IN THE SUPREME COURT OF SEYCHELLES

NORRIS POTHIN ***Appellant***

vs

THE REPUBLIC ***Respondent***

SCA No: Cr 2 of 2007

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Before: MacGregor, P; Bwana, Domah, JJA

Counsel: Mr. A. Juliette for Appellant
Mr. J. Camille for Respondent

J U D G M E N T

Bwana, JA.,

1. The Appellant, Norris Pothin, was charged with Murder contrary to section 193 of the Penal Code. It was alleged that on the 9th of July 2006, at Pointe Larue, Mahe, he murdered one Terry Pharabeau. Twenty two witnesses testified for the prosecution and three for the defence case. By a unanimous verdict of the Jury, the Appellant was found guilty of murder. He was sentenced to life imprisonment. Aggrieved by that decision, an appeal was lodged by the Appellant, raising six grounds of appeal. However, during the hearing of the Appeal, Counsel for the Appellant preferred to argue only three of them – grounds 2, 3 and 6. The three grounds are that -

1.1 The trial judge erred in his direction to the jury on an issue of involuntary intoxication when such had never been the defence of the Appellant. And having directed the jury on the issue of intoxication, he failed to direct them as to the legal effect of a finding of a person having killed another whilst

being voluntarily intoxicated.

1.2 The trial judge erred in failing to direct the jury to consider manslaughter as a possible verdict.

1.3 The trial judge erred and misdirected the jury on the evidence and circumstances upon which the issue of self-defence was raised by the Appellant and failed to direct the jury on matters raised by the Appellant in his defence of self defence.

The Appellant therefore prays to this Court to allow the appeal and quash his conviction and/or convict him of the lesser offence of manslaughter.

2. The facts of this case as distilled from the record may be succinctly stated as follows. On the night of 8 July 2006 – at about 11:00 p.m. at Nageon Estate, Mahe, two groups of people, said to be supporters of two rival political parties in Seychelles, were arguing and swearing against each other. Stone throwing followed leading to damage being caused to motor vehicles parked in a nearby car park. One of the people involved in that fracas is the Appellant herein.

3. All the witnesses at the scene and at the subsequent scene a few hours later did testify that the people involved in both clashes were drunk. They had taken a lot of beer.

4. Some hours later after the 11:00 p.m. clashes, Peter Pharabeau (pw 13), Andre Pharabeau (pw 17) and Terry Pharabeau (now deceased) decided to walk home passing by the place of the earlier fracas. Passing near Elizabeth Hoareau's (dw 3) veranda, they saw the Appellant, in the company of Bernadette Lime (dw 1)

his concubine, and another person. An argument then ensued which led to a fight between the Appellant and the deceased. Pws 13 and 17 deposed that they saw the deceased raised up both his hands and cry *"Norris, you have cut me, you have wounded me"*, he then fell on the ground.

5. Both pws 13 and 17 deposed further that they then saw dw 1 rush from the veranda where she had been. She rushed to the scene, pinned down the decease on the ground while the Appellant stabbed him repeatedly using a knife and an axe. The said axe was later described by Jemmy Lemiel (pw 15) as being a "tomahawk" type of axe. The Appellant appeared to be aggressive and he even threatened to stab pws 13 and 17. They had to run away for their lives.

6. The aggressive aspect of the Appellant is deposed as well by PC Bernard Havelock (pw 19) who later took him together with dw 1 to hospital. This pw 19 and the Appellant – now an ex-policeman – served the police force together. Likewise pw 15 described the Appellant at the scene of crime as "being very aggressive and no one could stop him." Daniel Bernard Jeanne (pw 18) who was near the scene of crime heard the Appellant tell the deceased (although the latter had already fallen on the ground and was almost motionless) that "*if you keep moving, I will kill you*." That was

followed by other series of stabbing (about 6 times). Even when the ambulance came, about half hour later, the Appellant was heard saying: *"if he is still breathing, I will continue to kill him".* Pw 19 deposed further that even at the Casualty Section of Victoria hospital, the Appellant was still very aggressive. He was heard saying: *"I have killed him because he has wounded my wife."* The Appellant attempted to go near the body of the deceased, while at the said hospital.

