IN THE SEYCHELLES COURT OF APPEAL

FLOSSEL FRANCOISE **PPELLANT**

versus

THE REPUBLIC **RESPONDENT**

Criminal Appeal No: 1 of 2002

[**Before:** *Ayoola. P, Pillay & De Silva JJ.A]*

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Mr. A. Derjacques for the Appellant

Mrs. S. Govinden for the Respondent

JUDGMENT OF THE COURT

(Delivered by Pillay, JA)

The appellant had been charged before a Judge and jury with the offence of murdering one Robert Adelaide ("the deceased"), contrary to Section 193 and punishable under Section 194 of the Penal Code (Cap 158). He was convicted for the offence charged by the jury and sentenced by the learned Presiding Judge to life imprisonment.

The appellant is appealing against both his conviction and sentence on the following grounds:-

"(1) **Conviction**

(i) The Honourable Judge erred in failing sufficiently explain to the jury the law on circumstantial evidence and its requirements.

(ii) The Honourable Judge erred in failing to address the court adequately on self-defence in that he was ambiguous in reference to when self defence is open to a person who is or who is not an aggressor. He failed to clarify that verbal arguments or threats do not render one an aggressor vis-à-vis a person who is physically aggressive.

(iii) The Honourable Judge failed to adequately direct and sum up the law for the jury on intoxication vis-à-vis the charges of murder and further in respect of a reduction of the offence to manslaughter.

(iv) The Honourable Judge erred in failing to sufficiently direct the jury in respect of the discrepancies in the Republic's case and allowing the Appellant the benefit of doubt.

(v) The verdict of guilty was against the weight of the evidence.

(vi) The verdict of guilt is unsafe and unsatisfactory.

(2) **Sentence**
In the light of the above, an acquittal or an alternative sentence should be imposed."

The jury, as it was entitled, chose, in its capacity as judge of facts, to accept beyond any reasonable doubt the evidence of the prosecution witnesses to the effect that the appellant stabbed the deceased with a chisel with the intention to cause the latter's death or grievous harm to him or with the knowledge that his act would probably cause death or grievous or really serious harm to the deceased or not caring whether death or grievous harm would be caused to the deceased. The jury specifically rejected the two defences of the appellant, namely that:-

(a) he had acted in self-defence when he was threatened by the deceased who had a hammer in his hand and had previously dealt him blows so that he feared for his life; or

(b) the appellant was so intoxicated as to be incapable of forming an intention to cause the death or grievous harm to the deceased or of having the knowledge that his act would probably cause death or grievous harm to the deceased when he stabbed the latter with a chisel.

The salient features of the evidence of the prosecution witnesses on which the jury relied to find the appellant guilty of the offence of murder are as follows:-

(a) The appellant met the deceased, a friend of his, on 5th September 2001 at about 3.30 pm in the carpentry workshop of witness Donald Jean and the two had drinks together and were discussing politics. On the table on which stood a wood carving machine were 8 chisels belonging to witness Jean who also had two hammers, one with a wooden handle which he was using that day and was near the bench-vice and another with a rubber handle that was in a box containing tools on the shelf. According to the witness, the appellant had been drinking before coming to his workshop whereas the deceased had not.

(b) Witness Jean left the appellant and the deceased at a certain moment and went to his house which adjoined his workshop. From his kitchen, he could hear them discussing loudly. Shortly afterwards he noticed that France Sanguillon had come to the workshop and had joined the appellant and the deceased. He then heard the appellant making certain disparaging allegations against the deceased regarding his job and observing that as a man he could stand up to the deceased. The latter then remarked "*Men do not fight; they talk.*"

(c) As the discussion became heated, witness Jean went back to the workshop. The appellant who was panicky and nervous stated that he did not know what he had done. The witness had a good look at the appellant but found that the latter did not bear any injuries and had no bruises on him, least of all on his face or neck which was normal. He saw that one chisel had been moved from its original position near the wood carving machine and was bloodstained. Everything was undisturbed except for that one bloodstained chisel which had been displaced. The hammer with the wooden handle was in its normal position near the bench-vice while the hammer with the rubber handle was in the box on the shelf.

(d) Witness Jean was adamant that he heard the appellant and the deceased talking loudly and having a verbal discussion but he did not hear of any physical fight. If there had been a fight, he would have known. He had not mentioned anything about bruises, hammers or physical fighting in his statement given to the Police on the very day of the incident for the simple reason that there was no incident of hammer, bruises and physical fighting.

