(4)

IN THE SEYCHELLES COURT OF APPEAL

CRIMINAL CASE NO. SCA 6 OF 2003

In the matter between

DAVID DODIN — APPELLANT

VERSUS

THE REPUBLIC — RESPONDENT

[BEFORE: RAMODIBEDI P, KARUNAKARAN J.A., RENAUD J.A.]

DATE of hearing: 28 September 2004

DATE of judgment : 27 October 2004

Mr A. Juliette for the Appellant

Mr. R.J. Govinden for the Respondent

JUDGMENT

RAMODIBEDI, P.

[1] On the night of Sunday 1 December 2002 and at Beau Vallon, Mahe, John Jonashan Lusta ("the deceased") was fatally stabbed in the chest with a knife at appellant's premises. He was pronounced dead upon his arrival at the hospital. According to the undisputed evidence of the pathologist who performed a post-mortem examination on the deceased's body, the stab wound penetrated deeply through the soft tissue muscles right through the heart. The cause of death was the stab wound and internal bleeding.

[2] Consequent upon this tragic incident, a charge of murder, contrary to section 193 of the Penal Code, was preferred against the appellant. He was tried by Alleear C.J. sitting with a jury and was convicted as charged and sentenced to life imprisonment in terms of section 194 of the Penal Code. He appeals to this Court against conviction only.

[3] Now, it may no doubt be useful to refer to the two sections of the Penal Code under which the appellant was charged. They provide as follows:

> "193. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.
>
> 194. Any person convicted of murder shall be sentenced to imprisonment for life."

[4] At this point it is no doubt convenient to mention that the appellant does not dispute that he is the person who stabbed the deceased and caused his death. He pleads self- defence. He does so in his unsworn statement to the police which was very fairly and properly, in my view, placed before the jury by the learned Counsel for the prosecution, Mr. Govinden as he was obliged to in accordance with a long standing noble tradition in our criminal justice system. In a nutshell, it is the appellant's case that trouble between the deceased's group ("the Lustas") and the appellant's group had been simmering long before the fateful night in question. To be precise, such trouble had started on 22 November 2002 and was politically motivated. The two groups were members of opposing political parties and they resented each other to the extent that they often clashed physically culminating in the stabbing of the deceased on 1 December 2002. The appellant says that the Lustas attacked and assaulted him in his own house whilst sleeping and that, fearing for his life, he stabbed the deceased in self-defence.

[5] The prosecution called a total of fifteen witnesses in support of its case. Two of these witnesses gave direct evidence implicating the appellant as eyewitnesses. These were people who were in the company of the deceased namely, P.W. 6 Jean Paul Lusta and P.W.8 Marcus Lusta. Admittedly they were deceased's nephews and as such their evidence required to be approached with caution and so it was. In any event, and as will become

apparent from the grounds of appeal shortly, no complaint is directed at the special relationship between the deceased and these witnesses.

[6] Stripped to its bare essentials, the evidence of these witnesses shows that on the fateful day in question, they were in the company of the deceased driving around in a car described as a Mitsubishi Lancer. The deceased was driving. At some point later in the afternoon, they decided to go to their aunt Tanna Lusta's birthday party at Beau Vallon. Reaching the area at about 6.30 p.m., they met the appellant's group namely D.W.1, D.W.2 and the appellant's own son, Gerard Andre otherwise referred to as Gro Papa sitting on a rock referred to as "anba ros". This group started swearing at them and throwing "missiles" such as bottles and stones at their car – all missing their target though. At this point the deceased alighted from the car followed by the two witnesses apparently to confront the appellant's group. D.W.2 Eric Philoe ran away. Gro Papa also ran towards the appellant's premises. It was then that the deceased and Gro Papa swore at each other.

[7] Both witnesses corroborate each other that the appellant then also swore at them charging "you come to fight at my house" or words to that effect. He then immediately ran inside his house and came out with a shiny object or weapon with which he stabbed the deceased as indicated above. The deceased remarked that he had been stabbed. He then leaned against P.W.6 Jean Paul Lusta but being too heavy for the latter he slipped and fell into the gutter. He was rushed to hospital but was, as pointed out earlier, certified dead on arrival.

