
O N A P P E A L

FROM THE COURT OF APPEAL OF GRENADA

B E T W E E N :

CHARLES FERGUSON

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE APPELLANT

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1. This is an Appeal from the Judgment and Order of the Court of Appeal of Grenada (Davis C.J., St. Bernard and Peterkin JJ.A.) dated the 28th day of May, 1976 whereby the Appellant's Appeal against his conviction for murder in the High Court of Justice (Criminal) at the Assizes held at St. George's, Grenada (Nedd J. and a Jury) on the 4th day of November, 1975 was dismissed.

Record

Pp.64-69

Pp.2-61

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2. The principal grounds of this Appeal are as follows:

(a) That because it was conceded by the Director of Public Prosecutions in the Court of Appeal that the Jury were misdirected as to the question of the specific intent required for the crime of murder and the Court of Appeal accepted the concession, the Court of Appeal could not invoke the proviso to Section 41(1) of the West Indies Associated States Supreme Court (Grenada) Act, 1971 and dismiss the Appellant's Appeal against his conviction.

P.68, ll.
4-6

P.69, ll.
2 & 3

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(b) That the learned Trial Judge ought to have left the Jury to decide whether or not the Appellant had the requisite intention required for a conviction of murder or whether or not a verdict of manslaughter was the proper verdict.

P.49,11
8-13

(c) That the Learned Trial Judge erred in directing the Jury on the burden of proof that a reasonable doubt as to the Appellant's guilt would be the kind of doubt which might affect the mind of a person in the conduct of important affairs.

3. The indictment charged the Appellant as follows:

"Her Majesty's Director of Public Prosecutions in and for the State of Grenada and its Dependencies for and on behalf of Our Sovereign Lady the Queen presents that YOU CHARLES FERGUSON of Conference in the parish of Saint Andrew in the State aforesaid, on Saturday the 6th day of April, One thousand nine hundred and seventy-four at La Poterie in the parish of Saint Andrew aforesaid, did commit MURDER by intentionally causing the death of one ROY DONALD by unlawful harm: contrary to Section 234 of the Criminal Code (Cap.76) of the Revised Laws of Grenada."

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4. The cases for the Prosecution and Defence at the Appellant's trial are conveniently summarized in the Judgment of the Court of Appeal as follows:-

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P.64,1.1-
P.66,1.47

"The Appellant was convicted on the 4th November, 1975, for the murder of Roy Donald and sentenced to death by hanging. He has appealed against his conviction on the following grounds :-

1. The decision is unsafe and unsatisfactory having regard to the evidence.
2. A reasonable jury properly directed could not have come to the decision to which this jury came.
3. The learned trial judge failed to give full and/or adequate directions to the jury on the specific intent necessary to support a conviction for murder in Grenada.

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The late Roy Donald and his wife Louise kept a shop at La Poterie, St. Andrew's, in April 1975, but lived then at River Antoine in the parish of St. Patrick. On the 6th April, 1974, the deceased, his wife, his sister-in-law, Linnette Rock, Angela Drakes and a small child left the shop at La Poterie for home about 9.15 p.m. in a pick-up motor vehicle. The deceased was driving the vehicle with the child near to him while the others were in the tray of the pick-up. Louise Donald had a brown beige bag with a long strap containing about \$200, a bank book, a cheque book, some tablets, a bunch of keys and letters. On approaching the River Antoine bridge the deceased observed the road was

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10 blocked with stones in three places - one set at the entrance, a second set at the centre and the third set at the end of the bridge. The deceased stopped the vehicle and leaving the headlights on went outside. The other adults save Louise Donald also alighted and begun clearing the road. Angela went to the nearest heap, Linnette to the middle and Roy to the last heap. Suddenly a man leaped from behind the bridge, went to Louise pointing a gun at her telling her to remain where she was and ordering her to "give all the money made today." Louise handed him the bag saying, "here is it." He replied, "this is not all, it has more." Louise Donald said, "Take the money and leave us alone." Linnette Rock who observed what was taking place shouted, "Roy". Roy looked up and started running towards his wife. The man fired a shot and said, "Don't come any closer". Roy kept coming with his hands in the air and shouting "Kill me if you want to kill me." The man who was about six feet away shot the deceased in the chest fatally injuring him and ran away into Ramdhanny's banana field.

