

Privy Council Appeal No. 14 of 2000

Everad Nicholls

Appellant

v.

Her Majesty The Queen

Respondent

FROM

**THE COURT OF APPEAL OF SAINT VINCENT AND THE
GRENADINES**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 13th December 2000

Present at the hearing:-

Lord Bingham of Cornhill

Lord Steyn

Lord Hoffmann

Lord Hutton

Lord Hobhouse of Woodborough

[Delivered by Lord Steyn]

On 27 August 1996 on a remote part of Saint Vincent called Fanny Mountain, there was a fight involving two rival criminal gangs. Carlon Baptiste suffered a severe 4 inch laceration to his left upper arm, which was inflicted with a cutlass, and he received 5 bullet wounds. After surgery he died in hospital. The police arrested the appellant on the next day. In a statement made under caution he admitted that he had been involved in a fight with the deceased but said that he had reacted with the cutlass to a threat by the deceased, who was armed with a gun, and that in a struggle the gun had gone off accidentally. The appellant was charged with murder. In February 1997 he was tried in the High Court (before Cenac J. and a jury) but the jury could not agree on a verdict. In June 1997 he was retried (again before Cenac J. and a jury). On 11th June 1997 he was convicted of murder and sentenced to death. He appealed. On 12th January 1998 the Court of Appeal of the Eastern Caribbean dismissed his appeal. He appealed to the Privy Council.

The Prosecution Case

It is a distinctive feature of the case that the whole of the direct evidence as to the circumstances in which the deceased sustained his fatal injuries came from members of two criminal gangs. They cultivated marijuana on nearby parts of the mountain and lived in separate shacks in close proximity. There was a history of trouble between the two gangs. Both gangs possessed firearms and cutlasses. The flash point of trouble on the day in question was apparently that the deceased had gone to fetch water close to the shack in which the appellant and his gang lived.

Three members of the deceased's gang gave direct evidence on behalf of the prosecution as to what happened. Dillon Baptiste was the deceased's twin brother. He said he had heard the appellant (known as "Float-I") arguing with the deceased in the vicinity of the shack. He heard a single gun shot. He called Anthony Edwards (known as "I-Pa"), who was the leader of the deceased's group. He then heard several shots. He arrived at the scene after the deceased had sustained the wound to his arm and the bullet wounds. He found the deceased in a gravely wounded state. Dillon described how Edwards and a member of his group attacked the shack.

The second prosecution eye-witness was Glenroy Henry (known as "Sweets"). He said that he had gone with the deceased and another member of their gang to fetch water. On the way back the deceased was ahead of him. He heard a shot. Then he heard an argument and recognised the appellant's voice. When he reached the shack he saw the appellant with a gun. The judge's notes of evidence state:-

"I-Pa was in the middle and Southie (Augustine Black) was behind of him with a cutlass. Float-I was backing back. After there Float-I looked around in our direction. Carlon was in front of me. Carlon had his water bucket still on his head. After that he started to shoot up Carlon and after that he take the cutlass and chop him on his hand. The shots hit Carlon and he fall backwards. When Carlon received chop with cutlass he was lying on the ground. Float-I didn't say anything when he shot Carlon."

Glenroy also described the shots, which "sounded to me like ta-ta-ta".

The third prosecution eye-witness was Anthony Edwards ("I-Pa"). He went with a cutlass to the scene of the incident. His account of what happened was follows:-

“As I reached up on the ridge I heard “hold it your mother c-.” So I meet Float-I and Southie, Float-I had a gun in front me stick me up and Southie had a cutlass behind my back. I was in the centre of them. Southie behind me, Float-I in front me with gun. Float-I then said “move you mother c-one ah all you dead this morning” I then said “Dread you go have kill me because I send the men and them for water and they didn’t trouble you”

“Float-I was backing back coming down and I going to Float-I facing him and he facing me. My back was turned to Southie. At that time I didn’t see Carlon, Brian or Sweets. We were then on the track – one track to use to go for the water. Then I just see Carlon burst out the track. He had a small bucket on his head. Water was in the bucket. We were still backing down then Float-I turned around and said “You fucker you” and I only hear Brup, brup and Float-I shoot Carlon in his belly. The gun pitch him back over in the track where he was coming from and then I jumped over a little bank and then I heard Float-I say “Southie hand the f-cutlass give me, either you f- dead or you cripple, you mother cunt.” Then Southie handed the cutlass to him (Float-I) and Float-I chop Carlon on his hand. Then Float-I and Southie ran and I called out to Dillon and I told him Float-I shot his brother.”

