

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable**

[2021] SCCA 42 13 August 2021  
SCA CR 31/19  
(Appeal from CR 09/2019)

In the matter between

**SWALLEN JOURDAN BASSET**  
*(rep. by Mr. France Bonte)*

**Appellant**

and

**THE REPUBLIC**  
*(rep. by Mr. Stefan Knights)*

**Respondent**

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**Neutral Citation:** *Basset v R* (SCA CR 31/19) [2021] SCCA 42 (Arising in CR 09/2019)

13 August 2021

**Before:** Fernando, President, Twomey JA, Dingake JA

**Summary:** Appeal from a conviction for murder

**Heard:** 2 August 2021

**Delivered:** 13 August 2021

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**ORDER**

Appeal against conviction and sentence dismissed.

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**JUDGMENT**

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**FERNANDO, PRESIDENT**

1. The Appellant has appealed against his conviction for murder of Franky Patrick Hertel (herein after referred to as the deceased) on the 16 January 2019.
2. The Appellant has raised the following grounds of appeal against conviction:

- i. The learned trial Judge erred, in law and in fact by relying on insufficient evidence to convict the Appellant. By doing so, he did not put to the jury sufficiently or at all the case for the Appellant.
- ii. The learned trial Judge erred in his summing up by not directing the jury sufficiently or at all on the legal implications of self-defence which was available to the Appellant. In doing so, the Learned trial judge erred in failing to direct the jury fully and fairly as to the evidence of witness Marc Herminie, which supports the Appellant's defence of self-defence.
- iii. The learned trial Judge erred in failing to sufficiently and fairly put to the Jury the alternate verdict of manslaughter which was open to the Appellant.
- iv. The learned trial judge erred in failing to direct the jury fairly in regards to the law on provocation, a defence that was available to the Appellant.
- v. In all circumstances of the case the conviction of the Appellant for murder was unsafe and unsatisfactory.

Appeal against sentence:

The sentence of life imprisonment was manifestly harsh and excessive.

Facts in brief according to the Prosecution witnesses:

3. On the day of the incident the Appellant, the deceased, Kerine Nanon, Marc Herminie, Brina Laurencine were consuming alcohol around 3 pm in the afternoon near a shop at Hangard Street. A quarrel had developed between the Appellant and his girlfriend Kerine Nanon and the deceased had intervened and asked the Appellant not to fight with his girlfriend. The Appellant had told the deceased to

“stop interfering in his personal life and his relationship.” The deceased had told the Appellant that he is not interfering in his personal life nor is he interfering in his relationship, but that he should not be fighting with his girlfriend and that police would come.” At this stage both witnesses Brina Laurencine and Marc Herminie had testified that the Appellant had slapped the deceased and the deceased had slapped the Appellant in return. The Appellant slapped the deceased a second time and in response the deceased had thrown a bottle of beer that was in his hand at the Appellant, but that had not struck the deceased. At this stage according to the testimony of Marc Herminie the Appellant had removed a kitchen knife which had a black handle. The deceased had then run in the upwards direction of Harrison Street and fallen on the ground. The Appellant had run after him and then the deceased who had fallen down had managed to get up and had run down Harrison Street in the opposite direction. The Appellant had continued to run after the deceased with the knife. The deceased had fallen a second time while running and the Appellant had fought him again. Marc Herminie, not wanting to see what was going to happen had covered his head with the hood of his shirt. When he lifted his hood again, he had seen the deceased coming towards him pressing his abdomen. He had been bleeding profusely. The Appellant had gone away when the deceased came back bleeding from his abdomen. Kerine and Brina had tried to help the deceased by trying to stop the flow of blood. Later the ambulance had come and taken the deceased away. The Appellant at the time of the incident had been wearing a red T-shirt and the deceased a green T-shirt.

4. The NVR cam recorders located at the scene of the incident had caught the incident on camera. They had been played in court and the CCTV video footage downloaded from the cameras produced as exhibits. I have personally watched the video footages, which I believe is the best evidence in this case. The Appellant who is before us in Court and the deceased whose photographs had been produced at the Trial can be clearly seen in the video footages. The date and time line can be

seen in the video footages. The date is 16 January 2019, the date set out in the charge sheet.

5. I have set down herein what I have clearly seen on the video footages:

- Appellant (A), wearing a red T-shirt and a backpack appears to quarrel with his girlfriend (14:58:48-59)
- A, is seen attempting to pull out an object with a black handle from his left waist, with his right hand. (15:00:08)
- Deceased (D), who is wearing a green T-shirt, throws a bottle at A. (15:00:17)
- A, is seen removing a knife with a black handle from his left waist with his right hand. (15:00:26)
- A, wearing a backpack, is seen chasing D with a knife in his right hand. (15:00:28)
- D, falls on the ground while running. A, attempts to stab D, several times. (15:00:29-31)
- D, stands up and starts running. D's Hands are empty. A follows him behind with a knife in the right hand. Two women try to stop A. A's backpack drops on the ground, and A, continues to chase behind D. 15:00:59)
- Both A and D, fall on the ground (15:01:07)
- Two women can be seen pulling D away. (15:01:17)
- A and D stands up and goes to the other side of the road. Two women try to stop them (15:01:19-25)
- A is seen stabbing D leaning to the left of D. Two women try to hold D (15:01:26)
- A moves away with the knife in his right hand (15:01:28)
- D lifts up his torn Green T-shirt to look at his wound. (15:01:34)