(e) Witness France Sanguillon came to the carpentry workshop of witness Jean at about 4.30 pm on the relevant day and met with both appellant and the deceased who were both his friends and were drinking and having a verbal discussion about politics. He saw the appellant near the wood carving machine while the deceased was in front of a work table. He was only some two metres away from the deceased and some 2.4 metres from the appellant. He heard the appellant making some disparaging remarks about the deceased's wife. He became embarrassed since both of them were his friends and drank his toddy alone, not looking at them but at the sea through a divider in the workshop. He heard them swearing at each other and challenging each other to fight. Then he heard the appellant exclaiming "Oh, what have I done!" He turned round and saw the appellant who was not too drunk but normal. He also saw the deceased leaving the workshop holding the left side of his head.

(f) Witness Sanguillon saw also the bloodstained chisel on the table near where the appellant had been standing. The appellant was slightly tipsy but not drunk. When the appellant exclaimed about his deed, he was like someone under a lot of pressure and he sobered up and was not confused. According to the witness, the appellant must have realised what he had done. Both the appellant and the deceased were making a lot of noise, talking politics, swearing and threatening each other to fight but there was only noise but no fight. If there had been any movement, he would have turned round to see that the appellant and the deceased were moving and fighting but they did not move or fight.

> It is significant that there was no evidence on record to suggest that chairs or tables in the workshop had been moved or disturbed. In fact, only one chisel had been displaced, as testified to by witness Donald Jean, as indicated already.

(g) Witness Hansel Larue testified that at about 5.10 pm on the relevant day the appellant told him that someone had wanted to fight him and that he hit him with an instrument.

> It is significant to note that the appellant stated that someone had wanted to fight and not had fought him or threatened him with a hammer.

(h) According to Detective Superintendent Bedier and ASP Louise, the deceased had only injuries near the left ear and the left elbow. They did not notice any bruise on the deceased's lips or nose. The pathologist, Dr. P. Thanikachalam, who conducted the post-

mortem examination of the deceased found a 4 cm irregular laceration below his left ear which was sutured, and a 1.2 cm deep laceration made with a sharp instrument like a chisel. There was no injury over the nose or lips of the deceased nor was there any injury to his left elbow. However, Dr. P. Kandasamy who was shown a photograph of the deceased by the defence stated that there appeared to be a bruise with abrasion on the nose of the deceased.

(i) Detective Superintendent Bedier saw the appellant after the incident. He had bluish marks under and on his neck and an injury below the knee. According to the witness, the marks on the neck was as if someone had tried to strangle him or get hold of him. His eyes were a bit reddish. He was smelling of alcohol but was not drunk. If the appellant had really been drunk, he would not have been able to engage in a conversation and talked the way he did.

(j) According to Police Officers Luc and Rose, they went to arrest the appellant at about 7.15 pm on the relevant day and the latter became aggressive. P.C. Luc locked his arms to the neck of the appellant who fell down, struggling. This was confirmed by P.C. Rose. He was then handcuffed by P.C. Rose and brought to the Police jeep but he kept on struggling and fell several times. The appellant had bruises on the face, legs and neck. P.C. Rose also noticed that the appellant was under the influence of alcohol but was not drunk.

> It is significant that in the statements to the Police both officers had not mentioned the bruises under the neck of the appellant.

(k) Superintendent Quatre saw the appellant at about 9 pm on the relevant day after his arrest. The appellant told the witness that he would tell him what had happened, there was nothing to hide and everything was clear. Witness Quatre asked whether the appellant knew the reason for his arrest; the appellant stated that he had stabbed the deceased and they had told him that he had killed a man. The appellant further stated that the Police Officers who arrested him had assaulted him.

> It is significant that not a word was mentioned by the appellant about any blow given to him by the deceased or the latter threatening him with a hammer.

(l) Witness Quatre looked at him and found him to be under the influence of alcohol but not drunk. The appellant had a bruise on the right cheek, bruises under the neck, bruises on the right shoulder, bruises on both sides of his body at the rib cage area and on both legs. The appellant was taken to Dr. Commettant for examination and treatment.

(m) Dr. Commettant confirmed that the appellant had bruises on the face, a small laceration on the right cheek, swelling of the right eye, dried blood on the left side of the face, bruises on the left side of the neck, on the left side of the chest and on the lower part of the right leg. He did not notice any swelling of the lips of the appellant. The doctor was of the opinion that the bruises under the neck of the appellant could have been caused by force being used against the neck of the appellant by hands or some thing.