30 Louise Donald recognised the man as the Appellant whom she knew for about five or six years previously. He worked at Point Estate which is in boundary with River Antoine and he also visited the shop of Louise Donald approximately twice a week for about two years.

40 Urlan Phillip, a lad 17 years at the time, stated that he was at one Mr. Lyon's shop at La Poterie in the company of other young men when he heard the report to two shots and a "bawling" in the direction of River Antoine. He left running towards River Antoine bridge taking a "short cut" and when he was about 100 yards he saw the Appellant about 10 yards away coming out of Ramdhanny's banana field. He had a bag with a strap on his shoulder and on his head was a cap pulled down over his forehead. He was trotting away from the direction of the bridge. This witness knew the Appellant for four or five years previously.

50 Anne Romain of La Poterie stated that she was at home about 9.00 o'clock to 9.30 p.m. when she heard two reports of a gun followed by a shouting in the direction of River Antoine. She left for that direction and on her way she saw the Appellant, whom she knew about five years before, coming out of Ramdhanny's banana field.

He was about 18ft away from her. He crossed the road entered her land and went up the hill. He had a cap on his head.

Linnette Rock and Angela Drakes supported the story of Louise Donald but were unable to identify the Appellant. They described him as a fair person dressed in dark clothes with a cap pulled over his forehead.

The other prosecution witnesses did not carry the case further. The doctor gave a description of the injury and the cause of death. 10

The Appellant's Defence was an alibi. In a statement from the dock he said that on that day he left his home at Conference and went to one Mr Dolphus' shop and left there about 6.00 p.m. for his girl-friend Petra Joseph's home at River Sallee. He left a message at Mr. Dolphus' shop to let his brother know that he must meet him at his girl-friend. He arrived at his girl-friend's home about 7.00 p.m. and about 8.30 p.m. his brother Donald, Ossie Francis and one Francis Chitan joined him there. He ate and drank there and left for Mr Dolphus' shop about 10.00 p.m. where they remained until about 12.30 a.m. playing cards and drinking. He arrived home at about 1.00 a.m. He attacked an identification parade held by the police as unfair. 20

His witness Petra Joseph supported his story. 30

5. The relevant statutory provisions in Grenada as to the crime of murder are as follows. The Criminal Code (Cap.76) provides by Section 234

"Whoever commits murder shall be liable to suffer death:

Provided

Sections 241 and 242 respectively provide definitions of manslaughter and murder. They read as follows

"241. Whoever causes the death of another person by any unlawful harm is guilty of manslaughter. If the harm was negligently caused, he is guilty only of manslaughter by negligence. 40

242. Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as in the next succeeding

section is mentioned."

The relevant provisions relating to intent are in Part II of the Criminal Code where Rules as to Criminal Responsibility are set out. Sub-sections 1 to 3 of Section 12 are germane to this case. They read

10 "12.(1) If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.

(2) If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this Code, although he does not do the act for the purpose of causing or of contributing to cause the event.

20 (3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

30 These provisions in the law of Grenada correspond with the provisions of Section 168 and 71 to 75 of the Criminal Code of St. Lucia, Cap.250. These provisions were extensively considered by the Court of Appeal of the West Indies Associated States in James Jaganath v. The Queen (1967) 11 W.I.R. 315. This case has not been considered by the Board and it is submitted that the interpretation of these provisions will fall to be considered at the hearing of this Appeal.

