court as against a statement made on oath from the witness box. Mr. Derjacques maintained that the trial judge was in error. In his summing-up, after indicating to them that the appellant had elected to give evidence, that he had also made a statement to the police on 8th June 1993 and that the police who had recorded it had been cross-examined on it, the trial judge informed the jury, therefore, they must place the same weight on it as on the evidence of any witness that they had heard from the witness box. He further elaborated that the correct position in law was that once a statement made to the police has been admitted without objection from the appellant, the jury must consider it as evidence in the case and accept the whole of it, part of it or reject it because such a statement to the police is evidence which they must consider together with all the evidence.

His third ground of appeal is that the trial judge erred in law in directly and expressly speculating and therefore pre-empting a finding by the jury, mid-way in his summing up, by telling the jury that he thought they had already found the ingredients of murder established against the appellant. Having given the explanations required by them on the terms

"malice aforethought" and "premeditation", the jury returned subsequently and sought clarification and definition of "provocation", "what is a reasonable person" and "reasonable doubt". At this stage the trial judge indicated that what was understood in common parlance of provocation, may be quite different in law. The trial judge pointed out that if they accepted that a person had been provoked to commit the act which caused death then he could not be convicted of murder and that if the defence of provocation was successful it reduced murder to manslaughter. He continued that before they considered the defence of provocation they must have been satisfied in their minds that all the essential elements of murder explained by him had been proved beyond a reasonable doubt. He indicated that he took it that for them asking about provocation they must have been satisfied that all the elements constituting murder had been proved beyond a reasonable doubt. Mr. Derjacques maintained that the trial judge had pre-empted the jury by this remark. The trial judge then went on and once again explained to the jury what in law constituted provocation. He concluded by providing them with the explanations about "reasonable person" and "reasonable doubt".

The appellant's next grounds of appeal are that the trial judge erred in law by directing the jury not to consider the repeated actions, conduct and character of the deceased and the complainant at the time of the incident and that the trial judge placed a too high an onus on the appellant when addressing them on provocation. In his subsequent clarification the trial judge repeated to them that the law did not accept the notion of what was termed "cumulative provocation" and gave as an example a wife nagging for ten years and reminded them that it was what transpired at the material time and not past conduct that should have caused the loss of self-control. Mr. Derjacques criticised this and referred to D.P.P. v. Camplin (1978) 67 Cr. App. R.14.

The appellant's final ground of appeal is that in all the circumstances of the case the conviction is unsafe and unsatisfactory. Mr. Derjacques relied on R. v. Turnbull (1976) Cr. App. R. 132 which stated that before the jury could convict they had to be satisfied of both the honesty and correctness of the identification only made of the accused by the principal witness for the prosecution. Mr. Derjacques argued that Gonsagues Beaudouin was an interested party in that he gave the harpoon to the appellant, that he swept his yard where the incident happened and threw the harpoon on top of the chicken roof. Therefore, Mr. Derjacques maintained that it was unsafe to rely on Gonsagues' evidence without corroboration and the trial judge should have directed the jury accordingly.

Mr. Fernando submitted that Gonsagues was not an interested party. He asserted that corroborative evidence was necessary of participants and those who had an axe to grind when called as prosecution witnesses. He argued that

the trial judge's direction on self-defence was proper. He stated that provocation was defined in section 198 of the Penal Code. He referred us to the appellant's answers given under cross-examination that the deceased told him "mwa bez ou" (I will beat you up), and in the course of all this that happened he did not get angry, that he did not lose his self-control that night and that he was not acting in the heat of passion. Mr. Fernando asserted that there was no provocation at all. Therefore, he maintained that the trial judge did not err as stated in the grounds of appeal that he directly and expressly speculated and so pre-empted a finding by the jury mid-way in his summing up. He argued that even if there was such an error the proviso to Rule 41 of the Seychelles Court of Appeal Rules, 1978 permitted this Court "notwithstanding that it is of the opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice occurred."

As for the contention that the trial judge erred in telling the jury that the same weight may be given to an out of court statement tendered in court as against a statement on oath, Mr. Fernando cited R. v. Sharp (1988) 1 All ER65 (HL). He argued that the appellant's out of court statement under caution was a "mixed statement" and so the whole statement must be considered by the jury together with his evidence in court under oath in determining the matter.

Now sections 197 and 198 of the Penal Code deals with provocation. Section 198 defines the term "provocation"

> "as any wrongful act or insult of such a nature as to be likely, when done to any ordinary person, or in the presence of an ordinary person to another person who is under his immediate care ..., to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered."

From this certain acts are excluded by section 198 not relevant in this case and the expression "an ordinary person" means an ordinary person of the community to which the accused belongs. Section 197 provides that when a person "does the act which causes death in the heat of passion caused by sudden provocation ... and before there is time for his passion to cool, he is guilty of manslaughter only".

In his summing up to the jury the trial judge instructed them on the essential elements of the crime of murder in terms of the Penal Code, the burden of proof, self-defence, accidental killing, provocation, intoxication and corroboration. It is clear to us that from the

exhaustive address to them the trial judge was most circumspect in his charge to the jury, having carefully summarised the evidence given by the witnesses.

