IN THE SEYCHELLES COURT OF APPEAL

COLLIN THELERMONT Appellant

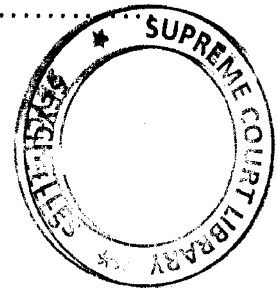
VERSUS

THE REPUBLIC Respondent

Criminal Appeal No: 7 of 2001

(Before: Ayoola, P., Pillay & Matadeen, JJ.A)

Mr. A. Juliette for the Appellant
Mr. S. Gooneratne for the Respondent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JUDGMENT OF THE COURT

(Delivered by Matadeen, J.A.)

The appellant was prosecuted for murder. After the jury had returned a verdict of guilty as charged, the learned trial Judge convicted him of that offence and sentenced him to imprisonment for life.

The facts of the case are briefly to the effect that after the deceased David Freminot and his friend Cliva Alphonse had left the Barrel Night Club in the early hours of the morning of 2nd February 2001 and were proceeding towards the taxi stand, they saw a girl crossing the road ahead of them and started teasing her. At that time the appellant was standing in front of a building nearby together with two lady friends. Thinking that the deceased was addressing the two girls in his company, the appellant reacted by making some remarks to the deceased and his friend. These two then walked towards the appellant. On seeing them coming towards him, the appellant removed a knife from his pocket. There was an exchange of kicks and punches. The

deceased received several injuries and collapsed; whereupon the appellant ran away.

The appellant is now challenging his conviction on the following two grounds:-

(1) The learned trial Judge erred in directing the jury to ignore and disregard the evidence about the knife inasmuch as such evidence was material and the jury should have been directed to consider it.

(2) The learned trial Judge erred in failing to direct the jury to consider whether the evidence amounted to the lesser charge of manslaughter.

We can easily dispose of the first ground of appeal. This is what the learned trial Judge said in his summing-up to the jury:-

> *"Ladies and gentlemen of the jury, you are well aware that the weapon which was used to inflict the deadly injuries has not been found. It has not been found because someone must have taken it away from the scene of the incident. That someone whom we do not know, had necessarily an interest in the case. The incident occurred at a concreted area and if the weapon had been left lying on the ground in that area someone would have found it. However, the finding or non-finding of the weapon should in no way detract you from your task of ascertaining the truth in this matter. It is immaterial whether the knife had been found or not. You should, however, note that on reaching the Barrel Night Club a dagger was found on the accused person whereas there is no evidence that either the deceased or Cliva Alphonse had any weapon when they reached Barrel Discotheque."*

It is clear from the above quoted excerpt from the summing-up of the learned trial Judge that at no time did he direct the jury to ignore and disregard the evidence about the knife. Given the fact that the evidence adduced before

the jury showed that the deceased bore three external injuries, one of which was a stab wound which went through the neck down to the apex of the heart, that the only eye witness saw the appellant wielding a knife, and that no knife or other weapon was found at the scene of the crime, the learned trial Judge was perfectly entitled to direct the jury that, when considering the evidence, they should not allow their reasoning to be clouded by the fact that the weapon was not subsequently found. Indeed his direction was to the effect that the finding or otherwise of the weapon used should in no way detract the jury from their task of ascertaining the truth in the matter. Consequently the first ground of appeal fails.

The second ground of appeal has more substance. It is true that the line of defence adopted on behalf of the appellant all through his trial for murder was that he acted in self-defence. The learned trial Judge properly and fully directed the jury on the issue of self-defence. It is equally true that neither in evidence nor in his address to the jury did learned Counsel for the appellant raise the issue of provocation. It is certainly the duty of learned Counsel not only for the defence but also for the State to have alerted the trial Judge to the existence of evidence which, if believed by the jury, could amount to provocation. Neither of them did so. However, the cardinal principle is that if there is evidence which might lead the jury to find provocation, then, whether the issue is raised or not, it is the duty of the trial Judge to leave that issue to the jury: vide R v. Cascoe (1970) 54 Cr. App. R. 401.

Was there such evidence in this case? We shall refer first to the testimony of the main witness for the prosecution. This is what Cliva Alphonse said in chief-

"Upon seeing the girl we called her, myself and David Freminot, we called her and said to her 'wait for us we accompany you'. She did not listen to us, she went away. And then this guy here in the dock, we were not addressing him but I heard David asking him 'what's happening'. We were about 15 ft from him. Since we were not addressing him and he intervened we went towards him to ask him what was the problem. We were going towards him when he took out a penknife from his back pocket. I saw him. He retrieved the penknife. If someone has a weapon one has to be prepared to defend oneself. David gave him one kick in the stomach. I kicked him too because he had a weapon in his hand and in our defence we had to defend ourselves. David kicked him first in his stomach. He fell towards David. In one hand he had a weapon and in the other hand he was throwing punches. He was trying to punch David. He was throwing punches with the left hand and he had a penknife in the right hand. The fight was happening very suddenly and at a certain time he ran away and I tried to run after him. Then I saw David Freminot collapse forward" (the underlining is ours).

It is also appropriate to refer to the evidence of Sherina Tom King, a girl who was in the company of the appellant and who gave evidence on his behalf. This is what she had to say in chief-

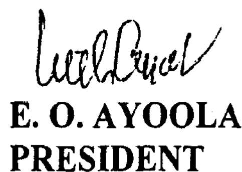
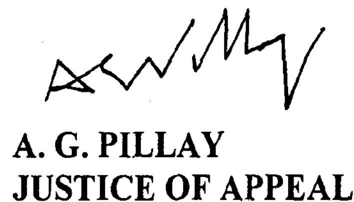
"*Q:* *Carry on, what happened?*
A: *While going down, these two boys asked Colin if both girls were his.*
Q: *Yes?*
A: *Colin answered, if you want one, you can come and get one.*
Q: *Then, what happened?*
A: *The two boys called Colin a homosexual and swore at him, cunt of your mother"* (the emphasis is ours).

In the light of the above-quoted excerpts highlighted by us, we consider that there was evidence on which the jury, if properly directed, could have found that the acts of or insults by the deceased and Cliva Alphonse were "*of such a nature as to likely to deprive him (the appellant) of the power of self-control and to induce him to assault the person by whom the act or insult was done or offered*" – vide

Section 198 of the Penal Code. In such a case they could have returned a verdict of manslaughter pursuant to Section 197 of the Penal Code.

It was essential, therefore, that the question of provocation should have been left to the jury. It was equally essential for the trial Judge to have explained the law in relation to provocation and to have told the jury, as he had done when he dealt with self-defence, that from beginning to end the onus lay upon the State, that it was not for the appellant to prove provocation, but that if, at the end of the day, the jury were left in any reasonable doubt by the evidence whether the appellant had been provoked or not, then they should acquit him of murder and find him guilty of manslaughter.

In the circumstances we have no alternative but to allow the appeal and set aside the verdict of guilty of murder and substitute one of guilty of manslaughter. In view of our conclusion, we set aside the sentence passed by the Supreme Court and substitute therefor one of fifteen years' imprisonment.

E. O. AYOOLA	**A. G. PILLAY**	**K. P. MATADEEN**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe, this 8th day of **August** 2001