GNTG.1 33, 1961

IN THE PRIVY COUNCIL

No. 10 of 1961

ON APPEAL FROM
THE FEDERAL SUPREME COURT OF THE WEST INDIES

B E T W E E N :

JOHN De FREITAS — Appellant

- and -

THE QUEEN — Respondent

CASE FOR THE APPELLANT

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1. This is an Appeal from the Order of the Federal Supreme Court of the West Indies, Criminal Appellate Division, dated the 12th September 1960, dismissing the Appellant's appeal against his conviction by the Supreme Court of British Guiana on the 18th May 1960 on a charge of murder. p.68. p.64.

2. The principal issues arising in this appeal are whether the learned trial judge misdirected the jury:

(i) by failing to direct them that if they thought or had some doubt that the Appellant acted in self defence, but used excessive violence, they might return a verdict of manslaughter.

(ii) by giving them the impression that they could not find a verdict of manslaughter because of any provocation to which the Appellant had been subjected if they believed the killing to have been intentional.

3. The Appellant was tried before the Supreme Court of British Guiana on a charge of having, on the 21st August 1959 in the County of Essequebo, murdered Flavio De Silva and was convicted and sentenced to death.

4. Evidence was given for the prosecution showing that the Appellant lived with and worked for the deceased. He had previously lived with the deceased's wife's sister. A few days before the

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p.3, l.30. 21st August 1959 the Appellant had disclosed to the deceased and the deceased's wife that he was in love with their daughter Gwendoline and wished to marry her, stating that she returned his love. According to the deceased's wife there had been a long discussion. The deceased had not agreed that Gwendoline loved the Appellant and had said that Gwendoline was too young. No final decision had been made in the matter. The deceased's wife admitted in cross-examination that she, the deceased and the Appellant got on well. Gwendoline testified that she was 14 years old and had not told the Appellant she loved him. She had been afraid of her father, who got angry quickly and when he got angry he got very angry and used to beat her. But she had never seen him violent to anyone except his children.

p.4, l.34.

p.8, l.31.

p.11, l.5. Evidence was also given that at 3 a.m. on the 21st August 1959 the Appellant and the deceased went out together in a 27 foot boat to shoot ducks. The only fire-arm they took was a 16 bore single barrel shot gun belonging to the deceased. The deceased's son Rudolph, aged 13 said that while they were trying to haul up the sail the mast "root out". His father had no longer wished to go, but the Appellant had jumped out and nailed the mast.

p.11, l.12.

Later on the same day the Appellant returned on foot with a story to the effect that the deceased had fallen over-board and been drowned. He made a similar statement to the police on the 22nd August. The boat was found moored in the river, but its anchor and a length of rope were missing. On the 22nd August, the body of the deceased was discovered, washed up on the river bank by the tide. There were wounds on the head, a gun-shot wound in the chest, and a piece of rope was tied tightly round the neck. The medical evidence was that death was due to the gun-shot wound and strangulation. In the doctor's opinion the gun-shot wound was the first injury inflicted. He thought these wounds would have been inflicted by an assailant standing behind the victim and pointing the gun downwards over the shoulder. Then came the head wounds, which were consistent with blows from the gun barrel; and the deceased was still alive when the rope was tied round his neck, but dead before he was put into the water. The gun-shot wounds would have eventually caused death if not attended

p.87.

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to, but the head wounds alone would not have been fatal. In cross examination the doctor admitted that only slight pressure on the throat would cause death after a struggle and providing there were other defects present.

5. The Appellant made further statements to the police on the 23rd August (in which he repeated the story that the deceased had fallen overboard by accident) and on the 25th August 1959 in which he told a different story on which he relied at the trial as his defence. In a statement from the dock he referred to the statement made to the police on the 25th August and added: "I have said everything I have to say I had no intention of doing anything." The statement referred to was to the effect that while out in the boat the deceased told the Appellant that he was going to dismiss him and turn him out. The Appellant had replied that the deceased might regret that step because he would make Gwendoline follow him. The deceased then threatened to shoot the Appellant, picked up his gun, and loaded it. The Appellant, who had been sitting in the stern, steering, jumped up, caught hold of the gun in the deceased's hands, and began to wrestle for it. The deceased fell down, and the gun went off whilst the Appellant was standing over him trying to take away the gun. The deceased was holding the barrel, but the Appellant got the gun away from him. The Appellant then "got mad or something" and remembered hitting the deceased on his head with the gun. He then threw the gun overboard. The deceased said twice "Gwendoline my daughter, you is the cause of this." The deceased looked as if he were dying and said to the Appellant "Sonny throw me overboard." The Appellant then tied a piece of rope, which he cut from the main sheet, around the deceased's neck, but could not remember why he did so. He then threw the deceased and his baboon-skin cartridge bag into the river, took down the sail, stopped the engine and dropped the anchor. Later, when he came to himself, he found that the anchor, which had been attached to a chain, was gone. He hoisted the sail and went ashore.

p.88.

p.93

p.35, l.15.

In his statements the Appellant had variously described himself as 33 and 36 years old.

6. In his summing up the learned trial judge

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directed the jury that they had to consider issues of self-defence, of insanity and of provocation.

p.37, l.45. He also told them that in his statements to the police and from the dock there were four defences

p.39, l.33. intertwined, the defence of insanity which could be coupled with automatism, of self defence, of accident and of provocation.