[8] The evidence of P.W.7 Antoine Kate is also significant to the effect that after the fateful incident in question, the appellant and his son Gro papa ran away and were nowhere to be seen. P.W.7 accompanied by one David Lawen and another man called Jean Paul Botsoie set out on the night of 1 December 2002 in search of the appellant and Gro Papa. When they reached Le Niol they found Gro Papa sleeping in an old abandoned house bareback and wearing only trousers. They effected a citizen's arrest on him and thereafter the search for the appellant continued throughout the night. They then decided to waylay him at his house and the next morning on 2 December 2002 at about 5.45 a.m. the appellant came to the house as anticipated. He too was bareback, wearing only shorts. He claimed to have come for his clothes but P.W. 7 and his companions did not give him the chance to collect them. They only allowed him to enter the house and

they effected a citizen's arrest on him as he came out of the house. They were ably assisted by P.W.10 Georges Alphonsine Andre and P.W.11 Andrew Lusta at that stage. The appellant resisted arrest and tried to run away. He fell and injured his head on a washing stone in the process.

[9] It requires to be noted at this juncture that the appellant did not give evidence in his own defence at the trial. He was, I may add, perfectly within his rights in adopting this approach as there is no onus on an accused person to prove his innocence. It is in fact an old principle of English common law that no man can be forced to give evidence against himself. It is in this spirit that s.134 (a) and (b) of the Criminal Procedure Code makes provision in these terms: -

"134, Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:

Provided as follows: -

(a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;

(b) the failure of any person charged with an offence or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;"

Similarly, s.25 (1) of the Code reads:-

> "If an accused elects to give evidence or make a statement, he shall do so before any other witness is called." (Emphasis added).

Most importantly, the Constitution which is the supreme law of this country provides in Article 19(g) and (h) thereof that every person who is charged with an offence:

"(g) shall not be compelled to testify at the trial or confess guilt;

(h) shall not have any adverse inference drawn from the exercise of the right to silence either during the course of the investigation or at the trial."

[10] Where, as here, the accused raises self-defence, the onus is on the prosecution to negative self-defence beyond reasonable doubt. This is clearly so even where an accused person does not rely on self-defence as such. If the circumstances of a particular case are such that a reasonable man would have been entitled to resort to self- defence an accused person is entitled to acquittal even if, for example, he remains silent and does not advance self- defence at all.

[11] As I have pointed out earlier, and as I repeat now, the appellant relied on his unsworn statement to the police in which he exculpated himself as indicated above. Furthermore, he relied on two witnesses namely D.W.1 Jim Agathine and D.W.2 Eric Philoe. Both these witnesses were, however, not present when the deceased was fatally stabbed. Their evidence was clearly directed at establishing previous encounters between the Lustas and the Appellant's group.

[12] It is important to note that none of the prosecution witnesses testified to seeing any blood inside the appellant's house. On the contrary, blood was seen outside the house and I should say at once that if that was so, this then confirms the prosecution version that the deceased was stabbed outside the house and not inside as the appellant claims in his unsworn statement to the police. I shall deal with this aspect of the matter more fully later.

[13] It shall no doubt suffice at this stage to say that the prosecution submitted a formidable case against the appellant. Save for minor details, the prosecution witnesses were consistent and remained completely unshaken in cross-examination. Indeed none of the grounds of appeal are directed at any criticism of these witnesses. It is to these grounds of appeal that I now turn. They are as follows: -

"1. The Learned Chief Justice erred in giving his written summing up to the jury to retire with,

in that such a course of action is prejudicial to the Appellant.

2. The learned Chief Justice erred in directing the jury that "the issue of self-defence arises only if there has been an attack by the deceased on the accused. A person who is attacked may do what is reasonably necessary to defend himself."

3. The Learned Chief Justice erred in directing the jury to consider only specific issues which are favourable to the prosecution and failed to direct the jury to also consider specific issues relevant and favourable to the defence and that such directions led to an improper assessment of the evidence by the jury, thus resulting in an unsafe and wrong verdict.