40 6. The summing-up of the learned Trial Judge was delivered on the 4th November, 1975. The learned Trial Judge gave the following directions on the question of intent in relation to the crime of murder

Pp.47-61
P.47,11.14-
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50 "What constitutes the crime of murder has actually been set out in the charge. A person commits murder who intentionally causes the death of another by unlawful harm. In order, therefore, for the Prosecution to secure a conviction of murder against the accused the Prosecution must prove that the accused intentionally did an act which caused harm to the deceased Roy Donald; that

that harm was unlawful and resulted in the death of Roy Donald."

and

P.47,1.29-
P.48,1.14

"You have heard me say that the Prosecution must prove that the accused intentionally did an act. You might well ask how does one know when a person does an act intentionally? If a person does an act of a kind and in a manner which, if he had been cautious or observant when he did it, he should have realised that that act of his would have been likely to cause the event which followed upon his act, or contributed to cause it or, that there was a great risk of his act having the consequences which it did have, then that person is presumed in law to have intended to cause that event, unless it is established that he believed that the act would probably not have caused or contributed to cause the event. Again if a person does an act voluntarily, believing that his act will cause or contribute to cause an event, by the law of this state, he intended to cause that event, even though he might not have done it for the express purpose of causing the event or contributing to cause the event. His voluntary act plus his belief in the result is sufficient; and naturally if a person does an act for the purpose of causing an event or contributing to cause an event, then, by our law, he intended to cause that event. This is so even if, in fact, it was unlikely to cause the event, or even if he did not believe that it was likely to cause the event. What matters is, that he did it with that purpose, and if he did, then according to our law, his act was intentional."

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7. It is respectfully submitted that the above direction as to the requisite intention was erroneous as held by the Court of Appeal.

8. The learned Trial Judge went on in the summing-up to deal with the question of the burden of proof in the following words

P.48,1.47-
P.49,1.24

" I have told you what the Prosecution must prove. I must now tell you the nature of the proof which the Prosecution has to give. The Prosecution is not required to satisfy you beyond all doubt; it is required to satisfy you beyond reasonable doubt - to satisfy you beyond reasonable doubt that from the evidence before you - all the evidence, whether it be from the Prosecution or from the defence - that the accused is guilty of murder, as I have explained murder to you. If you entertain the kind of doubt, which might affect the mind of a

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10 person in the conduct of important affairs, then you entertain a reasonable doubt which is the kind of doubt which the Prosecution must remove in order to secure a conviction. The burden of thus proving the accused guilty rests on the Prosecution and remains there from the beginning to the end of the case, even when - as in this case - the accused has pleaded an alibi. The Prosecution must satisfy you that the accused's plea of alibi cannot, in the light of the evidence before you, stand the light of day, or hold water, or if you prefer more dignified language be entertained. Once you entertain that reasonable doubt, it must be resolved in favour of the accused, and he must be acquitted."

20 9. The Appellant respectfully submits that a direction in the form given by the Learned Trial Judge ought not now to be approved. The Appellant acknowledges that a similar direction was approved by the Board in Walters v. Reginam (1969) 2 A.C. 26 but respectfully submits that the matter is still open for argument before the Board as Leave to Appeal was not, in the event, granted in that case.

30 10. In the course of his summing-up the learned Trial Judge dealt at length with the evidence. The learned Trial Judge acknowledged the inconsistencies and deficiencies of the Prosecution case at various points in the summing-up and concluded his study of the evidence by saying

"You must have remarked on the inconsistencies in the evidence for the Prosecution. It is your duty to consider all that evidence and take your decision as to the guilt or innocence of the accused; guilt beyond reasonable doubt. If you believe Louise Donald, after considering Dr. Gibb's evidence, and disbelieve the accused and his witness, you must convict the accused of murder; there are no circumstances to warrant a direction from me on the possibility of returning a verdict of manslaughter. You convict of murder or acquit."

50 11. In so withdrawing from the Jury the issue of whether or not the killing of the deceased by the Appellant - once the Jury were satisfied as to the Appellant's identity - was intentional or otherwise and thus the opportunity of returning a verdict of guilty of manslaughter only, the learned Judge, it is respectfully submitted, fell into error. Evidence certainly existed that the deceased's assailant certainly did not originally wish to cause the death of the deceased. This appears from the following passage in the summing-up

P.61,11.
4-16

P.52,1.47-
P.53,1.8

"The man remained standing where he was, despite her pleading with him to go. In the meantime, Lynette Rock looked up, on hearing the talking, and called out to Roy Donald who started running towards the pick-up and the man standing there. The man turned from Louise Donald to Roy Donald's direction. Roy Donald did not stop, but continued to approach the man, daring him to kill him if he so wished. The man accepted the challenge and shot Donald, then turned and ran away, entering a track on the eastern side of the public road, called 'Ramdhanny's Trace'."

