

Confessor Valdez Franco

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF ANTIGUA AND BARBUDA

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

Delivered the 14th August 2001

Present at the hearing:-

Lord Bingham of Cornhill
Lord Mackay of Clashfern
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Clyde

[Delivered by Lord Bingham of Cornhill]

1. On the evening of 12 October 1995 Ishmael Zorella (also known as Noel and Gago) was fatally stabbed at Bruce's Nightclub, Hatton, Antigua. The appellant was charged with his murder and following a trial before Benjamin J and a jury was convicted on 17 February 1997 and sentenced to death. At trial the appellant contended that he had struck the fatal blows in the course of defending himself, a defence which the jury rejected. No defence of provocation was advanced at the trial, and no direction on provocation given to the jury. On appeal to the Eastern Caribbean Court of Appeal (Byron CJ (acting), Singh and Redhead JJA) it was accepted by the Director of Public Prosecutions that on the evidence of the appellant an issue of provocation had been raised and ought to have been left for the jury's consideration, even though the defence had not been raised by the appellant. But the Court of Appeal concluded that the jury, if properly directed on provocation, would inevitably have convicted the appellant: it accordingly applied the proviso to section 39(1) of the West Indies Associated States Supreme Court Act 1969 and dismissed the

appeal because it considered that no miscarriage of justice had actually occurred. The central issue in this appeal, brought by special leave of the Board, is whether the proviso was properly applied in the circumstances of this case.

The facts

2. Lisa Cabral had three children. The deceased was the father of two of them. The appellant was the father of the third and youngest. He lived with her, and was at her house on the evening of (it seems) 3 October 1995 when the deceased called at the house and pushed his way in, armed with a knife. A violent scene followed during which the deceased threatened Lisa and cut the appellant with the knife and threatened (according to the appellant) “to kill the both of us anywhere he met us”. The scene only ended when Carlos Gomes, a friend of the deceased, entered the house, took away the knife and dragged the deceased, still threatening violence against the appellant and Lisa, out of the house. The appellant and Lisa made written statements to the police concerning this violent attack, but there is no evidence that any action was taken.

3. Four witnesses testified to the course of events at Bruce’s Nightclub on 12 October when the deceased was killed. Of these witnesses, Gomes and the appellant were much the most significant. Gomes gave evidence that on that evening he and the deceased together went by car to the nightclub, of which they were regular patrons. The deceased got out of the car. Gomes parked it. As he did so he heard a rushing sound from the area of some rubbish drums at the entrance to the nightclub. He then saw the appellant “running” the deceased with a cutlass. The appellant chased the deceased into the nightclub, Gomes following a little behind, until the deceased, over his shoulder, sprayed some mace at the appellant. This is a substance with the effect of tear gas. Gomes got some of this in his face and went back to his car. After a time he again saw the appellant, with a cutlass, chasing the deceased. The appellant was waving and swinging the cutlass. Gomes stood between the two of them. The deceased ran away from behind Gomes and the appellant pursued him, followed by Gomes and another man not called to testify. The appellant “fired a chop” at the deceased with the cutlass, which fell to the ground. As the chase continued the deceased told Gomes “Watch it, he have a knife also”. The deceased then fell face down in the road outside the nightclub, whereupon the appellant jumped on top of him and stabbed him three times in the back with a black-handled knife later admitted by the appellant to be his. The appellant was unable to

pull out the knife after the third stab and left, leaving the knife lodged in the backbone of the deceased. The deceased had a long cut across the back of his head caused, according to Gomes, by the cutlass. The appellant left on a bicycle but was intercepted after a struggle and taken to a police station. According to Gomes, the deceased did nothing on that evening to interfere with the appellant. Gomes thus painted a picture of unprovoked aggression by the appellant, armed with a cutlass and a knife, against the deceased.