As for the defence of the appellant, it is contained in his statements given to the Police on 6th and 10th December respectively, as the appellant chose not to go into the witness box. The appellant stated that on the relevant day he went to witness Donald Jean's carpentry workshop to drink. Before that he had drunk two pints of guiness. He met with the deceased and witness France Sanguillon. A political discussion ensued with the deceased. Since the latter became more angry, he (the appellant) got up and left, after saying something which he could not recall. The deceased came behind him, held him by his t-shirt, pulled him and punched him on his mouth. His lips were broken but the deceased did not let go of him but continued to pull him towards the carpentry workshop. They rolled and reached the workshop. The deceased took a carpentry hammer with a black handle in the workshop and threatened to hit him with it.

The appellant told the deceased to relax and during the struggle the hammer with the black handle fell to the ground. Then the deceased took another hammer with a wooden handle from the carpentry table and threatened to hit him on his face as before. The handle of the two hammers was made of wood. The appellant then took a carpentry chisel on the table and hit the deceased, without seeing which part of the body it

was aimed at. There was blood on the chisel and he dropped it on the table and went away.

The appellant explained that while he was fighting with the deceased, witness Sanguillon and Jean were there. It was only after the stabbing that witness Jean went into his house. The appellant had stabbed the deceased with the chisel because twice the deceased had threatened to hit him with a hammer. Later some Police Officers, among whom was P.C. Luc, arrested the appellant and assaulted him. However, the bruises under the neck were caused by the deceased who strangled him and punched him on the mouth. According to the appellant, the deceased seemed to be drunk because when he came to the workshop he was "*in steam*" but he, the appellant, was a bit drunk, but he could nevertheless understand.

The appellant finally was at pains to stress that he had no intention to kill the deceased but was only defending himself against the second hammer wielded by the deceased who threatened to hit him with it.

The jury was told again and again by the Presiding Judge that it was its duty to assess the credibility of the prosecution witnesses, to subject their evidence to a critical evaluation and to decide whether they were speaking the truth or not, inspite of certain contradictions to be found in their testimony, be they witnesses Sanguillon and Jean who were adamant that there had been no physical fight between the appellant and the deceased or Police Officers P.C. Luc and Rose who mentioned in Court the bruises they found under the neck of the appellant but not in their statements to the Police.

Indeed learned Counsel for the defence referred the jury in some detail to nineteen points on which the appellant relied to show that the

evidence adduced by the prosecution witnesses was doubtful and unreliable. The Presiding Judge mentioned some of them extensively, for example the evidence of witness Sanguillon, who said he did not witness the stabbing but that there was no physical fighting between the appellant and the deceased and the injuries sustained by the deceased and the appellant. The jury was told to choose between the testimony of, on the one hand, of ASP Bedier and Dr. Thanikachalam who had examined the body of the deceased and claimed that the mark near the nose of the deceased was dry blood and, on the other, that of Dr. Kandasamy who looked at a photograph of deceased and claimed that the mark appeared to be a bruise with abrasion.

Similarly, the jury was told that it had to resolve the conflicting evidence of ASP Bedier and Dr. Thanikachalam regarding the injury on the elbow of the deceased. The former saw the injury whereas the latter did not, as mentioned already.

Moreover, the jury was again told by the Presiding Judge it had to decide whether the bruises under the neck of the appellant were caused by the headlock effected by P.C. Luc when overpowering the appellant or by the strangling of the deceased, as alleged by the appellant. In this regard, the jury was reminded that Dr. Commettant did not notice that the lips of the appellant had been broken, least of all swollen. Moreover, there was ə testimony of witness Donald Jean to the effect that he had a good look at the appellant after the incident and saw no bruises on him, least of all on the face or neck.

At the end of the day, the jury chose, as arbiter of facts, to rely on the evidence of the prosecution witnesses, highlighted already, in spite of certain discrepancies to be found therein. Having reviewed such evidence, we do not consider that the Presiding Judge had failed to sufficiently direct the jury (a) to those discrepancies and (b) to give the benefit of the

doubt to the appellant, the more so as the Presiding Judge made it clear in his summing-up to the jury on several occasions, as the Court record shows, that the prosecution always bore the burden of proving its case beyond any reasonable doubt and that, if the jury had any reasonable doubt on any issue, the benefit of that doubt should be given to the appellant. So much for ground (1)(iv).