4. The Learned Chief Justice erred in directing the jury in specific terms "when a man plunged a dagger into the heart of another what his intention could be if not to kill the other person" is prejudicial as it implies guilt on the part of the Appellant.

5. The Learned Chief Justice erred in directing The jury that "you can only convict the accused if you disbelieve him that he was attacked inside his house and that he was acting in self-defence" in that such a direction places the burden of proof wrongly on the Appellant to prove he was acting in self-defence.

6. The verdict is against the weight of the evidence and is unsafe and unsatisfactory."

[14] It is now necessary to examine the criticisms raised in the grounds of appeal in turn and in some detail.

> (1) That "the Learned Chief Justice erred in giving his written summing-up to the jury to retire with..."

This ground can quickly be disposed of as it is not borne out by the record. But even if it was, I cannot see how prejudice could arise in the absence of an allegation that the written summing-up in question was materially different from the one delivered in Court and that it was either inaccurate or it contained false propositions. Having said that, however, this Court must not be understood to convey that it is right for trial judges to hand down summings-up or indeed any paper or document to members of the jury secretly behind the back of accused persons or their legal representatives as this can often lead to unpleasant results.

[15] It is no doubt necessary to digress a little at this stage and record that at the hearing of this appeal, Mr. Juliette for the appellant sought to overcome the difficulties raised in the preceding paragraph by making an application from the Bar for production of tape recordings of the case before the trial Court. Thus effectively this would inevitably entail a postponement of the appeal. Mr. Govinden for the prosecution strenuously opposed the application and after hearing oral submissions from both sides the Court unanimously dismissed the application on the following grounds:-

> (a) there was no acceptable explanation why the application was made so belatedly after the appellant had been supplied with the record of proceedings more than a year previously. It is significant that during the interim period in question the appeal came before this Court in the last Session in December 2003 when it was postponed. Still no application for production of tape recordings was forthcoming.
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> (b) There is no acceptable explanation why the application was only made from the Bar and not on motion supported by affidavits as to the facts relied upon.

(c) Not only was the application opposed but Mr. Govinden also disputed the allegations by Mr. Juliette that the written summing-up was given to the jury to retire with.

(d) In the view of the Court, the application was more than a delaying tactic contrary to the age-old principle that there must be finality to litigation and that justice delayed is justice denied.

In the result, these reasons coupled with the fact that the application was totally unsubstantiated carried sway with the Court.

[16] In passing, this Court draws the attention of legal practitioners to Rule 61(1) of the Seychelles Court of Appeal Rules 1978 in cases where disputes arise as to the correctness or otherwise of the record of proceedings emanating from the Supreme Court. That Rule reads as follows:-

> "61(1) The preparation of the record of appeal shall be undertaken by the Registrar of the Supreme Court upon payment of the prescribed charges and shall be subject to the supervision of the Supreme Court. The parties may submit any disputed question arising in connection therewith to the decision of the Supreme Court, and the Supreme Court shall give such directions thereon as the justice of the case may require. As many copies as may be necessary of the record of the appeal shall be prepared." [Emphasis supplied].

I revert then to the other grounds of appeal raised in this matter.

> (2) That the learned Chief Justice erred in directing the jury that "the issue of self-defence arises only if there has been an attack by the deceased on the accused" and that "[a] person who is attacked may

> do what is reasonably necessary to defend himself."

The criticism raised in this ground of appeal is, in my view, a classic example of a summing-up being quoted out of context. It will be borne in mind that this quotation comes right at the end of a long paragraph in which the learned Chief Justice addressed the jury as to the essential elements of self-defence. He duly emphasized repeatedly that self-defence is a complete defence and that the onus rests on the prosecution to prove beyond reasonable doubt that the accused was not acting in self- defence. Furthermore, the Learned Chief Justice correctly, in my view, took into account the appellant's version contained in his unsworn statement to the police to the effect that he was unlawfully attacked and that he accordingly acted in self -defence. In contrast, as will be recalled, the version of the prosecution witnesses was that the appellant did not act in self- defence. He simply stabbed the deceased who was not fighting and was not posing any danger to him. It is in that context that the learned Chief Justice concluded the paragraph in question in the words complained of, namely: - "You must, however, bear in mind that the issue of self-defence arises only if there has been an attack by the deceased on the accused. A person who is attacked may do what is reasonably necessary to defend himself."