7. The following evidence is equally important. Nickson Julio Pharabeau (pw 14) had witnessed the fight between the Appellant and the deceased. He had seen the Appellant start the fight and stab the deceased repeatedly even after the latter gad fallen on the ground and was showing no signs of movement. He saw the Appellant holding both the knife and the axe and using them to attack the deceased. After the ambulance had left the scene of crime, Micheline Hoareau (pw 16) gave the axe to pw 15 to keep in her house, from where the police retrieved it. Pw 18 also deposed to have seen the Appellant standing, holding both the knife and axe in his hands.

It is appropriate to note here, that even though the incident occurred late at night, there was sufficient light to enable visual identification of both the people around and the weapons used in the stabbing of the deceased.

8. At Victoria Hospital, Drs. V. M. Raddy (pw 4) and M. Zlatkovic (pw 5) attended to both the deceased and the Appellant together with dw 1. A post-mortem report (Exh. P11) shows that the cause of death of Terry Pharabeau is -

"(a) Celebral contusion, secondary to sub dural hematoma.

b) *Poly traumatism.*

c) *Internal bleeding."*

Injuries suffered by the deceased are said to be –

a) Laceration of the anterior right lobe with the penetration to the base.

b) Contusion and haemorrhage of the mesenterial tissue in the region of the radix mesenteric ... rupture of the small intestine.

c) Left ventricle and septum slightly hypertrophic.

d) Contusion of the brain.

e) Severe congestion under scalp of the left side. Left temporal fracture triangular in shape. Left subdural hematoma of the fronto temporal side.

f) Leceration wounds of the right maxillo-zygomatic region, multiple linear abrasions of the right cheek, neck and

chest. Localised right fracture of the mixillo with subluxation of the right eye. Laceration wounds of supa orbital; right frontal, left pre auricular, right occipito-temporal, right arm, anterior abdominal wall and lumbar region.

9. According to the defence witnesses (dw 1 to 3), it is the deceased who first attacked dw 1 by holding her neck and cutting her forehead with a knife. When dw 1 screamed asking for help, the Appellant rushed to the scene. Upon seeing the Appellant, the deceased jumped on him, cutting him as well on the forehead and face while shouting at him: *"Frank Kilindo has sent me to "bez" you."* To which that Appellant replied: *"if Frank has sent you to "bez" me, now it is me who is going to "bez" you.* With those words, a savage fight ensued. It is, therefore, the defence case that the Appellant came to the rescue of his concubine (dw 1) who was being attacked by the deceased using a knife. Further, that it was the deceased who attacked the first and as such, the Appellant was not only defending himself but also dw 1.

10. Taking the three grounds of appeal (paragraph 1.1 to 1.3 above) into consideration, we think this appeal may be decided upon by examination of three legal issues raised by Counsel for the Appellant namely provocation; intoxication and self-defence. Before we examine the three issues, it is necessary to state herein that we are satisfied with the way the summing up to the jury was done by the trial judge. It left out no important and basic issues required for the knowledge of the jury. Equally important, the trial judge did clarify issues that Counsel had raised in their final addresses but which he thought he was duty bound to impress upon the jury, the correct position of both the law and facts. Believing, as we do, it is unthinkable that the trial judge would have abdicated his role by declining to state what he stated at that crucial point of the trial.