4. Malcolm Isaac was an employee of the nightclub. On the evening of 12 October he heard shouting and felt his eyes and nose burning. He doused his face in water. He then saw a short man whom he did not know but identified as the appellant chasing the deceased, whom he did know. He got between the two of them and tried to keep them apart. He said “The short one fire something like that. I don’t know what he had in his hand. [Witness demonstrates stabbing motion with his right hand.] I moved away”. The deceased ran into the yard, the appellant following, and the deceased fell face down. The appellant stabbed the deceased three times in the back, and left on a bicycle.

5. Another witness, Adolphus Espinal, worked at the nightclub and was also there in the evening of 12 October talking to a woman. He saw the deceased and Gomes at the nightclub, also talking to a woman. Later he was called outside and saw the deceased lying in the road.

6. After his arrest the appellant made a statement in his native Spanish which was translated into English. In this he described the incident of 3 October in some detail. He also said that on the evening of 12 October he went to Bruce’s Nightclub by bicycle. He was on the veranda and did not see the deceased. Then the deceased came and said “You don’t remember what I told you” and sprayed him in the eyes. He shouted. Soon after he ran out and tried to get his bicycle but the deceased “came at the back of me and tried to cut me”. He held the deceased to defend himself and they both fell on the ground and the appellant began to fight to defend himself. The deceased had something in his hand. The appellant ran away and the deceased came back and held on to him. The appellant then pulled out a knife to try and defend himself because he could not see properly. “I began to send stabs at him with the knife in one hand and my other hand was over my eyes”. After a while he did not feel the knife in his hands and went to look for his bicycle.

7. The appellant gave sworn evidence at the trial. He arrived at the nightclub on 12 October. He was touched on the back and then a man pushed him and sprayed him. He recognised the man as his assailant of the week before. It was the deceased, who attacked him. The appellant tried to hold the hands of the deceased but could not see because of the spray. The deceased kept on attacking. The appellant tried to hold him but was cut on the hand. The appellant did not know what happened after. The deceased had a piece of iron in his hand which the appellant tried to take away. He was wounded on his hand and fingers. The appellant then took a knife from the deceased and began to slash to see if the deceased would let him go. The appellant tried to hold the deceased with one hand and slashed with the other. The appellant then felt the knife get stuck and the deceased fell. The appellant left to fetch his bicycle to go and tell the police he had been attacked again. In cross-examination the appellant admitted taking the knife to the nightclub, but denied taking a cutlass or chasing the deceased with a cutlass or at all, denied “firing chops” at the deceased and denied injuring the back of the deceased’s head with a cutlass. He repeated that the deceased had had a piece of iron, although he had not mentioned this to the police.

8. There was police evidence of the injuries to the deceased. These were: a very long and deep wound to the back of the head; a deep wound on the left hand; a wound under the right arm which had torn part of the armpit; two wounds, which appeared to be stab wounds, to the left breast; two wounds to the lower portion of the back, in one of which the knife was still lodged. Death was said by the pathologist who had performed a post mortem examination on the deceased to have been due to laceration to and through both lungs and heart.

9. There was also police evidence of injury to the appellant on 12 October immediately after this incident. He had a bleeding wound on the right index finger and another on the left small finger. He also had a small abrasion to the left hand. There was evidence of other recently sutured wounds.

10. The evidence before the court was plainly unsatisfactory. Gomes left the scene of the violence for a period of unknown length and saw no wounds inflicted to the chest of the deceased. Isaac did not see the start of the incident and saw no injuries inflicted on the deceased other than those to his back when he was lying flat on the ground. Espinal described a meeting between the deceased and Gomes and a woman which cannot readily be reconciled with the evidence of Gomes, and he neither saw the appellant (of whom he was a friend) nor any violence of any kind.

The accounts given by the appellant in his statement and in evidence were not fully consistent, provided no explanation of the wound to the back of the deceased's head and provided no explanation of a blood-stained cutlass found some 37 feet from the entrance to the nightclub. The medical evidence did not identify the laceration or lacerations to the lung and heart which caused the death of the deceased, although counsel appearing before the Board were agreed that it must have been one or other or both of the wounds to the front of the deceased's chest which proved fatal, not the wounds to his back.