With regard to ground (1)(iii), we can now examine the direction given in law by the Presiding Judge on the issue of intoxication. This is what he stated:-

> *"The burden rests on the prosecution to establish beyond a reasonable doubt that the accused in this case was not so intoxicated as to be incapable of forming an intention to cause death or grievous harm to the deceased. It is therefore for you, ladies and gentlemen of the jury to decide that. You will recall that some of the prosecution witnesses gave their own assessment of the level of intoxication of the accused. In his own voluntary statement to the police he stated – "I was a bit drunk but I could understand." That was his own assessment in the statement to the police which he claims to contain the truth. Therefore ladies and gentlemen of the jury, if you are satisfied beyond a reasonable doubt that the prosecution has proved that the level of intoxication was not so high as to prevent the accused from forming an intention to cause the death or causing grievous harm to Robert*

Adelaide, then you must reject that defence. In that respect apart from the statement of the accused, you may take into consideration his own statement to the police, and the fact that he spoke well with Donald Jean, Sanguillon and Hansel Larue soon after the incident. P.C. Luc, P.C. Rose, A.S.P. Bedier, S.P. Quatre and Dr. Commettant also testified that although the accused was under the influence of drinks, he was not drunk. These are relevant witnesses you may consider in coming to a decision as to whether the level of intoxication he was in at the time of committing the offence was not so high as to make the accused incapable of forming an intention to cause death or grievous harm to the deceased. If it was high enough in your assessment then you consider whether he was not able to intend to kill or cause grievous harm, in which case there is no malice aforethought and accordingly if the other two elements of causing death and unlawful act have been proved by the prosecution, the offence of murder will be reduced to one of manslaughter only. In these circumstances, your verdict will be not guilty of murder, but guilty of manslaughter" – vide pages 527 to 528 of the Court record .

We may quickly dispose of this ground which has no merit whatsoever and is factually incorrect. Indeed, as we pointed out to learned Counsel for the appellant at the hearing of this appeal, the

learned Presiding Judge, as the excerpt quoted above amply demonstrated, referred to the essential elements contained in Section 14(4) of the Penal Code, without referring or having to refer to that Section.

Section 14(4) of the Penal Code reads as follows:-

> "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or offensive, in the absence of which he would not be guilty of the offence."
> (Emphasis is ours)

Moreover, every single prosecution witness who had an opportunity of talking about the level of intoxication of the appellant stated in categorical terms that, although he was under the influence of alcohol, the appellant was not drunk and knew what he was doing or talking about – vide, for instance, the testimony of Sanguillon, Detective Superintendent Bedier, P.C. Rose and Superintendent Quatre.

Indeed the appellant, himself, stated to Superintendent Quatre on the day of the incident that he could tell him what had happened, there was nothing to hide and everything was clear. Moreover, on the next day in his first statement given to the Police he said that he was a bit drunk but he could understand. Moreover, we consider that, just as the jury must have thought that, if the appellant had been completely drunk, his memory would have been blank or there would have been lapses in his memory and he would not on the day following the incident have been able to give the sort of statement that he gave, giving so many details, to the extent of contradicting all that the prosecution witnesses had testified to!

Consequently, the jury had no difficulty on the evidence on record to come to the conclusion that the level of intoxication of the appellant was not so high as to prevent the latter from forming an intention to cause the death of the deceased or from causing the latter grievous harm, the more so as the jury was told by the Presiding Judge that as men and women of experience in the society, they would be able to decide how intoxicated both the appellant and the deceased were at the time of the incident.

We may now turn to ground (1)(ii) which finds fault with the direction in law of the Presiding Judge in relation to self-defence. There are many places in his summing up where the Presiding Judge mentions self-defence – pages 518, 519 and 521 to 526, of the Court record.

Having examined closely his direction in law on self-defence, we consider that it is unimpeachable. The learned Presiding Judge rightly stated, in our opinion, that the defence of self-defence avails only the victim and not the assailant. If the appellant was the assailant, then the defence of self-defence would not avail him. The jury was specifically told:-

> "It is for you to decide whether on the whole of the evidence in this case that the prosecution has proved to you beyond reasonable doubt that at the time of the stabbing who was the assailant and who was the victim. However, there is no rule of law that a man must wait until he is struck before striking in self-defence. If another strikes him he is entitled to get his blow in first if it is reasonably necessary so to do in self-defence. If you reach the conclusion that the accused was the assailant, then his defence of self-defence cannot be accepted. Also if you are satisfied beyond a reasonable doubt that the accused had used greater degree of force than was necessary in the circumstances then you must reject the defence of self-defence. However, if you are satisfied beyond a reasonable doubt that, on

> satisfied beyond a reasonable doubt that, on a consideration of all these legal principles I explained to you on this defence, the accused had acted in self defence, you should bring a verdict of not guilty. If the defence of self defence has in your view failed, then the prosecution would have established the element of unlawful act" – vide page 526 of the Court record.

The crux of the matter is that, on the evidence adduced by the prosecution witnesses, the appellant was the assailant in that he used a chisel to stab the deceased, as acknowledged by him, while the deceased was a victim, had engaged no doubt in verbal abuse and threats but had never used any violence against the appellant, least of all threatened him successively with a hammer with a rubber handle and another one with a wooden handle.