11. The defence of provocation is considered first. It is important to note here that the prosecution had the duty to prove the absence of provocation beyond reasonable doubt (per ***R vs McPherson*** – 1957 41 Cr. App. R 213). That defence was not expressly raised by Mr. Juliette in his final submission. Neither did he do so in his grounds of appeal save in a generalised manner under ground 1.2 of

the appeal, above. That, notwithstanding, Rule 31 of the Court of Appeal Rules (SCAR) 2005, does empower this Court to consider the issue. Mr. Juliette seems to suggest the following:

a) That the trial judge's failure to address the jury on the question of provocation was a fatal misdirection which would make the verdict unsafe.

There was evidence of provocation.

The immediate point for our determination is whether the trial judge's failure to address the jury on the issue of provocation led to a fatal misdirection or fundamentally to an unbalanced summing up. Strictly speaking this issue (of provocation) does not arise on the facts of this case. It was not raised during trial or during the final address by counsel or summing up by the trial judge. But, as stated above, we will consider it here pursuant to the provisions of Rule 31 of SCAR. The question for determination is whether there was provocation.

12. Section 198 of the Penal Code defines provocation as -

> "… any wrongful act or insult of such nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental filial, or fraternal relation of master or servant, to deprive him of the power of self control and to induce him to assault the person by whom the act or insult is done or offered."

It means therefore, and by using the words of Devlin, J, in ***R v Duffy*** (1949) 1 All. ER 932 CA;

”provocation is some act or series of acts done or words spoken by the deceased to the accused which would cause in any *reasonable person and actually causes in the accused a sudden and temporary loss of self control, rendering the accused to subject to passion as to make him for the moment not master of his mind …”* (emphasis added).

The various authorities on the issue suggest the following namely that provocation would be accepted as defence if –

a) the deceased uttered some words or conducted himself in way that would make a reasonable man (of the accused calibre) temporarily lose his powers of self control.

b) the words uttered or the conduct of the deceased should make the accused to subject himself to passion, making him lose powers of self control.

c) all that should occur in a spur of the moment leaving him with no time to cool off.

The test is always of that “hypothetical reasonable man” of the accused’s calibre. The test is objective. However, it is said that such a test does not apply to drunken person. Archbold, Chapter 17, paragraph 17 to 53 states:

“Drunkenness and Provocation
Apart from inability to form the intention charged, drunkenness which may lead a man to attack another in a manner in which no reasonable man would do cannot assist to make out a defence of provocation and cannot be pleaded as an excuse reducing the crime from murder to manslaughter if

death results."

We subscribe to the above views of Archbold especially as they are very relevant to this case. In ***R v McCarthy*** (1954) 38 Cr. App. R. 74, it is re-emphasized that the reasonable man has to be sober. If the accused was provoked (as in this case) in circumstances where a reasonable sober man would not have been provoked, he cannot avail himself of the defence of provocation. In the instant case, it is not controverted that all the people involved were drunk. Therefore this deprives the Appellant the defence of provocation.

13. Initially, the exchanges between the parties started around 11:00 p.m. The stabbing and killing of Terry is said to have taken place between 1:00 – 2:00 a.m., therefore some hours later. If it were to be considered that it is the earlier clashes that provoked the Appellant to subsequently attack the deceased, then provocation will not help him either. There was sufficient cooling off period/interval. However, if provocation is based on the claims that the Appellant lost his powers of self control and hence attacked the deceased following the latter's attack on dw 1, that claim is disputed. The relevant pws testified that there was no such direct attack. If there was one, as dw 1 herself deposed, then it was once and when the Appellant rushed to the scene, he found the deceased standing (not continually attacking dw 1).

14. Having considered all the elements and issues related to provocation, we have come to the conclusion that the Appellant could not successfully avail himself of the defence of provocation. That ground of appeal, therefore, fails. He cannot use provocation as a possible defence likely to reduce the verdict of manslaughter.

15. The issue of intoxication is next for our consideration. It is not in dispute that both the Appellant and the deceased – and several other people – were drunk. The only point of contention raised by Mr. Juliette is that the trial judge misdirected the jury by introducing (in his summing up) issues related to voluntary or involuntary intoxication, issues that were not relevant. According to Mr. Juliette what the defence case tried to establish was that since the Appellant was drunk, that state may have led to delusion thus making him to commit the offence based on mistaken fact.