He said the appellant shot the deceased from a distance of 25 feet. In cross-examination he said that the deceased and his brother had a gun.

Hermus Adams (“I-Mus”) was another prosecution witness. Shortly after the incident he had been in his boat at the beach on the island. He picked up the appellant, Augustine Black and Gideon Lewis and took the three to Kingstown. He described how the appellant washed his skin in the sea. The appellant changed his clothes. The appellant threw something in the water. Adams said that a month before he had been attacked with a gun by the deceased and his brother.

Dr. Roslyn Bascombe-Adams performed a post-mortem examination on the deceased and described the laceration to the upper left arm of the deceased and 5 bullet wounds. Her description of the position of the bullet wounds was as follows:-

“The bullet wounds clearly had entry areas at (1) the left celiac fossa i.e. the left lower side of the abdomen. (2) an entry wound above the navel. Both those entry wounds were

angling downwards (3) an entry wound was found at the left hip and this angled posterior laterally i.e. to the back and to the side. (4) an entry wound was also noted at the buttock anus area grazing both sides of the buttock, left and right but none prominent on the right side. This wound was angled anteriorly i.e. to the front. (5) an entry wound to the mid lower left buttock. Also angled anteriorly. Three exit wounds were noted on the lateral side of the scrotum”.

Dr. Bascombe-Adams expressed no opinions about the plausibility of the prosecution and defence versions in the light of the bullet wounds. The prosecution called no other expert evidence concerning the wounds in relation to the prosecution and defence versions of the events.

Finally, the prosecution led evidence of a statement made by the appellant before a justice of the peace after his arrest. It read as follows:-

“When we wake up in the morning in the bush at Tawloo, we making some tea, after the tea we start to work in the land. The boy I don’t know his name come over to my ground, three of them. As he reach me, he push the shine gun right into me face and say ah long time I want to kill you. So I so frighten I got me cutlass in me hand I wave ah chop after him and we began to wrestle. While we were wrestling I hear the gun fire off and I run, me and me two brethrens. They start to search me and see if I get shot while we were searching me hear them above we taking if he stupid fuh shoot himself, before you shoot the man they began to tear up the shanty. The three ah we, Southie Buddy and me went down on the bay said, then we meet I-Mus, then he carry we up town that is all. I don’t know the name of the boy who got chop from me. I hear about three bullets go off. I don’t know if the boy get shot.”

There was no challenge to the admissibility of this evidence.

The Defence Case

The appellant gave oral evidence broadly in line with the account in his statement. He said:-

“. . . Three of them came over to my land: I was then weeding the land. I had my cutlass with him. One of my brethren had a cutlass with him. When the boys come over one of them had a gun in his hand. The one who had the gun

is called Carlon. I-Pa was one of them. Carlon came over to me and push the gun in my face. He said: “long time I want to kill you Float.”

I was so frightened I wave a chop after him like that (witness demonstrates with his hand) the chop caught him on his left hand. I then grab on to the gun and started to wrestle with him. We stand up and wrestle and then we fell on the ground. Then I hear the gun fire off. We still hold on, on to the ground. Then I let go the gun and run and search myself. I search myself to see if I get shot. Then my two brethren run and search me too. I didn't get shot. The gun was on the ground. Then me and Southie and Buddie left and go to the shanty.”

The appellant described the attack on the shack, how he fled from the shanty, went down the mountain and was picked up by Adams at the beach. He said he took off his clothes and washed off the blood on his body. In cross-examination, he testified to a struggle with the deceased, and how they had wrestled for possession of the gun. He said that “blood was coming from him onto my shirt”. He also said that he had taken off his clothes because there was “plenty” blood on them. He changed into other clothes and threw the blood-stained clothes into the sea. Augustine Black (“Southie”) then gave evidence, which supported the appellant's account on the events in the vicinity of the shack, and on the appellant discarding his clothes, washing himself in the sea, and throwing something away.

The summing up and verdict

The case was a relatively short one, the evidence lasting only a day and a half. The judge's summing up was detailed. Some indication of this assessment is the fact that the judge's notes of the oral evidence occupy some 22 pages and the transcript of his summing up runs to 17 pages. After giving directions of law the judge described the evidence of the three prosecution eye-witnesses, including the evidence of Dillon, who did not see the critical events, in great detail. And he repeatedly described their evidence as supportive of one another and graphic. He read the caution statement, which was part of the prosecution case, to the jury. He also adequately summarised the oral evidence of the appellant. He did not, however, describe the gist of Black's evidence. He merely said to the jury “you will remember you heard from Augustine Black who gave evidence of his behalf”. He also did not mention to the jury that Black's account supported the appellant's version. He did not ask the jury to consider what light if any the evidence of the bullet wounds cast

on the merits and demerits of the prosecution and defence cases. It will be recalled that the prosecution led no expert evidence on this aspect. The judge also did not ask the jury to consider the significance of the evidence of blood on the appellant's body and clothes.