11. On one view the evidence presented a straight choice between competing accounts: had the appellant visited the nightclub, which he did not regularly frequent, armed with knife and cutlass, in order to retaliate against the deceased for the violence inflicted on him and his girlfriend the week before, or had the deceased taken the opportunity of the appellant's visit to the nightclub to carry out the threat he had made the week before? On another view the evidence raised a number of unanswered questions.

The summing-up

12. The judge's summing-up, although containing all the standard directions, was directed to the issue of self-defence which the appellant had raised. He very properly directed the jury that they should acquit the appellant if they found he had been acting in self-defence or thought he might have been. If the appellant was attacked by the deceased, he directed, the jury might well find that he was entitled to defend himself. But self-defence could no longer be relied on once any threat to the appellant had passed, as the jury might find that it had when the appellant stabbed the deceased in the back. The injuries inflicted to the front of the body might be self-defence, but not those to the back. He reminded the jury of the appellant's admission that the deceased had not been attacking him when lying down on the ground, and observed "So you may have little difficulty arriving at the conclusion that those injuries inflicted on the back of the accused could not have been made in self-defence". At the end of the summing-up the judge asked prosecuting and defence counsel if there was anything either wished him to add, and each of them said that there was not.

Provocation

13. Since the prosecution have now accepted that provocation should have been left to the jury it is common ground that there was evidence, fit for the jury's consideration, that the appellant had on the evening of 12 October been provoked to lose his self-control

and act as he did in killing the deceased. Had the issue of provocation been left to the jury, although not raised by the defence, it would have been particularly important for the trial judge to help the jury by identifying the evidence which they should assess when considering both provocation and loss of self control: *R v Stewart (Benjamin)* [1995] 4 All ER 999 at 1007; *R v Humphreys* [1995] 4 All ER 1008 at 1023. In the present case there were, on the statement and evidence of the appellant, several possible causes of provocation: the push; the implied threat “You don’t remember what I told you”; the spraying with mace; the hostile behaviour of the deceased. The violent assault by the deceased on the appellant and his girlfriend in their home some nine days or so earlier could scarcely, on its own, cause that “sudden and temporary loss of self-control” (*R v Duffy* [1949] 1 All ER 932) which is the essential foundation of the defence of provocation, but it may readily be accepted that any provocative words or conduct at the nightclub on 12 October could have been the more potent in their effect against the background of what had passed on the earlier occasion. A possible inference of loss of self-control was raised by the frenzied nature of the attack on the deceased, and particularly by the repeated and violent stabbing of the deceased in the back when he was lying prone and inert on the ground. Had there been no evidence which a reasonable jury could accept as possibly showing provocation or loss of self-control, the judge’s duty, as in relation to other factual issues, would have been to withdraw the issue from the jury; but where, as is now accepted to have been the case here, there is evidence which could if accepted show that the subjective condition of a defence of provocation (that is, the condition relating to the particular defendant) were met, then it is the judge’s clear duty to leave the factual issue to the jury to decide.

14. When one turns to the objective condition of a defence of provocation, relating to the reaction of a reasonable man, the position is different. For section 9C of the Offences against the Person Act (Cap. 58) of Antigua, as amended in 1986, following section 3 of the Homicide Act 1957, provides:

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

The clear effect of this section is to deny to trial judges the power previously exercisable to withdraw the issue of provocation from the jury, where there is evidence potentially capable of satisfying the subjective condition, if the judge considers that there is no evidence which could lead a reasonable jury to conclude that the provocation was enough to make a reasonable man do as the particular defendant did: see *R v Camplin* [1978] AC 705 at 716, 720, 726; *R v Smith (Morgan)* [2001] 1 AC 146, per Lord Hoffmann at pages 161-164, Lord Clyde at page 175. The reason for making this change may be somewhat obscure, but the effect of the change is not in doubt. It is to ensure that the issue of provocation is left to the jury where there is evidence fit for the jury's consideration in relation to the subjective condition with no further exercise of judgment by the trial judge in relation to the conduct of a reasonable man. As Lord Hoffmann put it in *R v Smith (Morgan)*, above, at page 162, "The jury was to be sovereign and have the power in theory as well as in practice to decide whether the objective element was satisfied". A statutory prohibition of judicial intrusion is not without precedent; Fox's Libel Act 1792 provides one example. But such injunctions are rare. Section 9C makes plain that in this context it is the jury's opinion to which the defendant standing trial for murder is entitled, not that of anyone else.

15. Relying on the terms of section 9C of the Antigua statute, Mr Carter for the appellant submitted that it would very rarely be proper to apply the proviso where, there being evidence that the defendant had been provoked to lose his self-control and kill the deceased, the judge had failed to leave the objective issue for determination by the jury. By applying the proviso the appellate court was doing exactly what the statute forbade, by substituting the decision of judges for the decision of the jury on a question which the statute required to be decided by the jury. Counsel placed particular reliance on *R v Whitfield* (1976) 63 Cr App R 39. In that case the trial judge had taken the view that there was no evidence of provocation and loss of self-control fit for the jury to consider. But the Court of Appeal did not agree. At page 42 Lord Widgery CJ, giving the judgment of the court, said:

"We do not take that view. We think that this was a matter which ought to have been left to the jury and that it cannot possibly be said that there was no evidence of the subjective test being applied because the evidence of the applicant himself was to be heard and considered in this context. Whether any jury would have believed him is an entirely

different question, but when one asks oneself whether there was any evidence to support the plea of provocation, the answer is that there was evidence coming from the accused's mouth which he was entitled to have put before, and considered by, the jury.

In a sense that is an end of the matter, except that there was some discussion in this Court as to the propriety of applying the proviso to section 2(1) of the Criminal Appeal Act 1968. [Counsel] submits in the alternative, with considerable force, that no reasonable jury could possibly have found that a reasonable man, subjected to the provocation to which this man had been subjected, would have acted as he did. Of course, if the jury had failed to hold that a reasonable man would have acted as the applicant did, then the defence of provocation would have gone. The jury did not have an opportunity of expressing a view on the matter. [Counsel] says that if one looks at the facts it is so obvious that no reasonable jury could have accepted the provocation plea that we ought to apply the proviso and maintain the finding of murder.

We have thought a good deal about this because the point in a sense seems to be a new one. We are impressed by the fact that Parliament in the Act of 1957 has taken an unusual step of deliberately insisting that a particular issue shall be tried by the jury and no one else. In other words the reaction of the reasonable man must be assessed by the jury because the section says so.

In this case no jury had an opportunity of expressing a view on the point at the Court of trial. There is no jury in this Court. If we apply the proviso we are in fact determining that issue otherwise than by the verdict of the jury. Although we are not prepared to go to the length of saying that the proviso is never appropriate in this kind of case, we do not feel that it would be right to apply it in this case."

Mr Carter accepted, as Lord Widgery had suggested, that there could be cases in which the proviso could be applied even where section 3 or its equivalent had not been observed, but the present was not such a case.

16. In resisting this submission on behalf of the crown, Mr Dingemans submitted that it was appropriate, in this as in other contexts, to apply the proviso if the court could be satisfied that the

jury would inevitably have come to the same conclusion and returned the same verdict even if the error or irregularity complained of had not occurred: see *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 482-483; *Stirland v Director of Public Prosecutions* [1944] AC 315 at 321. Section 3 of the 1957 Act and its equivalents raised no special problems. He relied in particular on *R v Cox* [1995] 2 Cr App R 513. In that case the trial judge had not, after consideration, directed the jury on a possible defence of provocation which he regarded as incompatible with the defence of diminished responsibility which the defendant was advancing. The Court of Appeal held (as here, with the agreement of prosecuting counsel) that there was evidence in the case upon which the jury could have found that the appellant had been provoked to lose his self-control and that there had accordingly been a misdirection in failing to leave provocation to the jury. The issue was whether the proviso to section 2(1) of the Criminal Appeal Act 1968, corresponding to the proviso to section 39(1) of the West Indies Associated States Supreme Court Act 1969, should be applied. The court was referred to *R v Whitfield* and quoted part of the passage set out above. At page 519 Glidewell LJ, giving the judgment of the court, said:

“[Counsel] argues, and we agree, that although the section specifically requires that the question: ‘Would a reasonable man have acted as the defendant did?’ is to be left to the jury, this is generally true of other defences of which there is some evidence, for instance, a defence of alibi or a defence of self-defence. Take for example, the not uncommon situation, where the defendant says in evidence: ‘I was not there’ or ‘I did not do it’ but there is some evidence upon which an alternative defence of self-defence might be put forward. At trial before the jury it is extremely difficult, if not impossible, for counsel for the defendant to run those two defences in the alternative. But if there is some evidence upon which a defence of self-defence might be put, it is for the judge to draw the jury’s attention to the appropriate evidence and to leave it for them to decide whether a defence is made out. Statute does not require that, common-law does.

In our view, with all due respect to how the Court in *Whitfield* dealt with the matter, the section spells out the function of the judge and jury at trial, making them particularly clear, spelling them out as they would be in any case. The section is dealing with the trial not with the appeal.

In deciding whether to apply the proviso, this Court has in a sense to put itself in the position the jury would have been in, to consider what a reasonable jury would or would not have done.”

The court referred to other cases in which the proviso had not been applied but said (at page 521):

“We are clearly of the opinion, however, that as a matter of law this Court in an appropriate case may apply the proviso where there has been a misdirection by a failure of the judge to leave the issue of provocation to the jury.”

The court duly applied the proviso (at page 522):

“Having taken all the relevant evidence into account, we have concluded that a reasonable jury, if they had been properly directed to consider provocation, would have inevitably concluded that the reasonable man with those relevant characteristics of this appellant would not have been provoked to behave as the appellant did.”

This, Mr Dingemans submitted, was the right approach, followed in other cases. In the present case the Court of Appeal had been right to conclude that the jury would inevitably have rejected any defence of provocation if such had been left to them and that decision should not be disturbed.

17. The Board would accept that there will be cases where the proviso may properly be applied even where the objective issue should have been but was not left to the jury. *Williams (Cardinal) v R* (1998) 53 WIR 162 was such a case. The defendant was charged with the murder of his common law wife. He claimed in evidence that he had been provoked to kill her by discovering that his children had been killed, for which he blamed her. In a written statement made on his arrest, and not fully disclosed to the jury, the defendant had given a detailed account of how he had himself killed the children after killing her. The Board concluded that the objective issue should have been left to the jury, but the defendant’s appeal on that ground failed because the jury by their verdict had plainly rejected the defendant’s evidence that the wife had killed the children. It was also clear that the manner in which the parties had chosen to conduct the trial had given the jury a very incomplete understanding of the facts. In *Campbell (Adolphus) v The State* (1999) 55 WIR 439 one of the issues was whether there had been evidence on the first, subjective, provocation issue which should have been left to the jury. The Board did not in the event

find it necessary to resolve this question, finding it inevitable that the jury would have found that there was nothing done or said which was enough to make a reasonable man act as the defendant had done in killing the deceased. It does not however appear, from the terms in which the Board expressed its reasons or from the record of cases cited to it, that the present issue was the subject of argument in that case.