- A walks away from the scene with a knife in his right hand, and D is walking behind him with stains like blood in his green T-shirt (Prior to the stabbing no such stains were seen in D's green T-shirt) (15:01:36)
  - A walks up to the backpack (which fell while he was chasing D at 15:00:59) with a knife in his right hand, then grabs the backpack and walks away with the knife. (15:01:45)
6. According to the medical evidence, there had been an incised wound in the left thoracic region, 2.5 cm in diameter, with regular edges, well defined, with a single tail located downward, and at the level of the 7<sup>th</sup> and 8<sup>th</sup> left intercostal space, that had penetrated the thorax obliquely ascending, from left to right and from bottom to top. From the nature of the injury, the doctor who did the post-mortem examination had concluded, that the injury had been caused by a knife. From the single tail in the wound the doctor had opined that the assailant had been a right-handed individual since the tail is down and the cut of the wound is from left to right. The cause of death according to the doctor had been cardiac tamponade (*when blood accumulates in the space between the heart and the pericardium*), due to the penetrating wound in the heart. According to the doctor the assailant had been facing the victim and towards the left. The excoriation of skin on the left nose, shoulder, both elbows, right ankle found on the body of the deceased corroborates the prosecution evidence of a struggle. The medical evidence in this case corroborates the evidence of Marc Herminie and the video footages I had referred to at paragraph 5 above. There had been no challenge to the doctor's evidence by the defence.

Appellant's statement to the police:

7. The Appellant's cautioned statement to the police made about 3 hours after the incident had been produced as an exhibit at the trial by the prosecution without

objection from the defence. It had been made available to the Jury, at the end of the summing-up, during their deliberations. The Appellant in his statement had admitted that before the incident started, he was arguing with his girlfriend Kerine Nanon when the deceased had asked him why he was hitting her. According to the Appellant he was not fighting her. The Appellant has responded saying that “this woman is not your woman” and “I know what am supposed to do with my woman”. The deceased had then pressed his hand against his face and told him to leave the woman. Thereafter the Appellant and the deceased had started to struggle. According to the Appellant the deceased had taken out a knife as if he was going to stab the Appellant. Thereafter according to the Appellant: “I defended myself whereby I pressed his hand along with the knife that in front of him but I do not remember which side. At that time, we were both down in the crusher dust.” (verbatim) His girlfriend Kerine and Brina had tried to separate them and stop the fight. When he got up from the ground, he had seen blood dripping from the deceased’s chest. The Appellant had said: “I did not stab him intentionally as the knife was not with me. It was whilst we were struggling on the ground that I pressed his hand along with his knife towards him to defend myself. We rolling on the ground, that man fell on his knife and the knife stabbed him.” (verbatim from the cautioned statement). Having earlier said that after sustaining the injury the deceased had not told him anything, a few lines thereafter, the Appellant had said that when he was leaving the place after the struggle the deceased was standing and insulting him.

8. According to the Appellant the incident took place where the argument and the struggle started. The Appellant does not speak of the deceased running away and him running after and chasing behind the deceased as testified by Marc Herminie and clearly seen in the video footage. The version of the Appellant as to how the deceased came by his injuries is clearly proved to be false in view of the video

footages referred to at paragraph 5 above. The Appellant's version as to how the deceased came to be injured was never suggested to the doctor when he testified.

Decision on the grounds of appeal:

9. I find that the evidence of Marc Herminie and the video footages which stood corroborated by the medical evidence was sufficient evidence to convict the Appellant. At paragraph 96 of his Summing Up the learned Trial Judge had placed the version of the Appellant as to how the injury to the deceased came to be caused before the Jury. I therefore dismiss grounds (i) and (v) of appeal.
  
10. The learned Trial Judge had dealt with the issue of self-defence raised by the Appellant, having at paragraph 55 explained the law relating to self-defence. Certainly, the evidence of Marc Herminie does not in any way support the Appellant's defence of self-defence, in fact, it cuts across it, as it is clear from his evidence that the Appellant was the aggressor. It is the Appellant who started the fight by slapping the deceased who merely told him not to fight with his girlfriend, it is the Appellant who pulled out a knife from his waist, and it is he who chased behind the deceased, up and down Harrison Street and attempted to stab him several times and finally stabbed the unarmed deceased. In the circumstances of this case, it cannot be said that the Appellant could have honestly and reasonably believed that he was being attacked merely because the deceased had slapped him after he had slapped the deceased and thrown a bottle at him. The deceased had every right to stand his ground and fight the deceased. But the deceased retreated and ran away while the Appellant decided to run after him, up and down Harrison Street until he stabbed the deceased. Also, the use of a knife and the manner it was used by the Appellant on the deceased in the circumstances of this case cannot be said to be the use of necessary and reasonable force. The Appellant in his Written submissions had argued that the learned Trial Judge failed to direct the Jury, that "it is for the prosecution to destroy the plea of self-defence and not for the accused