We agree with learned Counsel for the appellant that verbal arguments or threats used by a person do not render him an assailant or aggressor vis-à-vis another person who is physically aggressive and uses force or a weapon.

The fact of the matter, however, is that, as indicated already, on the evidence adduced by the prosecution witnesses and accepted by the jury, the appellant was the assailant or aggressor in that he used a chisel to stab the deceased while the latter did not exercise any violence against the appellant but engaged only at most in verbal abuse and threats.

Indeed there was not a scintilla of evidence to suggest that there was a physical fight inside the carpentry workshop of witness Donald Jean. There was no sign that anything inside the small workshop had been disturbed, except for a chisel. The two hammers were in their respective places. The hammer with the rubber handle was not found on the floor, as alleged by the appellant. The chairs and tables were

undisturbed. After the stabbing, the appellant's face and neck were normal – vide the testimony of Donald Jean. He had no bruises thereon, least of all broken lips!

Moreover, the jury believed P.C. Luc and Rose that the appellant sustained all the injuries to his face and neck (a) when P.C. Luc effected a headlock upon his neck and (b) on account of the fact that the appellant had fallen several times during his arrest.

Indeed, that is why when he met with Superintendent Quatre at about 9 pm on the day of his arrest, the appellant admitted that he had stabbed the deceased but said nothing about the alleged assault against him by the deceased, although he did mention the assault on him of Police Officers arresting him. We consider that the jury found it safe to accept the submission of Counsel for the prosecution that the defence of self-defence put up by the appellant was an afterthought, concocted overnight to exculpate himself from the consequences of his act.

With regard to ground (1)(i), it is to be noted that:-

(a) the appellant accepted having stabbed the deceased with a sharp instrument, a chisel, in the head in the region of the left ear;

(b) the prosecution witnesses proved beyond reasonable doubt, as indicated already, that the appellant was the assailant and the deceased a mere victim who at most used verbal threats but never wielded any hammer to threaten the appellant or struck any blow on the appellant. Both hammers found in the carpentry workshop were in their respective places after the incident, no chairs or tables had been displaced in the workshop and the appellant bore no injuries on his face and neck;

(c) the Presiding Judge made the following direction in law on "circumstantial evidence":-

> Ladies and gentlemen of the jury, Counsel for the accused addressed you on what is

called circumstantial evidence. He told you that there were no eye witnesses in the case who saw the fight and the threatening by Robert with a hammer which the accused is relying on in his defence of self defence. He said that the prosecution was therefore relying on surrounding circumstances, such as the shed being too small for a fight of the nature the accused has stated in his statement to take place and the hammer with the wooden handle being in the same place as before, thus disproving the claim of the accused that Robert threatened to hit him with that. Evidence of a witness is called direct evidence. As evidence, there is no difference between direct and circumstantial evidence. The only difference is that of proof, the former directly establishes the fact in issue, while the latter does so by placing circumstances which lead to irresistible inferences. However there is a requirement that circumstantial evidence must be narrowly examined, because evidence of that kind may be fabricated.

So, before drawing any inference of guilt of the accused from the circumstantial evidence, you have to be sure that the inculpatory facts, that is, facts which show that the accused committed the offence, are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis other than the guilt of the accused. This means that the facts the prosecution has produced in this case by circumstantial evidence before you to prove the elements of murder must be so convincing to you that no other circumstances would weaken or destroy the inference of guilt against him. In short, the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by the prosecution must be so complete that there should be no reasonable ground to support the innocence of the accused" – vide pages 500 to 501 of the Court record.

We cannot see how the direction in law of the learned Presiding Judge can be faulted in the circumstances. What is important, however, is that the jury, in applying the test laid down by the learned Presiding Judge to the facts of the case, as pinpointed above by us, was right, in our opinion, to come to the irresistible conclusion that, when the appellant stabbed the deceased with the chisel, he did so not in self-defence but (a) with the intention to cause the death of the deceased or to do him grievous harm or (b) with the knowledge that his act would probably cause the death of the deceased or grievous bodily harm to him.

Moreover, we have already expatiated sufficiently on the material on record to show that the verdict of the jury is neither unsafe nor unsatisfactory nor against the weight of evidence. So much for grounds (1)(v) and (vi). Since the conviction for murder stands, we have no alternative than to maintain the sentence passed as it is a mandatory one, as is made clear by Section 194 of the Penal Code.

For the reasons given, we dismiss the appeal, with costs.

E. O. AYOOLA	**A. G. PILLAY**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 19th day of **December** 2002.