Mr. Derjacques mentioned D.P.P. v. Camplin, supra, where Lord Diplock narrated the long history at common law of the evolution of the doctrine of provocation. He pointed out that as early as R. v. Lesbini (1914) 11 Cr. App. R. 7 the test was twofold in that the "conduct of the deceased to the accused must be such as (1) might cause in any reasonable or ordinary person and (2) actually causes in the accused a sudden and temporary loss of control as the result of which he commits the unlawful act that kills the deceased." Prior to 1957, before applying this dual test, according to him R. v. Mancini (1942) AC1 laid down that the conduct of the accused had to be of such a kind as was capable in law as constituting provocation and this was a question for the judge. The English Homicide Act 1957 altered this when it provided that where there is evidence on which a jury can find that the person was provoked, by things done or by things said or by both together, to lose his self-control, the question whether the provocation was enough to make a reasonable person do as he did must be left for the jury to determine, and in deciding that the jury must take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable person. Lord Diplock agreed with Lord Simon that since this question is for the opinion of the jury the evidence of witnesses as to how a reasonable person would react to the provocation is not admissible. He went on and observed at p. 20:

> "But now that the law has been changed so as to permit of words as being treated as provocation even though unaccompanied by any other acts, the gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom the taunt or insult is addressed. To taunt a person of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the

> person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not."

Lord Diplock looked at the age of the accused in that case before the House of Lords, which was 15 years only and regarded this as a characteristic which may have its effects on temperament as well as physique.

Mr. Derjacques' criticism was that the trial judge should have instructed the jury about the deceased's mental condition and his past conduct as a characteristic. But Lord Diplock was concerned with verbal provocation and "the particular characteristics or circumstances" of the recipient of the taunt or insult and not that of the deceased.

In his summing up on provocation the trial judge said:

> "In law provocation is some act or series of acts done or words spoken which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind."

These words used by him were cited in R. v. Whitfield (1976) 63 Cr. App. R. 39 at p. 42 by Lord Goddard LCJ from Devlin J (as he then was) in R. v. Duffy 1949) 1 All ER 932 (CA).

It should be pointed out that the trial judge also emphasized to the jury that before they considered the issue of provocation, the prosecution must have proved beyond reasonable doubt that all the essential elements of the crime of murder. In our view this summing up was not unfavourable to the appellant and the later explanation, found wanting by Mr. Derjacques, merely reinforced this.

As for R. v. Turnbull, supra, which concerned a case that depended wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken and in which the judge should warn the jury of the special need for caution and he should direct them to examine closely circumstances in which the

identification came to be made. Where the quality of the identification is good, the jury can safely be left to assess it, but where the quality is poor, there should be the evidence capable of supporting the identification before the jury can assess it

Even if R. v Turnbull were applicable in this case, Mr. Derjacques has not shown that the quality of the evidence tendered by the prosecution as to the offence having been committed was not good.

Mr. Fernando drew our attention to R. v. Sharp, supra, where Lord Havers approved the following formulation of Lord Lane C.J. in R. v. Duncan (1981) 73 Cr. App. R. 359 at p.365:

> "Where a "mixed" statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statements are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight."

It cannot be shown that the trial judge in any way failed to treat the out of court statement under caution (which can best be described as a "mixed" statement) in the manner laid down above by the learned Chief Justice. In our view that approach to the jury is most appropriate where a "mixed" statement is involved and where the accused does or does not testify in the proceedings.

Looking at corroboration it is true that this Court in Pool v. R. (1965-1976) S.C.A.R. 88 approved the speech of Lord Hailsham L.C. in D.P.P. v. Kilbourne (1973) 1 All ER 440 at p.446 when he observed:

> "In my view there is no magic or artificiality about the rule of practice concerning corroboration at all. In Scottish law, it seems some corroboration is necessary in every criminal case. In contrast, by the English common law, the evidence of one competent witness is enough to support a verdict.. This is still the general rule, but there are now two main classes of exception to it. In the first place there are a number of statutory exceptions ...
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> But side by side with the statutory exceptions is the rule of practice now under discussion by which judges have in fact warned juries in certain classes of case that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless evidence is corroborated in a material particular implicating the accused, or confirming disputed items in the case ... I do not regard the categories as closed. A judge is almost certainly wise to give a similar warning about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence ..."

In Tirant v. R. (1965-1976) S.C.A.R. 137 Lionel Brett JA was prepared to hold that where the evidence of the principal witness was that the attack by the accused on that witness was political, it would be proper for the jury to be warned about the need for corroboration. It should be mentioned that in the instant case when summarising the evidence of Gonsagues the trial judge did give an example of corroboration and left it to the jury to find corroboration.

Further, in Bereng v. R. (1949) AC 253 (PC) at p. 270 the Privy Council, where there was no corroborative evidence, held that "circumstances may bear against an

accused and assist in his conviction if there is other material sufficient to sustain a conviction against him."

For the above reasons we are satisfied that there was no misdirection by the trial judge and that this appeal against conviction and sentence, therefore, must be dismissed.

Dated this 25th day of March, 1994.

.....A.M.S. Silungwe
Justice of Appeal

.....E.O. Ayoola
Justice of Appeal

.....M.A. Adam.
Justice of Appeal