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The learned Judge ought it is respectfully submitted to have left to the Jury the issue of whether or not the assailant fired the shot with the intention of merely frightening the deceased or wounding him in order to impede his further advance. Special weight should have been given to that matter because of the conflict between the medical evidence and the evidence of Louise Donald.

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P.50,11
34-46

Not

reproduced

12. At the conclusion of the summing-up the Jury convicted the Appellant of murder and he was sentenced to death.

13. By Notice of Appeal dated 5th November, 1975 the Appellant applied for Leave to Appeal against his said conviction. The original grounds read as follows

P.63,11
29-36

"The decision of the Jury is unsafe and unsatisfactory and should be set aside or a new trial ordered.

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Because: (a) The decision cannot be supported by the weight of the evidence.

(b) A reasonable Jury properly directed cannot come to the decision this Jury came to."

P.64,11.
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14. The Appellant's Appeal to the Court of Appeal (the Appellant, it seems, having been granted Leave to Appeal in the meantime) came on for hearing on 24th May, 1976. It appears from the Judgment of the Court of Appeal that an additional ground of Appeal had been added

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"The learned Trial Judge failed to give full and/or adequate directions to the jury on the specific intent necessary to support a conviction for murder in Grenada."

15. It is respectfully submitted that it is incumbent upon the Court of Appeal in Grenada to examine the case below subjectively to see if the Court of Appeal itself thinks that the verdict is unsafe or unsatisfactory. The Appellant so submits because of the provisions of Section 41, sub-sections 1 and 2 of the West Indies Associated States Supreme Court (Grenada) Act, 1971 which governs the powers of the Court of Appeal in relation to appeals against conviction. That Section provides

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"41(1) The Court of Appeal on any such appeal against conviction shall, subject as hereinafter provided, allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the Court before whom the Appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal:

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Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

(2) Subject to the provisions of this Act the Court of Appeal shall, if it allows an Appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial."

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16. The Judgment of the Court of Appeal was delivered on the 28th May, 1976 by the Chief Justice. So far as the facts of the case were concerned the Chief Justice acknowledged that Counsel for the Appellant had admitted that on the facts of the case he could make no unfavourable criticism of the summing-up. It is respectfully submitted that this concession was rightly made and that the facts of the case were presented fairly to the Jury. It is nonetheless respectfully submitted that the approach then taken by the Court of Appeal was wrong. The Judgment continued by stating

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P.67,11.
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"We are of the view that there was sufficient evidence on which a reasonable jury could have come to the conclusion that the man who shot the deceased Donald was the Appellant."

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P.67,11.
23-26

It is respectfully submitted that it was incumbent upon the Court of Appeal not only to satisfy itself that the Appellant was properly convicted in accordance with law but also to satisfy itself on a subjective basis of the guilt of the accused.

P.68,1.44-
P.69,1.2

17. The Judgment of the Court of Appeal later states

"In the present case the defence of the Appellant was an alibi and the jury by their verdict showed that they were satisfied of his identity. The verdict of guilty of murder was the only proper verdict on the evidence in the case"

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In the premises the Appellant respectfully submits that the Court of Appeal failed to consider for itself whether or not there was any or any sufficient evidence of the requisite specific intention.

P.67,1.27-
P.68,1.11

18. The Court of Appeal held, it is submitted correctly, that the learned Trial Judge had misdirected the Jury on the intent necessary to establish the crime of murder. The Director of Public Prosecutions having conceded that there was a misdirection sought to uphold the conviction by application of the proviso to Section 41(1) set out above. What happened thereafter in the argument before the Court of Appeal is recorded in the Judgment of the Court of Appeal as follows

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P.68,11.
12-20

"Counsel for the Appellant was asked by the Court whether, in view of the facts of the case, there was room for a verdict of manslaughter. He replied that on the facts the verdict of murder was a proper one but since the Judge erred in his direction on an essential ingredient of the crime albeit an important question of law the proviso should not be applied."