18. In the opinion of the Board, the reasoning of the Court of Appeal in *R v Cox*, above, does not give adequate weight to the intention of Parliament expressed in section 3 of the 1957 Act and its overseas equivalents. The starting point must always be that in a trial on indictment the jury is the body to which the all-important decisions on the guilt of the accused are entrusted. This does not mean that every deviation from procedural regularity and legal correctness vitiates a jury's verdict of guilty. That would impose an unattainable standard of perfection and frustrate to an unacceptable extent the effective administration of criminal justice. But it does mean that an appellate court, which is not the trial tribunal, should be very cautious in drawing inferences or making findings about how the jury would have resolved issues which, for whatever reason, were never before it. This is particularly so in the context of section 3, since Parliament has gone out of its way, unusually, to stipulate that resolution of the objective issue, where it properly arises, should be exclusively reserved to the jury. To the extent that an appellate court takes it upon itself to decide that issue it is doing what Parliament has said the jury should do, and section 3 cannot be read as applying only to the trial court.

19. Like Lord Widgery in *R v Whitfield*, above, the Board would not go to the length of saying that the proviso is never appropriate in this kind of case. The facts of a given case or the necessary logic of a jury's verdict may rule out any possibility of a miscarriage of justice. But the caution with which that conclusion should be reached is made clear by Lord Tucker, giving the advice of the Board, in *Bullard v The Queen* [1957] AC 635 at 644 when he said:

“Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.”

The potential danger of delving into the minds of the jury was recognised in *Bullard v The Queen*, quoting Humphreys J in *R v*

Roberts [1942] 1 All ER 187, and again in *Edwards v The Queen* [1973] AC 648 at 659.

20. It may very well be that the jury in the present case would still have convicted the appellant of murder even if fully directed on provocation. The verdict makes plain that they rejected his evidence that he killed the deceased in the course of defending himself. But it does not follow that they would have rejected a defence of provocation. There was clear evidence that the deceased had acted in a violent and aggressive manner towards the appellant very recently; there was evidence of provocative conduct on the evening in question; there was evidence possibly suggesting a loss of self-control. It cannot now be known how the jury would have resolved this issue had it been left to them, as it should. This is not a case in which it would be proper to apply the proviso. This conclusion makes it unnecessary to explore an argument based on the appellant's rights under section 15 of the Constitution of Antigua and Barbuda.

The judge's summing-up on self-defence

21. As a subsidiary argument, counsel for the appellant submitted that the trial judge had effectively removed the issue of self-defence from the jury. The complaint was that by laying emphasis on the stab wounds to the back of the deceased, at a stage when he was presenting no threat to the appellant, the judge had failed to emphasise the significance of the fatal wounds to the chest of the deceased. This was not a ground relied on in the Court of Appeal, which accordingly did not address it.

22. It is true that at trial little or no evidence was directed to identification of the wound or wounds which proved fatal, a matter which could have been of some significance. But the jury heard the accounts given by the appellant in his written statement and in evidence, which covered the whole course of his confrontation with the deceased on the evening in question, and the judge directed the jury to acquit if they thought his account was or might be true. The jury must have rejected his plea of self-defence, in relation to the stab wounds to the chest as well as those to the back. The judge's emphasis on the wounds to the back was unfortunate, but cannot have misled the jury. This ground of appeal must fail.

Character

23. Counsel for the appellant did not at the hearing pursue a complaint that the trial judge had wrongly failed to direct the jury on the appellant's good character. Given the judge's invitation to counsel at the end of his summing-up and their lack of response,

and the observations of the Board in *Thompson v The Queen* [1998] AC 811 at 844 and *Barrow v The State* [1998] AC 846 at 852, this is not a ground of appeal which could have succeeded.

Conclusion

24. Since, in the opinion of the Board, the proviso was wrongly applied, the conviction of murder should be quashed. In all the circumstances of this case, and since the appellant has been under sentence of death for four and a half years, an order for retrial would not be appropriate. The Board will accordingly humbly advise Her Majesty that a conviction of manslaughter be substituted for that of murder, as it is invited to do by the appellant. The case should be remitted to the Court of Appeal in order that that court may impose an appropriate sentence.