It will be noted that these words were taken from the case of Palmer v. The Queen 1971 (1) All E.R., 1077 (P.C.) followed by the Court of Appeal in England in R.V. McInnes (1971) 55 Cr. App. R.551, also followed by this Court in Jeffrey Francis v. The Republic, Criminal Appeal No. 7 of 1997. In the instant case, members of the jury were repeatedly told that if they felt in doubt about whether the appellant acted in self- defence or not they would have to acquit him. It follows in the light of the aforegoing considerations that there is no merit in this ground of appeal either.

> (3) That "the Learned Chief Justice erred in directing the jury to consider only specific issues which are favourable to the prosecution and failed to direct the jury to also consider specific issues relevant and favourable to the defence and that such directions led to an improper assessment of the evidence by the jury."

It is self-evident in this ground of appeal that the so-called "specific issues" complained of have not been identified. Nor could they be on the facts. On the contrary, a proper reading of the record shows that all relevant issues favourable to the appellant were raised in the summing-up as fully set out above.

In the circumstances, it is impermissible, in my view, for the appellant to make a vague reference to undisclosed "specific issues" without more. Such approach flies in the face of Rule 54(6) of the Seychelles Court of Appeal (Amendment) Rules 2000, which reads in these terms:

> "(6) No ground of appeal which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence and any ground of appeal or part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent. Notice of appeal shall be served on all parties directly affected by the appeal or their advocates respectively. It shall not be necessary to serve parties not so affected. The appellant shall at the time of filing his notice of appeal leave with the Registrar of the Supreme Court sufficient number of copies for service on all such parties."

> (4) That the Learned Chief Justice erred in directing the jury that "when a man plunges a dagger into the heart of another what his intention could be if not to kill the other person" and that this was prejudicial to the appellant as it implied guilt on his part.

Regrettably, these words have typically been quoted out of context. In the sentence preceding the one complained of, the Learned Chief Justice says the following: -

> "I must stress that intention has to be gathered from all the evidence of what the person does and what he says at the material time."

It was in that context, namely when it is clear from surrounding circumstances that the intention is to kill that the Learned Chief Justice used the words: "when a man plunges a dagger into the heart of another what his intention could be if not to kill the other person." This, it must be noted, was merely one of a series of examples which the Learned Chief Justice gave to the jury in a perfectly legitimate attempt to demonstrate circumstances which may be considered by a court of law in finding that intention to kill has been established in a particular case. Accordingly the criticism contained in this ground of appeal is in my view, unjustified.

(5) That the learned Chief Justice erred in directing the jury that:

> "you can only convict the accused if you disbelieve him that he was attacked inside his house and that he was acting in self-defence."

It is submitted on behalf of the appellant that such direction wrongly placed the burden of proof on the appellant to prove that he was acting in self-defence. It will be noted, however, that the Learned Chief Justice did not say "you can only acquit the accused if you disbelieve him..." On the contrary, the fact that he used the words "you can only convict ..." is consistent with the general tenor of his summing-up taken as a whole. As pointed out earlier, he repeatedly told the jury that the onus was on the prosecution to negative self-defence beyond reasonable doubt. The reference to a conviction resting on whether the jury disbelieved the appellant must obviously be understood in its proper context, namely the fact that the appellant's version was that he had been attacked inside his house while sleeping on his bed. He claimed self-defence on that basis. It will be recalled, however, that the version of the prosecution witnesses, P.W.6 Jean Paul Lusta and P.W.8 Marcus Lusta, who were present when the appellant admittedly stabbed the deceased was that this incident took place outside the appellant's house. He had merely run into that house to fetch the murder weapon and returned immediately to stab the deceased with it outside the

house. The deceased was not fighting the appellant nor was it suggested that he posed any threat to him. It is indeed common cause that he was unarmed.

