(13)

IN THE SEYCHELLES COURT OF APPEAL

JEFFREY FRANCIS APPELLANT

Versus

THE REPUBLIC · RESPONDENT

Criminal Appeal No:7 of 1997

[Before: Goburdhun, P., Silungwe & Ayoola, JJ.A]

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Mr. A. Juliette for the Appellant
Mr. R. Kanakaratne for the Respondent

JUDGMENT OF THE COURT

(Delivered by Silungwe J.A)

This is an appeal against the decision of Alleear, C.J., in which he convicted the appellant on a charge of manslaughter, contrary to Section 192 and punishable under Section 195 of the Penal Code, and sentenced him to ten years' imprisonment.

The facts of the case may shortly be stated. On June 17, 1991, at around 11.10 am, at English River on Castor Road, Mahe, David Barbe (hereinafter referred to as the deceased) was talking to Albert Joseph Pierre Louis (PW5), who was at the time employed as a police officer, when the appellant appeared on the scene. According to this witness, the deceased, whom he observed to be in an inebriated state, stopped the appellant and triggered off the following exchange of words:

"Deceased: What you are doing is wrong, you are assaulting everybody at English River."

Appellant: I have done nothing to you and I am going home.

Deceased: What you are doing is wrong and I have to talk to you.

Appellant: You are putting me on my nerves and I have done nothing to you."

The witness then intervened and advised the appellant to leave the deceased alone.

At some time between 1.30 and 2 pm, an eye witness account shows that the appellant was standing close to a lamp post holding a half full guiness bottle when he saw the deceased coming along Castor Road. The appellant then asked the deceased for a cigarette. The deceased then playfully touched the appellant's abdomen whereupon the appellant swore at him. The deceased's reaction to this was: "you ask me for a cigarette then you swear at me." The appellant was heard saying to the deceased: "I am on good terms with you and we have no quarrel. Why are you doing all this?" The deceased pulled the appellant's shirt which was over his trousers. The appellant became incensed and punched the deceased on the left side of his face thereby causing him to fall backward in a sitting position against the wall of a house. When the deceased got up immediately, the deceased punched him again. This time, the deceased fell hitting his head against the tarmac edge of a gutter by the road side. He became motionless and was conveyed to Victoria Hospital where he remained unconscious and died the following day.

Dr. Robel Brewer's post-mortem examination which was conducted on June 19, 1991, revealed that the cause of death was brain damage due to skull fracture.

It was in evidence that sometime before the deceased sustained the fatal injury, the deceased had become a victim of a stone-throwing incident occasioned by the Charles' brothers – David and Jason. The finding of the learned Chief Justice on the matter was that that incident had nothing to do with the subsequent incident between the appellant and the deceased.

In his defence, the appellant made the following unsworn statement:-

> "On the 17th June 1991, at around 11 o'clock, it happened that the deceased, David Barbe, tried to pick a quarrel with me. I ignored him and went on my way. After that, at about 1.15 p.m, I was going to buy some items from the shop. When I got to English River, between Chang Lai Seng's shop and Bonte's, I saw some empty bottles being thrown at me and I also saw stones being thrown at me. I was looking to see where they came from and they were coming from either side of me. I was hit at the back of my head. I looked up and I saw David Barbe talking to Jason Charles. After speaking to Jason, he came towards me. When he was coming towards me, Jason and his brother who were throwing stones at me stopped throwing stones at me. When David came towards me, I was about to leave by another way and he pulled at my shirt."

It was on the strength of the facts above stated that the appellant was found guilty and convicted as charged.

The Memorandum of Appeal raises the following grounds:

> "**AGAINST CONVICTION**
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> 1. The learned Chief Justice erred in rejecting the appellant's defence of self-defence in that the same goes against the weight of evidence in this case.
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> 2. The learned Chief Justice erred in law in his finding that "The defence of self-defence becomes available to an accused who has sustained a physical attack from the victim, thus making the conviction unsafe and unsatisfactory.
>
> **AGAINST SENTENCE**
>
> 1. The sentence is manifestly harsh and excessive in all the circumstances of the case."

For the purpose of convenience, the ground against sentence will become number 3.

Looking at the first ground, this presupposes that there was evidence of self-defence and that the learned trial judge fell into error by rejecting that defence. In motivating this ground, Mrs. Antao, learned counsel for the appellant, predominantly relies on the evidence of Robert Clement Confait (PW3) the relevant aspects of which may be stated thus:

1. that the deceased pulled the appellant's shirt;

2. that the appellant was trying to avoid a fight;

3. that one of the stones thrown at the appellant by the Charles' brothers landed on the appellant's head thereby causing injury thereto and removing a cap he had been wearing;

4. that when the deceased walked up to the appellant and talked to him, the Charles' brothers stopped stone-throwing; and

5. that when the deceased got up, after receiving the first blow from the appellant, he put himself in a fighting position. It was then that the appellant punched him again.

It is on the totality of that evidence that the first ground rests.

Firstly, the evidence that the deceased pulled the appellant's shirt featured in the accounts of all the eye witnesses. The fact that this episode led to the appellant's loss of temper tends to suggest that the spotlight was on provocation, rather than on self-defence.