On his part, Mr. Camille impressed upon us the fact that the trial judge was duty bound to clarify all issues surrounding intoxication (including voluntary or involuntary), following Mr. Juliette's submission on the subject.

16. We do agree with Mr. Juliette, indeed as Archbold provides (paragraph 17 – 53 iv), that there are circumstances where drunkenness may assist to make out a defence of self defence based on a mistake of fact. We will revert to this issue later on in this judgment. We equally agree with Mr. Juliette that voluntary or involuntary intoxication becomes an issue in a criminal trial where

an accused attempts to negate his mans rea. That appears not to be the case here.

However, having considered this issue and after analyzing the address of the trial judge to the jury, we are left with no doubts that the said trial judge had to take this approach in his attempt to clarify certain aspects of the law on intoxication. This was, we believe, after both counsel had addressed the jury on the issue of drunkenness. In order to arrive at a correct verdict, we believe, the jury had to know albeit briefly, intoxication and what it entails in law. The trial judge cannot therefore be said to have misdirected the jury by so doing.

17. The law relating to mistaken fact as a defence in a criminal trial was expounded by both McCullough and Lord Lame, C.J. in the case of ***R vs O. Grady* (1987) Q. B 995 et seq.** (and we quote en extenson):-

> … "given that a man who mistakenly believes he is under attack is entitled to use reasonable force to defend himself, it would seem to follow that if he is under attack and mistakenly believes the attack to be more serious than it is, *he is entitled to use reasonable force to defend himself against an attack of the severity he believed it to have. If one allows a mistaken belief induced by drink to bring this principle into operation, an act of grass negligence (viewed objectivity) may become*

> *lawful even though it results in the death of the innocent victim ... where the jury are satisfied that the defendant was mistaken in his belief that ... the force which he in fact used was necessary to defend himself and further are satisfied that the mistake was caused by voluntary induced intoxication, the defence must fail ...”* (emphasis provided).

We will revert to this issue in relation to self defence (ante). It suffices to state here that even under a mistake of fact, the Appellant was entitled to defend himself but was not entitled to use excessive force, as he did. Accordingly, this ground of appeal fails as well.

18. Self-defence seems to form the basis of this appeal. Mr. Juliette relies on the principle of self-defence as used in the ***Palmer v The Queen*** (1971) AC 814, 832 where it was stated by Lord Morris thus:

> “If there has been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was

necessary that would be most potent evidence that only reasonable defensive action had been taken …"

With much respect that principle would not apply in the present case for reasons shown below. What is well settled is that in order to succeed, self defence must avail the following –

a) That the accused was attacked.

b) That it was reasonably necessary to defend himself or those close to him or his property by using force to repel the attack.

c) The force used was reasonable in the circumstances of the situation.

In addition to the foregoing, the following factors, as correctly expounded by Venchard in "The Law of Seychelles through cases (1979)" – citing the cases of ***R v Agricole*** (1973) SLR 225; ***Bedier v R*** (1972) SLR 1; ***R v Francoisi*** (1975) SLR 12; and ***R v Ladouce*** (1969) SLR 218 need to be considered when dealing with self-defence –

a) The onus of disproving self defence always rests on the prosecution. It has to prove beyond reasonable doubt that what the occurred did was not by way of self defence.

b) It arises only if there has been an attack.

c) A person who is attacked may do what is reasonably necessary to defend himself … it is a matter of good sense.

d) The attack must be such as to put a person attached in immediate peril. If the peril is over, the employment of force is not justified by way of revenge or punishment.

e) The amount of force used must be proportionate to the necessities of the situation.

f) The party attacked is not expected to weigh to a nicety the exact measure of his necessary defensive action.

g) If a person attacked does in the agony of the moment what he honestly and instructively thinks is necessary, that would be strong evidence that only reasonably defensive action was taken.