Faced with these two versions which were diametrically opposed to each other, it follows that conviction could only follow if the appellant's version could be held not to be possibly reasonably true in the circumstances. That, in my view, is a question of fact, which entailed credibility. As the arbiter of facts, the jury was entitled to make a finding on the issue and so it did. After seeing and hearing the eyewitnesses, P.W.6 and P.W.8 respectively, it believed their version. Significantly there is no challenge against this finding, which was purely based on credibility supported in turn by the presence of bloodstains outside the appellant's house. Accordingly, there is no merit in the criticism levelled at the summing-up on this particular issue. It should be borne in mind that the jury needed to be sure beyond reasonable doubt that the version of the prosecution was correct and that the appellant's version was not only improbable but was false beyond doubt before a conviction could properly follow.

Having said this, however, this Court notes with concern that the use of the word "disbelieve" in the summing-up in question is unfortunate. The point sought to be made could well have been expressed differently and no doubt more appropriately. Looking at the summing-up in its totality, however, the jury could not have been left in any doubt that they did not have to disbelieve the appellant in order to acquit him.

In this regard it is important to stress that members of the jury were repeatedly told that it was for the prosecution to prove the appellant's guilt and not for him to prove his innocence. It is, for that matter significant that the words complained of were in fact preceded by the following direction to the jury:-

> "If you are unsure whether or not the accused told lies in his statement you have to give the benefit of the doubt to the accused and acquit him."
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> Indeed the words immediately following the passage complained of are not without significance in the matter. They read as follows:-

> "You can convict the accused only if you are satisfied that the accused went inside his house and came out with the knife and deliberately stabbed John Lusta in the region of the heart."

Finally, it is pertinent also to bear in mind the following direction by the Learned Chief Justice to the jury as recorded on page 396-397 of the record:-

> "Ladies and Gentlemen of the jury, I would also like to emphasise another point. I have listened to this case just as you have. It does not mean with a more accurate ear. I am simply more used to hearing evidence than you. It does not mean that I am more likely to get it right than you are and even if I were, that is not the way it is done in this Court. You are the one who decide the case and so what I may think about it whatever opinion I may have about it – is irrelevant. If you think that you detect my opinion of it you should not allow it in any way to influence you to come to a conclusion which does not fully reflect your own view of it."

Accordingly no miscarriage of justice has been caused by the unfortunate use of the word "disbelieve" in the special circumstances of this case as outlined above. This leads me to the final ground of appeal.

> (6) That the verdict is against the weight of evidence and is unsafe and unsatisfactory.

It will be recalled that the prosecution case rested primarily on the two eyewitnesses namely P.W.6 Jean Paul Lusta and P .W. 8 Marcus Lusta. They gave damning evidence, which depicted the appellant as the aggressor who stabbed the deceased in circumstances where the latter was not fighting at all. Besides, there was circumstantial evidence, which established beyond reasonable doubt that the stabbing in question took place outside the appellant's house and not inside the house as he had claimed. That evidence was to the effect that there was no blood seen inside the house. On the contrary, blood was seen outside the house. Moreover there was no sign of any disturbance inside the house to suggest a fight or a struggle having taken place thereat. There were simply no tell tales in that regard and once that is so, the jury was in my view, perfectly entitled to reject the appellant's version and to accept that of the prosecution witnesses who were

not shown to be liars or mistaken. Besides, there is undisputed evidence that the appellant disappeared after the incident in question and did not report to the police as might have been expected if he had been attacked as he had claimed.

[17] It follows from the aforegoing considerations that, viewed at in its totality, the evidence is such that there is no room for criticism of the summing-up in question. Similarly there is no justification for holding that the verdict is against the weight of evidence and that it is unsafe and unsatisfactory. As I have said in paragraph [13] above, the prosecution presented a formidable case against the appellant and succeeded in proving its case beyond reasonable doubt.

In the result the appeal is dismissed.

I concur:

I concur:

27th October, 2004