The jury retired for an hour and a half and returned a unanimous verdict of guilty of murder.

The Court of Appeal

The Court of Appeal pointed out that in directing the jury on the standard of proof the judge did not tell the jury that they must be satisfied so that they feel sure but simply said that "you must be sure of his guilt". The Court of Appeal described this as a technical misdirection. Secondly, the Court of Appeal criticised the fact that the judge did not tell the jury that Black's evidence supported the appellant's version. Nevertheless, the Court of Appeal ultimately concluded that the summing up was fair and adequate. The Court of Appeal dismissed the appeal.

The grounds of appeal

There were three grounds of appeal. First, counsel for the appellant submitted that, having regard to the state of the evidence and the issues in the case, the judge did not place the defence case fairly before the jury. He said that the trial judge's summing up was unbalanced and unfair. In support of this argument he referred their Lordships to the judgment of the Privy Council in *Mears v. The Queen* [1993] 1 W.L.R. 818. Secondly, he submitted that, although counsel for the appellant did not at trial rely on self-defence, it was on a realistic appraisal of the evidence an issue which the judge ought to have left to the jury to decide. Thirdly, he submitted that the trial judge misdirected the jury on the burden and standard of proof. While counsel for the appellant addressed their Lordships on all three grounds of appeal, he placed the first ground of appeal in the forefront of his submissions.

Was the summing up fair and adequate?

It is, of course, well settled that a judge does not have to repeat all defence arguments to the jury. If he did so, he would have to place before the jury the prosecution's answers. And that might often unacceptably undermine the defence case. On the other hand, a judge must always place the defence case fairly before the jury. What this principle requires is crucially dependent on the context of each particular case.

In the present case counsel for the appellant submitted that in a number of respects the summing up inadequately presented the defence case to the jury. First he submitted that the judge should have reminded the jury that the case involved two criminal gangs who had access to guns and cutlasses. Counsel pointed out that the judge did not remind the jury that Adams said that the deceased and his brother had threatened him with a gun a month before. The point was clearly relevant but their Lordships think it is perhaps not a very significant complaint since the judge had reminded the jury of Edwards' evidence to the same effect. The next point is more serious. The judge described the evidence of Edwards and Henry as confirmatory of one another. There was, however, a problem in the prosecution case which the judge did not place before the jury. Both Edwards and Dillon gave evidence which *prima facie* indicated that Henry was not at the scene of the incident but arrived later. And the appellant and Black did not place Henry at the scene. No doubt there may have been satisfactory explanations of this apparent conflict. It was a jury point. But it would have been fair to the appellant to alert the jury to this possible flaw in the prosecution case. It is not a problem which every juror would necessarily have had in mind. There were, however, more fundamental difficulties in the way in which the judge described the defence case.

At the heart of this part of the appeal lay the judge's treatment of two matters of real evidence, *viz* the bullet wounds and the blood on the appellant's body and clothes. There were five bullet wounds in all. In argument before the Privy Council the prosecution accepted that the gun was probably an automatic weapon. This is certainly consistent with the descriptions of the prosecution witnesses, *viz* "ta-ta-ta" and "brup-brup". In any event, it is common ground that one depression of the trigger could have resulted in five shots. Against this background it is now clear that the multiplicity of shots is not in itself supportive of either the prosecution or the defence case. In passing their Lordships observe that the jury were never told that the gun may have been an automatic weapon and indeed were invited by the prosecution and the judge to concentrate on the multiplicity of bullet wounds. Unaided by expert evidence both sides on appeal to the Privy Council relied on the position and angle of the wounds, and in particular on the fact that three wounds were from the front and two at the rear in the buttock area. Both prosecution eye-witnesses said that the appellant shot the deceased from the front and that the deceased fell backwards. Counsel for the appellant argued strongly that the position of the wounds was inconsistent with the prosecution evidence. There is force in this argument. It is then necessary to consider the angles of the wounds in the context of the defence case. The appellant said that the sequence was that the deceased pushed the gun in the appellant's face; the appellant chopped the deceased; they wrestled on

the ground for possession of the gun; and the gun went off accidentally. Counsel for the prosecution submitted that this version is inconsistent with the angles of the wounds. Their Lordships are not satisfied that this is necessarily so. Clearly, the matter should have been elucidated by expert evidence. Indeed the absence of expert evidence left a puzzling gap in the case. But, taking the evidence as it stood, the trial judge should at the very least have placed the problem squarely before the jury. The judge failed to mention it. This was a material flaw in the summing up.