to establish it". I do agree that it would have been preferable for the learned Trial Judge to have said so, but firmly believe that no prejudice had been caused to the Appellant as a result of the learned Trial Judge not making specific reference to it in his summing up, especially in view of the evidence in this case. It was the duty of Counsel for the Appellant at the conclusion of the summing up to have reminded the Trial Judge to give that direction if he considered that failure to make that statement would cause an injustice to the Appellant. However, the learned Trial Judge, in describing at paragraphs 40 and 41 of his summing up, an unlawful act, which is an essential element of murder and which the prosecution had to prove, had said, it was the duty of the prosecution to prove the unlawful act beyond a reasonable doubt and that a person acting in self-defence is not committing an unlawful act. In making this statement the learned Trial Judge had informed the Jury that the burden was on the prosecution to negative self-defence.

11. I am of the view that this is a fit case, if need be, for the application of the provisions of **section 344 of the Criminal Procedure Code, which states at 344 (a) and (c):**

*“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal ... on account-*

*(a) ...*

*(b) ...*

*(c) of any misdirection in any charge to a jury,*

*unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice...*

*Provided that in determining whether any error, omission, or irregularity has occasioned a failure of justice the court shall have regard to the question whether*



*the objection could and should have been raised at an earlier stage in the proceedings.”*

12. The **Proviso to rule 31(5) of the Seychelles Court of Appeal Rules 2005**, which deals with the power of the Court on hearing an appeal states: *“Provided that the Court may, notwithstanding that it is of 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 has occurred.”*
13. The Appellant had referred to a part of the cross-examination of Marc Herminie to show that it was the deceased who started the fight. This was when Herminie while watching the video being played in court and trying to describe the incidents displayed therein, had said “They were fighting each other. I ‘think’ Joker (deceased) slapped him first.” It is to be noted that videos from two cameras were played in court. I was also in a difficulty in making out the details of the quarrel, despite viewing them attentively. Both Marc Herminie and Brina Laurencine, in their examination-in-chief, had categorically said it was the Appellant who started the fight by slapping the deceased. I therefore dismiss ground (ii) of appeal.
14. There is no merit as regards ground (iii) since the learned Trial Judge had dealt with at length on the alternative verdict of manslaughter at paragraphs 42 to 47. There was no need to specifically mention the words ‘voluntary manslaughter’ and ‘involuntary manslaughter’ to the Jury, for they are technical terms, for so long as the learned Trial Judge had directed them on what the two concepts mean, and this he had done by making reference to provocation and intoxication. He had also dealt with intoxication although not raised as a ground of appeal and not made out on the facts of this case. The Appellant in chasing the deceased up and down Harrison Street, attacking him in the way he did as seen in the video footages, going back to collect his backpack which had fallen and walking away from the scene of crime after the incident, shows that he had total control of his senses. The

Appellant had not said in his statement made to the police three hours after the incident that he was intoxicated.

15. The learned Trial Judge had dealt with at length on provocation at paragraphs 50 to 52, having explained in detail the law and the elements pertaining to provocation. He had correctly told the Jury, it is they who would have to determine as to whether the deceased had offered any provocation to the Appellant in the circumstances of this case, so as to deprive the Appellant of the power of self-control to the extent it was likely to have deprived an ordinary person of the community to which the Appellant belonged. The learned Trial Judge had stated several times in his summing up that the Jury were not bound and need not accept whatever opinions he expresses in the summing up on facts as they were the Judges of fact. There are two essential elements to be satisfied before one could be said to have benefited from the mitigatory defence of provocation, namely the subjective element and the objective element. The subjective element being, it should be clear from the evidence, that the accused was in fact deprived of his power of self-control so as to induce him to assault the person by whom the act or insult was done or offered. The objective element is that the act or insult done or offered to the accused should have been of such a nature as to be likely, when done to an ordinary person, of the community to which the accused belongs to have deprived him of his power of self-control so as to induce him to assault the person by whom the act or insult was done or offered. It is clear that both these elements were not satisfied according to the facts of this case. In such an event the need to consider the mitigatory defence of provocation, any further does not arise.

16. According to **section 198 of the Penal Code** “*A lawful act is not provocation to any person for an assault*”. Also “*An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that*

*other person for an assault”* It was lawful for the deceased to have intervened to stop the quarrel between the Appellant and his girlfriend Kerine Nanon. It cannot be said that the deceased provoked the Appellant when he asked the Appellant not to quarrel with his girlfriend and also when the deceased slapped the Appellant in return when the Appellant slapped him. I therefore dismiss ground (iv) of appeal.

17. The appeal against sentence has no merit as life imprisonment is a mandatory jail term that shall be given to a person convicted of the offence of murder.
18. I find that there is no merit in any one of the grounds of appeal and have no hesitation in dismissing the appeal both against conviction and sentence.

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Fernando, President

I concur

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Twomey, JA

I concur

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Dingake JA

Signed, dated and delivered at Ile du Port on 13 August 2013.