Secondly, to even suggest that the appellant's attempt to avoid a fight had anything to do with the defence of self-defence is, on the facts, clearly misconceived.

Thirdly, there is no suggestion that the Charles brothers and the deceased ever acted with a common purpose; or that the fatal incident had

anything to do with the stone-throwing incident, as the learned Chief Justice properly found.

Fourthly, and as already stated under the third point above, the stone-throwing incident cannot, on the facts of the case, be linked to the fatal incident.

Fifthly, Robert Confait's evidence to the effect that after the deceased had received the first blow at the appellant's hands and prior to the delivery of the second one, the deceased put himself in a fighting position, finds no support in any eye witness account.

On the facts, it is quite clear that the appellant's claim to self-defence is illusory as no evidence exists to sustain it. The upshot of this is that the rejection by the learned Chief Justice of the defence of self-defence was inevitable.

Before moving on to the next ground, and for the avoidance of doubt, we feel inclined to comment on the competence of raising self defence in a case of involuntary manslaughter such as the present one. Apart from the intent required, the elements of the offence are the same as in murder. Accordingly, the rules as to causation, self-defence, etc, apply although it must be born in mind that provocation and diminished responsibility only apply to murder so as to reduce that crime to manslaughter. See paragraph 19-89 of Archibold, 1992 edition, Vol. 2. It is to be noted that the learned Chief Justice was alive to this situation.

The second ground challenges the trial court's finding that "the defence of self- defence becomes available to an accused who has sustained a physical attack from the victim", which, it is alleged, renders the conviction unsafe and unsatisfactory.

What the learned Chief Justice said on self-defence is reinforced by the case of Republic v Francois (1977) No. 12 which appears in the Seychelles Digest at p.66. We are, however, of the view that what was said there was narrowly stated. Some guidance on the matter is to be found in paragraph 19-39 of Archibold, 1992 edition, Vol 2 where reference is made to the classic pronouncement on the law of self-defence by the Privy Council

in Palmer v R (1971) 55 Cr. App. R. 223, approved by the English Court of Appeal in R v McInnes (1971) 55 Cr. App. R. 551. From these authorities, the law on the matter may be paraphrased in these terms:

(1) it is both good law and good sense that a person who is attacked may do whatever is reasonably necessary to defend himself;

(2) however, everything will depend upon the particular facts and circumstances of the case;

(3) 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;

(4) if an attack is serious, so that it put an accused in immediate peril, then immediate defensive action may be necessary;

(5) if the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction;

(6) if the attack is over and no sort of peril remains, then the use of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity;

(7) of all these matters, the good sense of the jury will be the arbiter;

(8) if there has been an attack so that the defence is reasonably necessary, it is recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action;

(9) if the jury thought that in a moment of unexpected anguish, the person attacked had only done what he honestly thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken;

(10) if the prosecution have shown that what was done was not done in self-defence, then the issue is eliminated from the case;

(11) if he jury consider that an accused acted in self-defence or if the jury are in doubt as to this, then they will acquit;

(12) the defence of self-defence either succeeds so as to result in an acquittal or it is disapproved, in which case it is rejected as a defence;

(13) in a homicide case, the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other issues will remain;

(14) if in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury; and

(15) there is no rule of law that a person must wait until he is struck before striking in self-defence. If another strikes at him, he is entitled to get his blow in first if it is reasonably necessary so to do in self-defence.

Obviously, the appellant cannot conceivably take advantage of any one of the points stated above. Even given the fact that the learned Chief Justice narrowly stated the defence of self-defence, this, on the facts, cannot render the conviction unsafe and unsatisfactory especially that there is no evidence on record that is capable of sustaining the defence of self-defence. It is thus inescapable to uphold the verdict of the learned Chief Justice and to consequently dismiss the appeal against conviction.

Finally, the third ground falls to be considered. It is submitted by Mr. Juliette, on behalf of the appellant, that the sentence of 10 years' imprisonment is manifestly harsh and excessive in all the circumstances of the case. Local case law has been cited in support of the submission to demonstrate that, in recent years, our courts have passed sentences of up to five years' imprisonment in cases of this nature.

As we consider what sentence will appropriately fit the crime committed and the circumstances of the case, we are mindful of the appellant's personal circumstances as revealed by the Principal Probation

Officer in his Social Welfare Report, for instance, that he is a young man aged about 32 years; that he has no relevant previous conviction, et cetera. We further take into account the seriousness of the offence and the circumstances in which it was committed. There is evidence that the appellant did not wish to be involved in a fight with the deceased; that he was provoked by the deceased and that the fatal blow was not the direct cause of the deceased's death in that it caused the latter to fall backward and thereby hit his head against the tarmac edge of the gutter, with the result that the deceased suffered a fractured head and lost his life.

In the light of the mitigating factors above stated, we find ourselves in agreement with Mr. Juliette that the sentence passed is manifestly excessive and it is accordingly set aside. Instead, the appellant is sentenced to 3 years' imprisonment. The time spent in remand will, as before, be credited to him.

Dated at Victoria, Mahe this 9th day of ***April*** 1998.

H. GOBURDHUN	**A. SILUNGWE**	**E.O. AYOOLA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Handed down

Adam JA