The evidence of the blood on the body and clothes of the appellant was before the jury. In argument before your Lordships counsel for the prosecution dismissed this evidence as coming only from the appellant. This is unrealistic. Both Adams (a prosecution witness) and Black (a defence witness) testified that the appellant washed himself in the sea, changed his clothes, and threw something in the sea. They did not mention blood but the thrust of their evidence supported the appellant's version. The judge did remind the jury of the appellant's evidence about the blood. But he omitted to mention Adam's evidence insofar as it supported the appellant on this point. He also failed to refer to Black's evidence which supported the appellant. The judge's treatment of the evidence on this important point was inadequate. The significance of this real evidence is obvious. On the defence version the appellant and the wounded deceased were wrestling on the ground for possession of the gun: on this basis it is easy to visualise how the appellant became spattered with blood. On the other hand, on the prosecution case the appellant delivered the blow with the cutlass while he was standing up *after* he had fired the gun: they never wrestled with one another at all. On this version it is less easy to see how the appellant's clothes and body became covered with blood. It was a significant point in favour of the defence. The judge failed to refer to it. The Court of Appeal thought that the judge's reference to the appellant's evidence on this point was sufficient. For the reasons given their Lordships cannot agree. There was a material defect in the summing up.

Unfortunately, it has to be said that the judge also misdirected the jury about the appellant's evidence. Twice he wrongly told the jury that the appellant mentioned only one shot. This is strange because he also told the jury that the appellant described how he and the deceased wrestled, the appellant held the mouth of the gun and "He heard explosions". He also told the jury:-

"The defence are asking you to believe no one else was present apart from Gideon Lewis and Augustine Black when the incident occurred between the accused and Carlon".

This was incorrect. The appellant testified that at least three members of the rival gang, including Edwards, were present. If the summing up had faced up to the critical issues on the bullet wounds and the blood, it might well have been possible to treat these blemishes as not sufficiently important to impugn the verdict. But, in the result, they tend to reinforce the impression of a jury who had not been given the assistance which they needed.

In these circumstances the conviction must be quashed.

Self-defence

Counsel for the appellant submitted that the issue of self-defence should have been left to the jury. It will be recalled that the appellant's version of events was that he had reacted in fear with a cutlass when the deceased pointed a gun at him, and that in a struggle for the gun it was accidentally discharged. The Court of Appeal concluded that "there is nothing which shows a deliberate act on the part of the appellant which caused the death of the deceased". The Court of Appeal explained:-

"The appellant admitted to chopping the deceased on his left arm when the deceased first approached him. The injury to the arm was not the cause of death. Therefore there would have been no killing as a result of provocation or in self defence. In my view, on the evidence, the issue of self defence and or provocation did not arise."

Counsel for the appellant submitted that this was too narrow a view of an incident which, at least arguably, should be viewed as a whole. Counsel for the prosecution argued that self-defence simply does not arise. Given the conclusion their Lordships have already reached, it is unnecessary to examine this quite difficult point.

Burden and standard of proof

Their Lordships are in agreement with the Court of Appeal that the judge's departure from the conventional direction on the burden and standards in Saint Vincent caused no prejudice to the appellant.

Disposal

Their Lordships humbly advise Her Majesty that the conviction of the appellant and his sentence should be quashed.

Re-trial

Counsel for the prosecution invited your Lordships to remit the matter to the Court of Appeal to consider whether a re-trial should be ordered. It is no bar to such an order that more than 6 years has elapsed since the killing; or that there has already been a re-trial; or that about 3 years have elapsed since the matter was before the Court of Appeal. Cumulatively, these factors do, however, raise the question whether the matter ought to be remitted to the Court of Appeal to consider a re-trial. There is, however, another factor. It is an “error in principle” to give the prosecution “a second chance to make good deficiencies in its case”: see *Reid v. The Queen* [1980] A.C. 343, at 348F, *per* Lord Diplock. In the present case the failure of the prosecution to adduce expert evidence on the significance of the bullet wounds is an integral and essential part of the reasoning of their Lordships which justified the quashing of the conviction. It would be wrong to permit the prosecution through Dr. Bascombe-Adams or another expert to make good this deficiency. And a new prosecution without such evidence would in all probability fail either at trial or on appeal to the Court of Appeal or to the Privy Council. In these circumstances the Court of Appeal ought not to be troubled with a remission. The application by the prosecution is dismissed.