7. In dealing with the defence of self defence

p.43, l.9. the learned judge said there were three prerequisites necessary for such a defence. First there was the duty to retreat if possible, but in this case retreat was out of the question. He went on:

p.43, l.18. "The second prerequisite is that the injury inflicted must not be excessive; that is to say the force must not be out of proportion to the attack or far greater than is necessary for the defence of the person's life and limb. Consideration must also be given to the nature of the weapon used.

p.43, l.25. In this case, in so far as the second prerequisite is concerned, you have this difference that they wrestled for the gun and that a shot went off while they wrestled. You will examine the other circumstances of the case in considering this second prerequisite which is that the injury must not be excessive. If you accept what the accused says that the shot went off when they were wrestling for the gun, you will go on to ask yourselves whether the blow in the head and the other things that happened, for example the strangulation, would or would not have constituted excessive force.

p.43, l.38. The third prerequisite is that the injury must not have been by way of revenge, that is after the danger from the assailant has passed. Here, you have the accused saying that the shot went off when they wrestled for the gun. You will recall the evidence of the doctor that in his opinion such a gun-shot wound would have caused a man to lie down quietly. If you accept the medical evidence ask yourselves if after that shot went off hitting the deceased somewhere in the sternum as it did whether there was the necessity for the blow in the head and the rope around the neck which resulted in strangulation.

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On examination of all the features of this case, you will ask yourselves whether in the given circumstances the prerequisites necessary for a defence of self-defence were present and whether this was a genuine case of self-defence. If upon a consideration of the evidence you are of that opinion that the accused acted in self-defence or if after your deliberations you find yourselves in any reasonable doubt as to whether he so acted, then it will be your duty to acquit the accused." p.44, l.5.

At no stage of his summing up did the learned judge direct the jury that if they thought or had some doubt, that the Appellant had acted in self defence but had used excessive violence, a verdict of manslaughter was open to them.

8. In dealing with the defence of provocation the learned trial Judge summed up to the jury as follows:

(i) "Although the accused is indicted for murder, it is always open to a jury on a charge of murder to convict of the alternative offence of manslaughter. Manslaughter is the unlawful and felonious killing of another without malice expressed or implied. Now, you will remember I told you that murder is the unlawful and intentional killing of another with malice. Manslaughter is the unlawful and felonious killing of another without malice expressed or implied. You will have observed that in both the offences - murder and manslaughter - the killing must be unlawful. The difference between the two offences being that in the case of murder you must be satisfied from the surrounding circumstances that there was in the mind of the accused immediately before dealing the fatal blow or blows an intention to kill or to do grievous bodily harm. In the case of manslaughter that intention to kill or do grievous bodily harm is not present." p.45, l.10

(ii) "In order to be satisfied on the issue of provocation, you must find that in the particular circumstances not only would an ordinary person have lost his self-control but that the accused as a fact did lose his self-

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control and that it was in consequence of that loss of self-control that he formed the intention to do the injury to the deceased from which death resulted."

Finally, towards the end of him summing up, some thirty pages later, the learned judge said:-

p.63, l.11. (iii) "If you are satisfied beyond reasonable doubt that the accused unlawfully caused the death of Flavio Da Silva but that at the time of doing so he was under the stress of provocation, and that when doing the act and/or acts which caused the death that he did not intend to kill him or to cause grievous bodily harm, your verdict should be one of manslaughter.

p.63, l.19. "If you are in doubt whether the act was done under such an impulse, you will resolve that doubt in favour of the accused as you will do if you are in any doubt with respect to any of the other propositions which I have put to you.

p.63, l.24. "Finally, if you are satisfied beyond reasonable doubt that the death of the deceased was caused by the deliberate act or acts of the accused and that at the time of committing those acts or immediately before he intended to kill the deceased or to do him grievous bodily harm and that in doing so he was not acting in self-defence or under the impulse of provocation or suffering from some disease of the mind your verdict should be one of guilty of murder."

9. The Appellant appealed to the Federal Supreme Court, inter alia, on the grounds that the learned trial judge:

p.67, l.4. (i) failed to direct the jury that as regards the defence of self-defence if the jury believed that the accused started to struggle with and shot the deceased in self-defence but that on the whole more force than was reasonable and necessary was used thereby causing the death of the deceased a verdict of manslaughter may be found;

p.67, l.12. (ii) failed to direct the jury that if they found on the whole evidence that the accused caused

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the death of the deceased by an act or acts done with the intention to kill or to do grievous injury likely to kill but acted under the stress of provocation then a verdict of manslaughter may be found.

10. The Federal Supreme Court dismissed the Appellant's appeal, inter alia, on the grounds:

(i) That if the learned trial Judge may have misled the jury in the first quotation set out in paragraph 8 hereof, they were put right by the second quotation and that the final passage quoted in paragraph 8 hereof taken on a whole made it clear that the jury should find manslaughter if they believed the accused intended, under provocation, to do what he did, but had no calculated intention of killing. p.76, l.12.

(ii) That the decision of the High Court of Australia in R. v. Howe (1958-9) Commonwealth L.R. 448 on which the Appellant relied was not the law of England or British Guiana and that the plea of self-defence either entitled the accused to be acquitted or failed, and could not, apart from provocation, lead to a verdict of manslaughter. p.82.

11. The Appellant respectfully submits that the Federal Supreme Court's judgment was wrong in the following respects -

(i) In not following the decision of the High Court of Australia in R. v. Howe (supra);

(ii) In failing to hold that the effect of the learned judge's summing up was to direct the jury that they could not find manslaughter if they believed the killing to have been intentional but under the stress of provocation.

12. The Appellant respectfully submits that grave and substantial injustice has been done, that this Appeal should be allowed and that his conviction should be quashed, for the following among other

R E A S O N S

1. BECAUSE the decision of the High Court of Australia in R. v. Howe 1958-9 Com.L.R.448 was right and the trial judge misdirected

the jury on the issue of self-defence.

2. BECAUSE the trial judge misdirected the jury on the issue of provocation.

DICK TAVERNE.

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