19. Evidence of excessive or reasonable force used may be established by the kind of injuries suffered or the type of weapons used in repelling the attack. The former is indicative of the type of force used. The latter, on the other hand, is indicative of the graveness of the attack and what weapons therefore the accused had to use to repel the attack.

20. All the above considered in relation to this appeal, can it be said that the Appellant acted in self defence of himself and/or dw1? Our considered position is that the force used was excessive in the circumstances at a time when he or dw 1 were not in any immediate danger of attack from the deceased. We find support for that view

from the following evidence on record.

a) If we are to assume (in favour of the Appellant) that the deceased first hit or cut dw 1 with a knife thus leading the Appellant to rush to her rescue, there is equally rebuttable evidence from dw 1 herself that when the Appellant arrived at the scene, he found the deceased standing. The latter was, therefore, not attacking dw 1 any more. Therefore, the peril was over. The employment of force was therefore not justifiable.

b) Even if we are to assume further and again in favour of the Appellant, that upon arrival at the scene, suddenly the deceased attacked him cutting him in the forehead region of his body, the subsequent amount of force used by the Appellant was not reasonable. It is on record that even after the deceased fell on the ground (crying as to why the Appellant was cutting him), the latter continued to stab him. He did so viciously for about half an hour, causing multiple stab wounds on vital parts of the body as shown in Exh. P11, using both a knife and tomahawk axe. That was not proportionate to the necessities of the situation. It is in evidence that the Appellant continued to utter threatening words (e.g. of killing the deceased if he was still breathing) several hours later after the fracas was long over and there was no danger of Terry attacking either the Appellant and/or his concubine, dw 1.

21. Therefore, while we do appreciate Mr. Juliette's reasoning and efforts in trying to convince this Court to agree that what the Appellant did was in self defence, we nevertheless find it inescapable from the irresistible conclusion that the force used by the Appellant was excessive in the circumstance. The continued vicious attacks and the weapons used to carry out the attack, all could not avail to the Appellant the defence of self defence. It is well settled that self defence, if successful, results in complete exculpation but that if unsuccessful it is rejected and that there is no half way house. It is our judgment that, the defence so raised is rejected.

22. Therefore, this appeal fails in its entirety. The Appellant to serve the sentence as imposed by the trial court.

23. Before we conclude we wish to make one remark. In the course of hearing this appeal it came to our knowledge that convicts sentence to "life imprisonment" do not serve the entire sentence as imposed. It is common knowledge that such people are released after serving 10 to 15 years in prison.

We are aware of the lawful powers available to other State Institutions when it comes to pardoning or parole of such prisoners. However, convicts sentenced to life imprisonment are those convicted of very serious offences – offences that in other jurisdictions still carry capital punishment. In Seychelles capital punishment has been abolished (Art. 15 (2) of the Constitution of the Republic of Seychelles) and section 194 of the Penal Code. The

abolishing of capital punishment notwithstanding, serious crimes are still being committed and those convicted of such crimes are sentenced to the maximum possible prison incarceration. Without encroaching on the powers of other State Institutions we would nevertheless, like to draw the attention of all concerned that serious offences deserved serious and severed punishments. Life imprisonment is one such punishment. It is, therefore, in the interest of justice as well as that of the public that people convicted and sentenced to life imprisonment should served their full term as ordered by the Court. The words “life imprisonment” or “life prison term” should be given their ordinary and natural meaning. Prisoners sentenced to life imprisonment should serve their full terms without intervention of a non judicial authority. If the legislature was desirous of rationalising this aspect of the law, it should be encouraged to do it but until then, life imprisonment should mean life imprisonment.

I concur I concur

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S. J. BWANA F. MacGREGOR S. B. DOMAH

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Date this 14 December 2007, Victoria, Seychelles