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19. The Appellant respectfully submits that Counsel on his behalf should have made no such concession as was apparently made before the Court of Appeal. Even if such concession was made, it is respectfully submitted, it was still incumbent upon the Court of Appeal to consider for itself the question of specific intention.

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P.68,11.
28-32

20. The Court of Appeal then determined, it is submitted wrongly, that the misdirection in law to the Jury by the Judge did not affect the verdict in any way. The Court then, as submitted above, applied the wrong test of satisfactoriness of the conviction, namely that of "a reasonable jury properly directed".

- 10 21. The Court having determined to dismiss the Appeal considered the courses open to it. The Court rejected the contention of Counsel for the Appellant that the case should be retried as being untenable. No reasons were advanced for this. It is respectfully submitted that the Court was wrong in rejecting this contention. This is because it is inequitable that the Appellant should not have the same advantage of having a retrial as was granted to the Crown when the Appellant's previous Appeal was allowed. (The Court of Appeal, with the same members as in the instant case, had on the 27th and 28th May, 1975 heard an appeal by the Appellant herein against his conviction at a previous trial and had allowed the same on 2nd June, 1975 on the basis that the Trial Judge had misdirected the Jury by telling them that the onus lay on the Appellant to prove his alibi.) P.68,11. 27-28 Pp.82-86
- 20 22. The Court of Appeal considered whether or not the proviso to Section 41(1) of the said Act should be applied. The Court determined to apply the proviso it appears for two reasons; it determined firstly that the Appellant had suffered no injustice and secondly that no miscarriage of justice had actually occurred. In reaching this conclusion it erred in two respects in the Appellant's submission. It firstly failed to consider the matters subjectively (as it also ought to have done under the main part of Section 41, sub-section 1) and secondly failed to appreciate that by not having the question of specific intention left to the Jury the Appellant had in fact suffered injustice. P.68,1.47- P.69,1.9
- 30 23. On the 21st December, 1977 the Appellant was granted Special Leave to Appeal to Her Majesty in Council. Pp.70-71
- 40 24. The Appellant respectfully submits that he has suffered grave injustice not only through the failure of the Court of Appeal, in his respectful submission, to consider his Appeal subjectively in the manner required by law but also through the failure of the Court below to consider the alternative verdict of manslaughter. The Appellant respectfully adopts the dictum of Lord Tucker in Bullard v. The Queen 1957 A.C. 635 at page 644 where he states "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 could 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 Appellant further relies on Knowles v. Reginam
1930 A.C. 366

25. The Appellant respectfully submits that this Appeal should be allowed with costs, that the Judgment of the Court of Appeal should be reversed, and that the conviction and sentence imposed on the Appellant should be quashed for the following, among other:

R E A S O N S

(1) BECAUSE the Court of Appeal failed to consider and/or determine the Appellant's Appeal according to law.

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(2) BECAUSE the Appellant's conviction is unsafe and/or unsatisfactory for the reasons canvassed before the Court of Appeal.

Alternatively the Appellant respectfully submits that this Appeal should be allowed with costs, that the Judgment of the Court of Appeal should be reversed and that a new trial should be ordered for the following

R E A S O N

BECAUSE the interests of justice require that the Appellant should be retried

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In the further alternative the Appellant respectfully submits that this Appeal should be allowed, that the Judgment of the Court of Appeal should be reversed that a conviction of manslaughter should be substituted for the conviction of murder and that the case should be remitted to Grenada for an appropriate sentence to be passed in lieu of the sentence of death for the following, among other:

R E A S O N S

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(1) BECAUSE, the Court of Appeal, having correctly held that the jury had been misdirected as to the question of specific intention, ought not to have accepted the erroneous concession of Counsel that on the facts the verdict of murder was a proper one.

(2) BECAUSE the verdict of manslaughter should have been left open to the Jury

(3) BECAUSE the proviso ought not to have been applied.

NIGEL MURRAY

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- and -

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SEIFERT SEDLEY & CO
14 Tooks Court
Cursitor Street
London EC4A 1JY